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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P., HIGHLAND INCOME FUND, NEXPOINT STRATEGIC OPPORTUNITIES FUND, NEXPOINT CAPITAL, INC., AND CLO HOLDCO, LTD, Defendants.	§	Adversary Proceeding No. 21-03000-sgj **OBJECTION AND BRIEF OPPOSED TO DEBTOR'S MOTION FOR PRELIMINARY INJUNCTION**

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TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COME NOW Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (collectively, the "Defendants"), and file this their *Objection and Brief Opposed to* (the "Brief") *Debtor's Motion for a Temporary Restraining Order and Preliminary Injunction Against Certain Entities Owned and/or Controlled by Mr. James Dondero* (the "Motion"), filed by Highland Capital Management, L.P. (the "Debtor"), objecting to the requested preliminary injunction sought by said Motion (the "Injunction"), respectfully stating as follows:

I. SUMMARY[1]

1. The true purpose of the Adversary Proceeding and the Motion is readily apparent—to prevent the Defendants from exercising their contractual and statutory rights *after* the potential assumption of the Portfolio Management Contracts and confirmation of the Plan, in order for the Debtor to continue managing (or mismanaging) billions of dollars of other people's property without oversight, without accountability, and without legal consequences.[2] The purpose of an injunction is to prevent a party from breaching a contractual obligation or from violating the law. The purpose of an injunction is not to relieve a party from its own contractual obligations or from its compliance with federal law. Stated simply, if the Debtor wishes to assume the Portfolio Management Agreements, then the Debtor must, after assumption, abide by its contractual obligations and comply with strict federal law even if the Debtor finds this inconvenient or burdensome. If the contracts are inconvenient or burdensome, the Debtor may reject them.

[1] Capitalized terms used in this Summary are defined below.

[2] For the avoidance of doubt, the Defendants reserve all of their objections to the assumption of the Portfolio Management Agreements and to confirmation of the Plan.

2. Prior to confirmation, the automatic stay prevents the Defendants from terminating the Portfolio Management Agreements. After confirmation or assumption, however, the situation is fundamentally different. If the Debtor assumes the Portfolio Management Agreements, then the Debtor must assume those agreements, and all obligations, duties, and liabilities imposed by those agreements, *in toto*. The Court lacks both the jurisdiction and the authority to enjoin the Defendants from exercising their rights and remedies under assumed contracts and applicable law post-assumption, and the Debtor's attempt to obtain such an injunction is nothing less than an end-run around the Bankruptcy Code. If the Debtor is concerned about its ability to perform under the Portfolio Management Agreements, then the answer is that the Debtor should not assume them.

3. The Debtor's other allegations are without merit. The Defendants have not violated the automatic stay. At most, the Defendants notified counsel that a motion for relief from the stay or other relief could be pursued to initiate the process of removal of the Debtor, but a notification that relief from the stay may be requested is not a stay violation. The Defendants have not tortiously interfered with contract. Their refusal to execute trades for the Debtor that they were under no obligation to execute is not an act of interference, and the Debtor has not alleged any resulting breach of contract. The Defendants have not otherwise interfered with or impeded the Debtor's business, and, other than potentially exercising their contractual rights post-assumption and post-confirmation, they will not. Rather, the Debtor's allegations are "much ado about nothing" in an attempt to link the requested injunction to *some* underlying cause of action, instead of calling it what it really is: a naked attempt to convince this Court to excise from an assumed contract provisions in that contract that the Debtor would prefer were not there.

II. JURISDICTION AND VENUE

4. With respect to subject matter jurisdiction, the Defendants agree that this Court has subject matter jurisdiction over the Adversary Proceeding and the Motion under 28 U.S.C. § 1334

and that such jurisdiction is core under 28 U.S.C. § 157(b), prior to any assumption of the Portfolio Management Agreements or confirmation of the Plan.

5. However, the situation will change if and when the Portfolio Management Agreements are assumed or the Plan is confirmed. Upon assumption of these agreements, the Court will have "related to" jurisdiction, if any at all, since the question will concern a contract party's right to enforce a contract under non-bankruptcy law against a successor to the Debtor. As a "related to" only proceeding, the Court's jurisdiction will not be core. Moreover, after confirmation of the Plan, the estate will cease to exit. *See, e.g., In re Craig's Stores of Tex. Inc.*, 266 F.3d 388, 390 (5th Cir. 2001). Generally, this means that a bankruptcy court lacks jurisdiction except over matters concerning the implementation of the Plan. *See id*. While the Fifth Circuit has subsequently refined this jurisdiction test, one thing is clear: when the matter "principally deal[s] with post-confirmation relations between the parties," there is no jurisdiction. *See In re Enron Corp. Sec.*, 535 F.3d 325, 335 (5th Cir. 2008).

6. The whole point of the Adversary Proceeding is to enjoin the Defendants from exercising their post-confirmation rights. While the Debtor seeks to predicate the Injunction on pre-confirmation issues, that is little more than smoke and mirrors. If the Plan is confirmed, that will mean that the Portfolio Management Agreements will be assumed, which means that they will have been cured. But that does not mean that post-assumption defaults and issues can be enjoined. If, for example, the post-confirmation Debtor absconds with funds or engages in trades that are illegal, no court can deny that the Defendants will have every right to replace the Debtor as servicer under the Portfolio Management Agreements. This Court would lack all jurisdiction to decide any such issue, as it is wholly a matter between a non-debtor and a post-confirmation debtor concerning post-confirmation rights. To the extent that any matter in the Adversary Proceeding or Motion is not core, the Defendants do not consent to this Court's entry of final orders or judgment.

