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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	Case No. 19-34054 (SGJ11)
Debtors	(Jointly Administered)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	
Plaintiff,	
v.	Adv. Pro. No. 21-03000 (SGJ11)
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.	

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MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (together, the "**Advisors**"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "**Funds**"), by and through their undersigned counsel, hereby move (the "**Motion**"), pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, such Rule having been made applicable to this proceeding pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, to dismiss *Plaintiff Highland Capital Management, L.P.'s Verified Complaint for Declaratory and Injunctive Relief* (the "**Complaint**") for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. The facts and arguments in support of this Motion are set forth in the Funds' and Advisors' contemporaneously filed *Brief in Support of Motion to Dismiss*.

WHEREFORE, the Funds and Advisors request that the Court grant the Motion and enter an order, substantially in the form attached hereto, dismissing Plaintiff's Complaint with prejudice pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: January 24, 2021

MUNSCH HARDT KOPF & HARR, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2021, I caused the foregoing document to be served via electronic email through the Court's CM/ECF system to the parties that have requested or consented to such service.

/s/ Davor Rukavina
Davor Rukavina

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03000-sgj
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.	§	

BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NexPoint," and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "Funds," and together with the Advisors, the "Fund and Advisors"), by and through their undersigned counsel, submit this brief in support of their contemporaneously filed motion to dismiss (the "Motion to Dismiss") the *Verified Complaint for Declaratory and Injunctive Relief* (the "Complaint") filed by Plaintiff Highland Capital Management, L.P. (the "Debtor") against the Funds and Advisors and CLO Holdco, Ltd. ("CLO Holdco," and together with the Funds and Advisors, the "Defendants"). In support of the Motion to Dismiss, the Funds and Advisors respectfully show the Court as follows:

SUMMARY OF ARGUMENT

The Adversary Proceeding[1] is nothing more than a thinly veiled attempt to enjoin the Defendants from exercising their valid and enforceable rights post-confirmation to instruct issuers and CLOs to act under executory contracts that the Debtor seeks to assume under its Plan. Not only is the Complaint not ripe, it is based purely on speculation and conjecture. If the Court were to anticipatorily enter an order preventing the Defendants from acting to instruct issuers and CLOs to exercise rights post-confirmation under executory contracts that are assumed under the Debtor's plan, it would, in effect, allow the Debtor to pick and choose which parts of such contracts to assume or reject. This is not allowed under the Bankruptcy Code. Furthermore, the Court lacks subject matter jurisdiction over post-confirmation matters that are, at their very core, contract disputes arising under state law or the law of another nation. The Debtor cannot bestow

[1] Capitalized terms used but not otherwise defined in the Summary are defined below.

jurisdiction on the Court by virtue of the Complaint at a time where any potential disputes between the parties have not materialized.

The Complaint is largely devoid of factual allegations, and instead, full of conclusory statements that are insufficient to survive a motion to dismiss. The Debtor's Complaint simply does not allege facts that support the relief requested.

BACKGROUND

Each of the Funds and Advisors 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").

The Funds have economic interests in certain collateralized loan obligations (the "CLOs") for which the Debtor serves as portfolio manager. 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 are securitization vehicles that were formed to acquire and hold pools of debt obligations. They also issued various tranches of notes and preferred shares, which are intended to be repaid from proceeds of the subject CLO's pool of debt obligations. The notes issued by the CLOs are paid according to a contractual priority, with the value remaining in the CLOs after the notes are fully paid flowing to the holders of the preferred shares. 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 Funds advised by the Advisors hold a majority of the preferred shares in three of the CLOs: Grayson CLO, Ltd., Greenbriar CLO, Ltd., and Stratford CLO Ltd.

Further, in many cases, the preferred share ownerships represent 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 Funds advised by NexPoint and HCMFA, as well as 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%.

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"). Pursuant to the Portfolio Management Agreements, the Debtor is responsible for, among other things, making decisions to buy or sell the CLOs' assets in accordance with the applicable indenture. Although the Portfolio Management Agreements vary, the agreements 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.

Further, 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 preferred shares to instruct the CLOs to remove the portfolio manager for cause, while their affirmative consent is required for an assignment of the agreements. However, certain Portfolio Management Agreements allow holders of preferred shares to instruct the CLO to remove the portfolio manager without cause.

Therefore, and at a minimum, the Portfolio Management Agreements expressly provide that the CLOs:

(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 under certain conditions or as instructed by the requisite majority of preference share owners.