7. Finally, and notwithstanding bankruptcy jurisdiction pre-confirmation, the predicate to any jurisdiction is that there is an actual case or controversy under the Constitution:

> The word 'actual' is one of emphasis rather than of definition. . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Rowan Cos. v. Griffin, 876 F.2d 26, 27-28 (5th Cir. 1989) (*quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937)).

8. The Debtor seeks to enjoin, for all time, the Defendants from exercising their rights under assumed contracts against a post-confirmation entity. That is simply not possible because, in addition to all other issues that will be addressed herein, the question of a post-assumption or post-confirmation removal of the Debtor as servicer under the Portfolio Management Agreements is hypothetical and an academic one at this time. Unless and until the Defendants exercise a right under the Portfolio Management Agreements, any such issue is not ripe and, in any event, will be for a different court in the future to consider.

III. ALLEGATIONS AND FACTS

A. THE CLOS AND PORTFOLIO MANAGEMENT AGREEMENTS

9. Each of the Defendants is registered with the U.S. Securities and Exchange Commission ("SEC") as an investment advisor under the Investment Advisers Act of 1940, as amended, 15 U.S.C. § 80b *et. seq.* (the "Advisers Act") or as a registered investment company or business development company under the Investment Company Act of 1940, as amended, 15 U.S.C. § 80a-1, *et. seq.* (the "1940 Act").

10. The Defendants have various economic interests in certain collateralized loan obligations (the "CLOs"). The CLOs are Aberdeen Loan Funding, Ltd., Brentwood CLO, Ltd.,

Eastland CLO, Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Greenbriar CLO, Ltd., Jasper CLO Ltd., Red River CLO, Ltd., Rockwall CDO, Ltd., Rockwall CDO II Ltd., Southfork CLO, Ltd., Stratford CLO Ltd., Loan Funding VII, LLC, and Westchester CLO, Ltd. The CLOs were created many years ago. Most of the CLOs have, at this point, paid off all the tranches of notes or all but the last tranche. Accordingly, most of the economic value remaining in the CLOs, and all of the upside, belongs to the holders of the preferred shares. The Defendants, or funds that they advise, hold a majority of the preference shares in three of the CLOs: Grayson CLO, Ltd., Greenbriar CLO, Ltd., and Stratford CLO Ltd.

11. Further, such ownerships represent in many cases the total remaining outstanding interests in such CLOs, the noteholders otherwise having been paid. In others, the remaining noteholders represent a small percentage only of remaining interests. Thus, the economic ownership of the registered investment companies, business development company, and CLO Holdco represent a majority of the investors in the CLOs as follows:

a. CLOs in which NexPoint or HCMFA manage owners of a majority of the preference shares: Stratford CLO, Ltd. 69.05%, Grayson CLO, Ltd. 60.47% and Greenbriar CLO, Ltd. 53.44%.

b. CLOs in which a combination of NexPoint, HCMFA and CLO Holdco hold all, a supermajority or majority of preference shares: Liberty CLO, Ltd. 70.43%, Stratford CLO, Ltd. 69.05%, Aberdeen Loan Funding, Ltd. 64.58%, Grayson CLO, Ltd. 61.65%*, Westchester CLO, Ltd. 58.13%, Rockwall CDO, Ltd. 55.75%, Brentwood CLO, Ltd. 55.74%, Greenbriar CLO, Ltd. 53.44%.

12. The issuer of each CLO has separately contracted with the Debtor for the Debtor to serve as the CLO's portfolio manager or servicer pursuant to series of contracts (the "Portfolio Management Agreements"). The Portfolio Management Agreements have varying names, but they essentially provide for the same thing: the Debtor is responsible for, among other things, making decisions to buy or sell the CLOs' assets in accordance with an indenture and its obligations under the Portfolio Management Agreement. Although the Portfolio Management

Agreements vary, they generally impose a duty on the Debtor when acting as portfolio manager to maximize the value of the CLOs' assets for the benefit of the CLOs' noteholders and preferred shareholders. In particular, the Portfolio Management Agreements contain language providing for the maximization or preservation of value for the benefit of the preference shares as shown in the following examples:

> In performing its duties hereunder, the Portfolio Manager shall seek to maximize the value of the Collateral for the benefit of the Noteholders and the Holders of the Preference Shares taking into account the investment criteria and limitations set forth herein and in the Indenture and the Portfolio Manager shall use reasonable efforts to manage the Collateral in such a way that will (i) permit a timely performance of all payment obligations by the Issuer under the Indenture and (ii) subject to such objective, maximize the return to the Holders of the Preference Shares.
>
> In performing its duties hereunder, the Servicer shall seek to preserve the value of the Collateral for the benefit of the Holders of the Securities taking into account the Collateral criteria and limitations set forth herein and in the Indenture and the Servicer shall use reasonable efforts to select and service the Collateral in such a way that will permit a timely performance of all payment obligations by the Issuer under the Indenture.

13. Importantly, each of the Portfolio Management Agreements contains express language that the portfolio manager's obligations thereunder are for the benefit of and "shall be enforceable at the instance of the Issuer, the Trustee, on behalf of the Noteholders, or the requisite percentage of Noteholders or Holders of Preference Shares, as applicable, as provided in the Indenture of the Preference Share Paying Agency Agreement, as applicable." The Portfolio Management Agreements also generally allow the holders of preference shares to remove the portfolio manager for cause, while their affirmative consent is required to an assignment of the agreements. However, certain Servicing Agreements provide for a certain percentage of holders of preference shares to remove the portfolio manager without cause.

14. Therefore, and at a minimum, the Portfolio Management Agreements expressly provide that the Defendants:

(i) may enforce all of the Debtor's obligations thereunder;

(ii) have the right to approve or disapprove of a purported assignment thereof; and

(iii) have the ability to remove the Debtor as servicer thereunder.

B. ALLEGED VIOLATION OF THE AUTOMATIC STAY

15. The Debtor's allegations of a stay violation, in the form of communications between counsel, are without any merit. Moreover, the Debtor asserts a stay violation from a communication between counsel, and when the Defendants expressly conceded that the automatic stay applies to a purported termination of the Portfolio Management Agreements and expressly subjected any action that they may take on that front to the filing of a motion for relief from the stay. And, the Debtors simply refused to act on the Defendants' requests anyway.

16. First, the Debtor complains of a December 22 letter that counsel for the Defendants sent to counsel for the Debtor. Setting aside the issue of whether communications between counsel could ever be a stay violation, here is what the Defendants wrote:

> Contractually, the Debtor is obligated to maximize value for the benefit of the preference shareholders. Accordingly, we respectfully request that no further dispositions of CLO interests occur pending the confirmation hearing. While we recognize the Court denied the Advisor and Funds motion on this subject, the Court did not require liquidations occur immediately, and we reserve all rights to and remedies against the Debtor should the Debtor continue to liquidate CLO interests in contravention of this joint request. Given the Advisor, Funds, and CLO Holdco's requests, it is difficult to understand the Debtor's rationale for continued liquidations, or the benefit to the Debtor from pursuing those sales.
>
> * * *
>
> For the forgoing and other reasons, we request that no further CLO transactions occur at least until the issues raised by and addressed in the Debtor's plan are resolved at the confirmation hearing.

17. The foregoing communication: (i) makes true statements (*e.g.* that the Debtor is obligated to maximize value); (ii) makes assertions (that the Debtor is violating its duties); (iii) reserves rights; and (iv) requests that the Debtor not engage in certain trades pending confirmation.

Whatever one may think about this communication, nothing in the communication is a stay violation or even a threat: it is a request that the Debtors rejected.

18. Next, the Debtor complains of a December 23 letter, again a communication from counsel to counsel. In that letter, the Defendants write as follows:

> Consequently, in addition to our request of yesterday, where appropriate and consistent with the underlying contractual provisions, one or more of the entities above intend to notify the relevant trustees and/or issuers that the process of removing the Debtor as fund manager should be initiated, subject to and with due deference for the applicable provisions of the United States Bankruptcy Code, including the automatic stay of Section 362.

19. Nothing in this letter is a stay violation, nor a threat to engage in a stay violation. Counsel expressly writes that any action will be "subject to . . . the automatic stay." Counsel expressly writes that all that would occur is a notification to the CLO issuers and trustees that the process of removing the Debtor "should be initiated," not that it is "to be" initiated or that it "shall be" initiated. To the extent of any confusion, the Defendants' December 28 letter, not discussed by the Debtor or Mr. Seery, provides as follows:

> The letter dated December 23, 2020 was notification from counsel for the Funds and Advisors, as well as Holdco, to you as counsel for the Debtors that the process to remove the Debtor as manager of certain funds would be initiated, *subject to* applicable orders in the pending bankruptcy case, provisions of the Bankruptcy Code and, specifically the automatic stay. Neither letter was presented to, or constituted a request for relief from, any court.

20. In the end, only one fact matters: the Defendants have not taken any act to terminate the Portfolio Management Agreements or to remove the Debtor as servicer, precisely because of their respect for the automatic stay and their desire to abide by its provisions.

C. ALLEGED TORTIOUS INTERFERENCE WITH CONTRACT

21. The Debtor asserts that the Defendants have tortiously interfered with the Portfolio Management Agreements as follows:

> (1) hindering the Debtor's ability to sell certain CLO assets, (2) threatening to initiate the process for removing the Debtor as the portfolio manager of the CLOs, and (3) otherwise attempting to influence and interfere with the Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs.

Complaint at ¶ 58.

22. The first allegation is that "employees of NPA and HCMFA interfered with and impeded the Debtor's business by refusing to settle the CLOs' sale of AVYA and SKY securities that Mr. Seery had personally authorized." Complaint at ¶ 36. That is precisely the point—the employees of ***two non-debtor entities*** refused to settle the Debtor's sales. The two entities had no obligation to facilitate Mr. Seery's trades, especially when doing so would have violated internal policies and procedures. Non-debtors, having no obligation to settle trades for the Debtor, could not possibly have "tortiously interfered" with the Debtor's contracts by refusing to do what the Debtor requested, and to allege otherwise is baseless. And, the evidence will demonstrate that the Debtor was able to settle the trades, once it asked *its* employees to do so.

23. On this point of refusing to settle trades, Mr. Seery does not present a truthful or complete picture to the Court. In his declaration submitted with the Motion, Mr. Seery alleges that

> the Defendants' interference with trades that I authorized on behalf of the CLOs is the same type of conduct that led the Court to impose the TRO against Mr. Dondero. See Declaration of Mr. James P. Seery, Jr. in Support of Debtor's Motion for a Temporary Restraining Order against Mr. James Dondero [Adv. Pro. No. 20-03190-sgi, Docket No. 4 ¶¶ 21-23, Ex. 8].

Seery Declaration at ¶ 23. The same allegation is made in paragraph 37 of the Complaint.