On November 24, 2020, the Debtor filed its Fifth Amended Plan of Reorganization (the "Plan") in the underlying bankruptcy case. The Debtor has filed Plan Supplements indicating that the Debtor plans to assume the Portfolio Management Agreements. On January 5, 2020, the Funds and Advisors, in addition to certain other funds advised by the Advisors, filed an objection to the Plan. In pertinent part, and as relevant to the matter before the Court, the Funds and Advisors' Plan objection focuses on their belief that the Debtor will not manage the CLOs' assets appropriately in order to maximize value for the CLOs and the Funds and Advisors, but will instead breach its fiduciary duties by managing a wind-down of the CLOs and their assets in order to provide a recovery to the Debtor's creditors, presenting a conflict of interest between the Debtor (and its creditors) and the beneficial interest holders in the CLOs. Furthermore, the

objection asserts that the Plan impermissibly modifies the Portfolio Management Agreements it seeks to assume by preventing the counterparties to such agreements from exercising their rights thereunder to change management.

On December 22, 2020, Defendants' counsel[2] sent a letter to counsel for the Debtor, "respectfully request[ing]," but not demanding, that the Debtor cease further dispositions of CLO interests until after the hearing on confirmation of the Debtor's Plan. *See* Appx. 2.[3] On December 23, 2020, Defendants' counsel sent a follow up letter to counsel for the Debtor, indicating that the Defendants intended to notify the relevant trustees and/or issues of the CLOs that the process of removing the Debtor as fund manager should be initiated, "where appropriate and consistent with the underlying contractual provisions" and "subject to and with due deference for the applicable provisions of the United States Bankruptcy Code, including the automatic stay of Section 362." *See* Appx. 5. The December 23 letter again reiterated the Defendants' *request* that no further CLO transactions occur pending the confirmation hearing.

On December 24, 2020, the Debtor's counsel sent letters in response to the December 22 and December 23 letters, demanding that the Defendants, by December 28, 2020, withdraw their letters and confirm that they would not take steps to interfere with the Debtor's directions as the CLOs' portfolio manager or to terminate the Portfolio Management Agreements. *See* Appx. 2 - 25.

The December 23 letter merely provided notification of actions the Defendants believed they have the right to pursue if the Portfolio Management Agreements are assumed by the

[2] This letter and the other letters referenced were sent by counsel to the Funds and Advisors, but CLO Holdco, Ltd. joined in the letters and its counsel was copied.

[3] References to "Appx. #" are to the *Appendix in Support of Motion to Dismiss Plaintiff's Complaint*, which is being filed contemporaneously herewith.

Debtor. The letter further reiterated that with respect to initiating the process for removing the Debtor as portfolio manager, the Defendants would act, in all instances, "*subject* to applicable orders in the pending bankruptcy case, provisions of the Bankruptcy Code and, specifically the automatic stay."

On January 6, 2021, the Debtor filed the Complaint, initiating the above-captioned adversary proceeding (the "Adversary Proceeding"). The Complaint seeks damages, declaratory relief and injunctive relief enjoining Defendants from impeding, directly or indirectly, the Debtor's business.

The Debtor alleges that the Defendants have interfered with and impeded the Debtor's business or threatened to do so by initiating the process for removing the Debtor as the portfolio manager of the CLOs. In support, the Debtor makes unsubstantiated assertions that the Advisors' employees refused to settle the CLOs' sale of certain securities that had been authorized by the Debtor's Chief Restructuring Officer and Chief Executive Officer, Mr. James Seery, and points to three of the letters discussed above that were sent by counsel to the Funds and Advisors to Debtor's counsel (the "December Letters").

There is nothing in the Complaint that would support the notion that the Advisors' employees had any obligation or ability to settle the CLOs' sales of assets. To the contrary, and as the Debtor seeks to affirm in the form of declaratory relief, only the Debtor possessed the contractual obligation and ability to facilitate sales of the CLOs' assets. Moreover, the Complaint fails to allege any specific action (or inaction) by the Advisors' employees that interfered with and/or impeded the Debtor's business. The statement that the Advisors and/or their employees interfered with and impeded the Debtor's business as a consequence of letters between counsel is preposterous -- especially because the Debtor *rejected* the requests made in

those letters. The Complaint plainly lacks any supporting allegations that, taken as true, would show that the Advisors or their employees engaged in any activity that impeded or interfered with the Debtor's business.