24. However, the refusal by non-debtors to settle the trades of the Debtor, complained of in the Complaint and in the Motion, occurred on December 22, 2020. *See* Complaint at ¶ 36. The other trades or attempted trades occurred in November, 2020. *See* Adversary Proceeding No. 20-03190 at docket no. 4, ¶¶ 21-23. In those prior trades, Mr. Dondero allegedly instructed employees of the Debtor to cancel trades authorized by Mr. Seery or otherwise allegedly

intimidated employees of the Debtor. *See id*. Here, the Defendants were not employees of the Debtor or obligated to do the Debtor's bidding; no trade was "cancelled"; and, upon information and belief, all that occurred was that a certain computer entry was not made when and how Mr. Seery wanted it to be made.

25. The second allegation is that the Defendants' threat to "initiate the process for removing the Debtor as the portfolio manager of the CLOs" constituted tortious interference. This is equally frivolous, for the simple and obvious reason that the Defendants did not act to terminate the Portfolio Management Agreements or to remove the Debtor as servicer. Moreover, as explained below, it is black-letter law that exercising a contractual right that one has cannot constitute tortious interference as a matter of law.

26. The third act of alleged interference is equally without merit: "otherwise attempting to influence and interfere with the Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs." The Defendants, through counsel, wrote to the Debtor, through counsel, seeking to dissuade the Debtor from engaging in certain actions. The Debtor refused. What the Debtor is really saying is that an important constituent to whom the Debtor is thrice a fiduciary—once under the Portfolio Management Agreements, twice under the Advisers Act, and thrice by virtue of being a debtor-in-possession—is prohibited from communicating to the Debtor its displeasure at certain actions.

27. And, most obvious of all, the Debtor did not breach any contract as a result of any of the alleged "interference."

D. THE PLAN

28. On November 24, 2020, the Debtor filed its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [bankruptcy case docket no. 1472] (the "Plan"). Pursuant to its notice of assumption of executory contracts under the Plan [bankruptcy case docket no.

1648], the Debtor will seek, as part of the confirmation of the Plan, to assume all (or almost all) of the Portfolio Management Agreements. The Defendants have objected to both the Plan and to the assumption of the Portfolio Management Agreements [bankruptcy case docket no. 1670], which objection they hereby incorporate herein.

IV. ARGUMENTS AND AUTHORITIES

A. PRELIMINARY INJUNCTION ELEMENTS

29. A preliminary injunction "is considered an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *Harris County v. Carmax Auto Superstores Inc.*, 177 F.3d 306, 312 (5th Cir. 1999) (internal quotations omitted). The District Court has expressly cautioned that the power to issue a preliminary injunction is to be used "sparingly and only in extraordinary circumstances." *Mayo Found. for Med. Educ. & Research v. BP Am. Prod. Co.*, 447 F. Supp. 3d 522, 527 (N.D. Tex. 2020). The elements for granting a preliminary injunction are well known:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter v. NRDC Inc., 555 U.S. 7, 20 (2008).

B. THE LAW ON ASSUMPTION OF EXECUTORY CONTRACTS

30. The "Prohibited Conduct" the Debtor seeks to enjoin includes: (i) interfering with the Debtor's "contractual right to serve as the portfolio manager . . . of the CLOs"; and (ii) "seeking to terminate the portfolio management agreements and/or servicing agreements between the Debtor and the CLOs." As demonstrated above, however, the Portfolio Management Agreements and federal law give the Defendants these precise rights. While these rights may be temporarily suspended by the automatic stay, the requested preliminary Injunction would extend to a date that

is *after* the potential assumption of the Portfolio Management Agreements and the effectiveness of the proposed Plan.

31. If the Portfolio Management Agreements are assumed, the law is clear that the Debtor must assume them *in toto* or not at all:

> An assumed lease or contract will remain in effect through and then after the completion of the reorganization. The non-debtor party to the agreement is not released from its duties and must continue to perform; likewise, the debtor must continue to perform or pay for the services or other costs that are not discharged. . . Where the debtor assumes an executory contract, it must assume the entire contract, cum onere - the debtor accepts both the obligations and the benefits of the executory contract.

In re Nat'l Gypsum Co., 208 F.3d 498, 505-06 (5th Cir. 2000); *accord NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984).

32. "The trustee may not blow hot and cold. If he accepts the contract he accepts it cum onere. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other." *In re Monroeville Dodge*, 166 B.R. 264, 267 (Bankr. W.D. Pa. 1994) (*quoting In re Italian Cook Oil Corp*., 190 F.2d 994, 997 (3d Cir. 1951)). "[T]he *cum onere* rule prevents the estate from avoiding obligations that are an integral part of an assumed agreement." *In re IT Group Inc.*, 350 B.R. 166, 177 (Bankr. D. Del. 2006) (*quoting In re UAL Corp*., 346 B.R. 456, 468 n. 11 (Bankr. N.D. Ill. 2006)). This Court correctly and wisely applied the foregoing principles to prevent a debtor from seeking to "pick and choose what it wanted to keep":

> the law is clear that a debtor cannot pick and choose portions of an executory contract it wishes to assume. Where a debtor assumes an executory contract, it must assume the entire contract, '*cum onere*,' i.e., the debtor accepts both the obligations and the benefits of the executory contract. . . TRBP was required to assume the Agreement #2-the SCSA in full, or reject it in full. A debtor may not merely accept the benefits of a contract and reject the burdens to the detriment of the other party.

In re Texas Baseball Partners, 521 B.R. 134, 179-80 (Bankr. N.D. Tex. 2014) (Jernigan, J.).

33. This rule, mandated by the Bankruptcy Code, cannot be circumvented by an injunction: "[u]pon assumption of the lease, the Debtor is bound by the terms of the Assumption Agreement cum onere and the Debtor's obligations thereunder are not subject to the discharge or the post-discharge injunction granted under section 524 of the Bankruptcy Code." *In re Mortensen*, 444 B.R. 225, 226 (Bankr. E.D.N.Y. 2011). *See also In re Booka*, 2017 Bankr. LEXIS 4527 *13-*17 (Bankr. S.D. Cal. 2017) (concluding that discharge injunction did not prevent creditor from exercising its post-assumption rights under assumed personal property lease); *In re Ebbrecht*, 451 B.R. 241, 246 (Bankr. E.D.N.Y. 2011) (same).

34. The foregoing principles apply with full force to a counterparty's right to terminate an agreement or remove a debtor under an agreement, post-assumption, pursuant to a contractual termination clause. In *In re Nittolo*, the issue concerned a motion for relief from the automatic stay to terminate a tenancy at will. *In re Nittolo*, 2012 Bankr. LEXIS 2410 (Bankr. N.D. Ga. 2012). With respect to assumption the court held as follows:

> once assumed, an unexpired lease gives the estate no more rights than the debtor held on the petition date. If, as the Debtor contends, her interest in the Property was a tenancy at will, PFA, as her landlord, had the right to terminate that tenancy at its option by providing sixty days' notice. The filing of a bankruptcy petition stays, but does not destroy, that right.

Id. at *6-*7 (internal citations omitted). The court in *In re Bowman*, 555 B.R. 918 (Bankr. S.D. Ga. 2016), likewise held that, even if a debtor assumes a lease, the counterparty's right to terminate the lease upon 60 days' notice is preserved and may be enforced post-assumption. *Id*. at 924.

35. There is no support in the Bankruptcy Code for the issuance of any injunction that would prevent the Defendants from exercising their contractual and statutory rights and remedies post-assumption. On the contrary, the Bankruptcy Code and the case law mandate the conclusion that any such injunction would be incompatible with the effects of assumption and would thwart the whole purpose of assumption, while effectively and impermissibly judicially modifying

assumed contract rights. For similar reasons, there will be no case or controversy after assumption (assuming that any defaults are cured) such that this Court would have subject matter jurisdiction to enjoin post-assumption actions, as any post-assumption action is not ripe.

C. THE BASIS FOR THE INJUNCTION

36. The basis for the Injunction is section 105(a) of the Bankruptcy Code. However, section 105(a) does not create substantive rights or give the Court license to relieve a debtor from the impositions of the Bankruptcy Code itself. *See U.S. v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). With respect to the interplay between section 105(a) relief and other aspects of the Bankruptcy Code, this Court recently labeled such an attempt as a "Hail Mary," wisely and correctly concluding as follows:

> A bankruptcy court's equity power can only be exercised within the confines of the Bankruptcy Code. Section 105 does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.

In re Senior Care Ctrs. LLC, 611 B.R. 791, 799 (Bankr. N.D. Tex. 2019) (internal quotation omitted).

37. The Debtor asserts the following:

> In light of, among other things, (a) the Debtor's status as a debtor in bankruptcy subject to the jurisdiction of this Court, (b) the Settlement Order and Term Sheet, (c) Mr. Dondero's resignations as the Debtor's President and CEO and later as portfolio manager and an employee, (d) the authority vested in the Board and Mr. Seery, as CEO and CRO, (e) the TRO, (f) Mr. Norris's testimony during the Hearing, and (g) the Court's denial of the Restriction Motion, there is no legal or equitable basis for Defendants to engage in any of the Prohibited Conduct, and the balance of the equities strongly favors the Debtor in the request to enjoin Defendants from engaging in any Prohibited Conduct.

Complaint at ¶ 67.

38. This is nonsensical insofar as the Defendants' right to exercise its contractual rights and remedies post-assumption is concerned: (i) the Debtor's status as a debtor subject to this

Court's jurisdiction does not enable the Court to rewrite a contract; (ii) the Debtor fails to allege what portion of the "Settlement Order" or "Term Sheet" relieves the Debtor of post-assumption obligations; (iii) Mr. Dondero's resignations are irrelevant; (iv) the authority vested in the Board and the CRO is likewise irrelevant; (v) the restraining order against Mr. Dondero does not address the Defendants' post-assumption rights and is not binding on the Defendants anyway; (vi) Mr. Norris's testimony has nothing to do with anything, except proving the obvious and uncontested; and (vii) the Court's denial of the Restriction Motion has no relevance to enjoining the Defendants' post-assumption and post-confirmation rights.

39. Rather, and tellingly, the Debtor's argument boils down to the last of its asserted reasons above: "there is no legal or equitable basis for Defendants to engage in any of the Prohibited Conduct." Except that there is. The Portfolio Management Agreements give the Defendants the right to enforce the Debtor's obligations, to potentially remove the Debtor as servicer, and to potentially terminate, or cause the issuer or trustee to terminate, the agreements. The Debtor may not like the fact that the Defendants have these rights, but these rights are conferred by the same contracts that the Debtor seeks to assume.

40. The law is clear that a court may not issue a preliminary injunction that in effect relives a party from a contractual obligation or rewrites the contract, as the Second Circuit concluded in setting aside a preliminary injunction

> In proceeding to rewrite the contract between the parties, the District Judge said that he was preserving the rights of the litigants. We do not agree. . . . The parties having agreed upon their own terms and conditions, the courts cannot change them and must not permit them to be violated or disregarded. . . The order appealed from, while attempting to 'preserve' the rights of all the parties, irrevocably altered them. It permanently deprived USL of a contractual defense which, under normal circumstances, would be a valid one. This, we think, is not the proper function of an interim injunction order. . . [Preliminary injunction] should not be used as a device for creating a new contract between the parties or deciding questions of contract breach, properly determinable after trial.

Diversified Mortg. Investors v. U.S. File Title Ins. Co., 544 F.2d 571, 575-76 (2d Cir. 1976) (internal quotation omitted).

41. This is in line with fundamental New York law, which generally governs the Portfolio Management Agreements:

> And when parties have made their own contract, have agreed upon their own terms and assented to certain conditions, the courts cannot change them and must not permit them to be violated or disregarded. The conditions may seem harsh and useless, but they are the result of the meeting of the minds of parties capable in law of contracting, and if they have not been waived, or if one party has not been prevented from complying by the act of the other, all conditions must be respected and enforced.

Whiteside v. North Am. Acci. Ins. Co., 200 N.Y.320, 326 (N.Y. 1911).

42. Similarly, in vacating a preliminary injunction that prohibited the defendant from exercising contractual rights, the Fifth Circuit has held that "it is an abuse of discretion for the district court to issue a preliminary injunction which permits one party to obtain an advantage by acting, while the hands of the adverse party are tied by the writ." *Enterprise Int'l Inc. v. Corporacion Estatal Petrolera*, 762 F.2d 464, 476 (5th Cir. 1985). The circuit explained:

> The standby letter and the guarantee were due to expire on June 21, 1984, the day on which the district court heard argument on and granted the preliminary injunction. Unlike other courts that have faced the same problem, the court did not condition its injunction on Enterprise International's extension of the standby letter and the guarantee or on its posting of a bond of equivalent value. By its action, the court failed to maintain the status quo and in effect, granted Enterprise International all of the relief it might have had on the merits. The district court's preliminary injunction also interfered with the parties' contractual arrangement, for it prevented C.E.P.E. from making the demand it might otherwise have made, prohibited Bank of America from acceding to that demand if made, and from in turn seeking recourse from First City National, and prevented First City National from honoring the demand on the standby letter.

Id. at 475-76 (emphasis added).

43. The situation is the same here: the preliminary Injunction would permit the Debtor to proceed unfettered while "the hands of [the Defendants] are tied," the Court would in effect

grant final judgment to the Debtor, and the Court would be interfering with the parties' contractual rights. This is a case where the Debtor proposes to assume the whole of the contract without any argument that any provision of the contract is unenforceable, yet seeks by injunction to prevent the other party from enforcing the contract. It is for the courts to enforce contracts as written, relieve parties from contracts in certain rare instances, and to construe ambiguous contracts. But it is not the role of the courts to rewrite a contract to deprive one party of an important benefit in order to make it less burdensome for the other party. Importantly, the benefit of the provisions the Debtor seeks to enjoin the Defendants from enforcing ensures accountability in connection with the management of billions of dollars of the money of others. The burden of the provision is merely to require a fiduciary to be accountable.

44. Indeed, as in *Diversified Mortg. Investors* and *Enterprise Int'l Inc*., a preliminary injunction here would be the equivalent of an impermissible permanent injunction or final adjudication without full discovery and a full trial. *See, e.g., Agrest v. Intern'l Safe Distribs. Inc*., 1986 U.S. Dist. LEXIS 26107 *19 (S.D.N.Y. 1986) (denying preliminary injunction because "the relief sought would provide Agrest with that which he seeks as a final award"). This is because the Debtor has indicated that it intends to liquidate over the next two (2) years. A trial in this Adversary Proceeding may take upwards as long as that, and at least one (1) year. If, during the interim, the Defendants are enjoined from exercising their contractual and statutory rights, then, as a practical matter, they will be prohibited from exercising those rights at all since, by the time that the preliminary injunction expires, the Debtor will likely have already completed the process of liquidating the CLOs' assets. At that point, there will be no case or controversy or CLO assets to administer.

45. Finally, the Debtor argues that the Defendants are alleged "affiliates" of the Debtor and that this has some unspecified effect on the analysis. The simple fact is that, with the removal

of Mr. Dondero from the Debtor's management and the installation of an independent board, there is no factual basis to allege any "affiliate" status. Indeed, the fact that these various companies are presently engaged in litigation against each other demonstrates that neither Mr. Dondero, nor any of the Defendants, have any control over the Debtor, or *vice versa*.

D. NO LIKELIHOOD OF SUCCESS ON THE MERITS

46. The Court should deny the Motion because the Debtor has not, and cannot, demonstrate any likelihood of success on the merits. As demonstrated above, the assumption of the Portfolio Management Agreements reinstates the contract and preserves all post-assumption rights, and neither section 105(a) of the Bankruptcy Code nor any other provision of the Bankruptcy Code can relieve the Debtor of these consequences. Since the Debtor cannot prevail on its requested permanent Injunction prohibiting the Defendants from exercising post-assumption rights, no preliminary Injunction can issue.

47. For the reasons explained above, the Debtor also has no likelihood of success on the merits of its claim that the Defendants have violated the automatic stay. The Defendants' letter urging the Debtor to not engage in trades for the CLOs prior to confirmation cannot possibly be a stay violation, while the subsequent letter indicating that the Defendants will initiate the process of removing the Debtor as servicer is not a stay violation because that letter expressly made any such process or removal subject to first obtaining relief from the stay and because the Defendants have not taken any action to remove the Debtor or terminate any agreement. At the very most, the only possible provision applicable to a potential termination of an executory contract is section 362(b)(3), as an act to "obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3); *In re Computer Communs.*, 824 F.2d 725, 728 (9th Cir. 1987) (holding that 362(b)(3) applies to a postpetition termination of an executory contract). Even then, the section only stays an "act," and a

communication from the Defendants' counsel to the Debtor's counsel is a communication; not an act.[3] Therefore, to the extent that the Injunction is predicated on succeeding on a stay violation claim, the Injunction must fail because the Debtor has no likelihood of succeeding on any claim that the Defendants violated the stay.

48. For the reasons explained above, the Debtor also has no likelihood of success on the merits of its claim that the Defendants have tortiously interfered with the Debtor's contracts. This tort requires the Debtor to prove four elements: "(1) that a contract subject to interference exists; (2) that the alleged act of interference was willful and intentional; (3) that the willful and intentional act proximately caused damage; and (4) that actual damage or loss occurred." *ACS Investors v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). Importantly, "[f]or a plaintiff to maintain a tortious interference claim, it must produce some evidence that the defendant knowingly induced one of the contracting parties to breach its obligations under a contract." *Cuba v. Pylant*, 814 F.3d 701, 717 (5th Cir. 2016) (internal quotation omitted). Tortious interference requires one "who wrongly induces another contracting party to breach the contract." *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995) (emphasis added).

49. That the Defendants refused to assist the Debtor with settling the Debtor's own trades, when the Defendants were under no obligation to so assist, and especially because doing so would have violated the Defendants' established protocols and procedures, is not interference any more than a neighbor's refusal to lend a stepladder for fear of liability is an interference with a promise to another neighbor to help him clean his gutter.

[3] A communication may, in certain situations, also be an act, when the communication accomplishes an act, such as an acceleration, a termination, a foreclosure, etc. But a mere communication with no independent significance, like the communications in question here, are not acts and cannot possibly be acts within the meaning of the automatic stay. *See, e.g., In re Clayton*, 235 B.R. 801, 807-08 (Bankr. M.D.N.C. 1998) (holding that a communication inviting a settlement is not a stay violation, but filing a lawsuit to collect on the debt is: "[t]he automatic stay was not designed to be used as a kind of spring-loaded gun against creditors who wander into traps baited by the debtor").

50. But perhaps most importantly, the Debtor has not alleged that any alleged interference by the Defendants caused the Debtor to breach any of the Portfolio Management Agreements. *See, e.g., Holloway*, 898 S.W.2d at 795 (requiring wrongful inducement to breach contract). The complained of communications were to the Debtor's counsel, not to the CLOs, and are not actionable under any theory. And, there can be no tortious interference when one is acting pursuant to a right given in the contract. *See, e.g., Friendswood Dev. Co. v. McDade* + Co.,926 S.W.2d 280, 282 (Tex. 1996). Indeed, the Debtor's response in the form of the Motion is indicative of its ultimate desire not to permit anyone to question its decisions, much less hold the Debtor accountable for breaches of its fiduciary and other obligations; again the true purpose of the Complaint and the Motion.

51. The Debtor's action for declaratory judgment is not even asserted as a basis for the Injunction. But, to the extent that it is, that declaratory judgment, even if it has merit, has no potential nexus to the Injunction. In this respect, the Debtor seeks the following declarations:

(i) "Each of the Defendants is directly or indirectly controlled by Mr. Dondero." Even if this is true, that is no basis to prevent the Defendants from exercising any contractual remedies.

(ii) "Each of the Defendants is an 'affiliate' of the Debtor for purposes of the CLO Management Agreements." This is not correct factually.

(iii) "The Plaintiff has the exclusive contractual right to manage the CLOs." Even if this is true, the only basis for an injunction would be to prevent the Defendants from attempting to manage the CLOs—something that they have not sought to do and something that the Debtor has not alleged.

(iv) "The Plaintiff has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs." Even if this is true, the only basis for an injunction would be to prevent the Defendants from buying and selling assets on behalf of the CLOs—something that they have not sought to do and something that the Debtor has not alleged.

(v) "Holders of preference shares have no right to make investment decisions on behalf of the CLOs." Even if this is true, the only basis for an injunction would be to prevent the Defendants from making investment decisions on behalf of the CLOs—

something that they have not sought to do and something that the Debtor has not alleged.

(vi) "The Debtor's decision to evict Mr. Dondero from the Debtor's offices, and to terminate the provision of services to him, did not violate any contract with, or duty owed to, any of the Defendants." Even if this is true, it bears no relevance to the Defendants exercising their contract rights, except to the extent those rights affect a duty owed to the Defendants—something that the Defendants have not asserted.

(vii) "The demands and requests set forth in Defendants' Letters constitute interference with the Plaintiff's business and management of the CLOs." This is inappropriate because the Debtor cannot obtain a declaration that a tort occurred when the Debtor has sued for that very tort. Moreover, the alleged tort has no merit, for the reasons discussed above.

52. The Debtor appears to argue, however, that the Court's January 9 order and its TRO against Mr. Dondero somehow grant the Debtor rights against the Defendants notwithstanding the provisions of the Portfolio Management Agreements and applicable law. The Court's January 9 order provides that "Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor." Bankruptcy Case Docket No. 339.

53. First, a fair reading of the January 9 order is that the order, and any agreement of Mr. Dondero, is not limitless as to time. Rather, the January 9 order is meant to address various rights during the pendency of the Bankruptcy Case, but it does not purport to address post-confirmation or post-assumption rights. That order effectuates a term sheet that provides for, among other things: an independent board; a CRO; protocols for ordinary and non-ordinary course transactions; committee standing; indemnification; and various other matters. Clearly, these and other issues will be superseded by a plan, and clearly the Debtor is not going to comply with these issues post-confirmation. The underlying 9019 motion states that the settlement "will allow the Debtor to proceed with a productive reorganization effort that will maximize value for all constituents." Bankruptcy Case Docket No. 281 at ¶ 15. That is the whole point of the January 9 order: to be a temporary resolution and not a permanent one. By the same token, Mr. Dondero's

agreement should be viewed as expiring upon confirmation of any plan, especially because the protocols provided for by that order provided control and supervision of the Debtor during the pendency of its case, but provide for no such control and supervision post-confirmation.

54. Second, the January 9 order applies to Mr. Dondero. It does not prevent a "Related Entity" from terminating any agreement, and it does not purport to bind any Related Entity. It may be that Mr. Dondero violates the order, and it may be that he faces potential consequences for so doing, but that in no way prevents a Related Entity from terminating any agreement. Simply put, the Defendants are not parties to the January 9 order nor are they enjoined from any action by that order.

55. Third, the Debtor is wrong to assume that Mr. Dondero controls all decisions of the Defendants or micromanages them. The Defendants may, for example, make a decision to terminate a Portfolio Management Agreement without any involvement of Mr. Dondero.

56. With respect to the separate TRO and preliminary injunction against Mr. Dondero, the only provision thereof of relevance to the Motion is that Mr. Dondero is prohibited from "interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's decisions concerning . . . disposition of assets owned or controlled by the Debtor." This provision cannot extend to the Defendants' exercise of their contractual rights, nor to Mr. Dondero's involvement in that, since the exercise of a legal contractual right cannot be judicially cognizable or actionable "interference" or "impediment" as a matter of law. Moreover, as explained above, the interference that the Debtor now alleges against the Defendants is completely different from the interference that it alleged against Mr. Dondero that gave rise to the TRO against him. Finally, the TRO does not apply to the Defendants' exercise of their rights after assumption for the same reasons listed above as to why the January 9 order does not apply.

E. NO IRREPARABLE INJURY

57. With respect to the element of no adequate remedy at law and of irreparable injury, "when the threatened harm is more than de minimis, it is not so much the magnitude but the *irreparability* that counts for purposes of a preliminary injunction." *Dennis Melancon Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). "It is thus well-established that an injury is irreparable only if it cannot be undone through monetary remedies. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of an injunction, are not enough." *Id*. (internal citations and quotations omitted). The irreparable injury must be "likely," not just possible. *See Winter v. NRDC Inc.*, 555 U.S. 7, 20 (2008).

58. To the extent that the Debtor argues that any alleged violation of the automatic stay or tortious interference with contract is the basis for the requested Injunction, then the Debtor cannot satisfy the requirement of demonstrating irreparable injury without the Injunction. This is because the Debtor does not seek to enjoin future tortious interference or stay violations, but rather the exercise of contractual rights after assumption. Moreover, both tortious interference and a stay violation are already actionable and give rise to damages for violations, meaning that, even if there is any merit to the Debtor's allegations, an injunction is not proper because the Debtor has an adequate remedy at law. And, since the Defendants have taken no action to remove the Debtor from the Portfolio Management Agreements or to terminate those agreements, there is no injury that is "likely" as opposed to hypothetical, even if any such injury is irreparable.

59. Moreover, the evidence will demonstrate that the only harm that may result to the Debtor if the Defendants, post-assumption, improperly terminate the Portfolio Management Agreements or remove the Debtor as manager, is a loss of revenue. That is precisely the kind of harm remedied by the "adequate remedy at law" of money damages. It is not irreparable harm.

F. BALANCING OF HARMS

60. At worst, if the Defendants take improper future action, the Debtor will lose no more than $15 million in future revenue (and, as the evidence will demonstrate, likely much less than that), something that is easily and properly remedied by money damages. But, if the Defendants are not able to exercise their lawful contractual and statutory supervisory, enforcement, and removal rights, then harm and damage of more than $1 billion may befall many innocent people who have invested their money in the funds holding the beneficial economic interests in the CLOs. This is especially so if the Court approves the broad and improper exculpation provisions in the Plan. These innocent investors will have no legal recourse and no recovery. And, if this happens, then the bankruptcy system as a whole will have been tarnished, for it should be unthinkable that a reorganized entity can be permitted, through what is effectively blanket immunity, to improperly lose many millions of dollars of other people's money, with impunity.

61. While it is true that a preliminary injunction may be issued in favor of a debtor without bond or security under Bankruptcy Rule 7065, this is a "may" provision and not a "shall" provision. If the Court is inclined to grant the Injunction, the Defendants request a substantial bond and security, and proper and enforceable insurance, to protect against these potential harms, which should be in an amount of at least $100 million.

G. PUBLIC INTEREST

62. It is true that the public has a strong interest in successful reorganizations. Except that this is not a reorganization and, even if it is, any action would occur post-assumption and post-confirmation, meaning post-reorganization. Rather, the public interest here lies with the many innocent, third-parties—money managers, pension and retirement planners, and investors—whose billions of dollars in value the Debtor is managing. Rights under the Portfolio Management Agreements exists precisely to protect the interests of these people, by holding the Debtor

accountable and by ensuring that the Debtor can be removed as manager for various of the "causes" that may exist or arise. If the Debtor is freed of these constraints, then these people and the public at large lose very important rights and protections; rights and protections that are so important in the public world of securities trading and investment that two federal Acts are implicated. Simply put, the public interest cannot be served when the Debtor is relieved of complying with the very obligations and requirements that the public has imposed.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendants respectfully request that the Court enter an order denying the Motion, conditioning any approval of the Motion on the posting of security as requested above, and providing the Defendants such other and further relief to which they show themselves to be entitled, at law or in equity.

RESPECTFULLY SUBMITTED this 21st day of January, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 21, 2021, a true and correct copy of this document was served electronically by the Court's CM/ECF system on all parties entitled to such notice, including counsel for the Debtor.

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