The December Letters consist entirely of communications between lawyers, sent by Defendants' counsel to Debtor's counsel. Communications between lawyers simply do not support any of the claims asserted by the Debtor. Further, the December Letters, as communications between counsel, cannot be interpreted under any light as actions by the Defendants to interfere with the Debtor's business or violate the Bankruptcy Code.

ARGUMENT

I. The Complaint Fails to State a Claim upon which Relief can be Granted

The Court should grant the Motion and dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Rules"), made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), because the facts alleged in the Complaint do not support a legal right to recovery under any of the claims asserted. The United States Supreme Court has instructed that blanket assertions of entitlement to relief do not satisfy the Rule 12(b)(6) standard and that the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Even under the federal notice pleading standard, a complaint must contain "more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action . . . ." *Twombly*, 550 U.S. at 555. Thus, to survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)). "A claim has facial plausibility when the plaintiff pleads

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Although all factual allegations of the complaint are typically treated as if true when deciding a motion to dismiss, this is not so for conclusory allegations and unwarranted deductions of fact. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992) ("'conclusory allegations and unwarranted deductions of fact are not admitted as true' by a motion to dismiss.") (quoting *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)). "In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations . . . ." *Id.* Moreover, documents not attached to a plaintiff's complaint, but which are referred to in the complaint and central to the claims in the complaint, may properly be considered on a motion to dismiss. *Walch v. Adjutant General's Dept. of Texas*, 533 F.3d 289, 293-94 (5th Cir. 2008); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

As discussed herein, the Complaint must be dismissed because it consists entirely of conclusory statements lacking any factual enhancement that cannot be accepted as true and do not support any legal right of recovery. Moreover, the letters referenced and relied upon throughout the Complaint contradict the Debtor's allegations, such that the allegations cannot be accepted as true.

A. First Claim for Relief (Declaratory Judgment)

The Funds and Advisors do not dispute several of the Debtor's requested declarations. With respect to those items that are not disputed, listed below, the Debtor has not identified any bona fide, actual, present dispute in existence:

Requested Declaration	**Paragraph in Complaint Evidencing Lack of Any Dispute**
Each of the Advisors is directly or indirectly controlled by Mr. Dondero	¶¶ 22, 23
The Plaintiff has the exclusive contractual right to manage the CLOs	Dec. 22, 2020 Letter; Defendants' counsel only *requests* that no further dispositions of CLO interests occur
The Plaintiff has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs	Dec. 22, 2020 Letter; Defendants' counsel only *requests* that no further dispositions of CLO interests occur
Holders of preference shares have no right to make investment decisions on behalf of the CLOs	Dec. 22, 2020 Letter; Defendants' counsel only *requests* that no further dispositions of CLO interests occur
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	Dec. 31, 2020 Letter; Defendants' counsel did not allege any breach of contract; rather, Defendants' counsel expressed concern about the impact of the decision on the ability of the Advisors and Funds to operate and as such, unspecified damages might ensue

With respect to the other requested declarations listed below, there is simply no factual basis asserted anywhere in the Complaint to support the requests:

- Each of the Funds is directly or indirectly controlled by Mr. Dondero;
- Each of the Defendants is an "affiliate" of the Debtor for purposes of the CLO Management Agreements; and
- The demands and requests set forth in the December Letters constitute interference with the Debtor's business and management of the CLOs.

The only support for the foregoing requested declarations is the conclusory statements within the requested declarations themselves. Such conclusory assertions cannot be accepted as true for purposes of the Motion to Dismiss and do not offer the factual bases necessary to sustain this claim for relief.

Additionally, and more importantly, there is no legal basis for the requested declaration that each of the Defendants is an "affiliate" of the Debtor (which is perhaps why the Debtor does

not even attempt to allege any facts that would support the requested declaration). The term "affiliate" is defined in the Portfolio Management Agreements and applicable nonbankruptcy law, both of which should be considered by the Court in ruling on this Motion to Dismiss, and such definitions expressly contradict and preclude such a declaration. The term "affiliate" is generally defined in the CLO documents as follows:

> ***Affiliate*** or ***Affiliated***: With respect to a Person, (i) any other Person who, directly or indirectly, is in control of, or controlled by, or is under common control with, the Person; or (ii) any other Person who is a director, officer, or employee (A) of the Person, (B) of any subsidiary or parent company of the Person or (C) of any Person described in clause (i) above. For the purposes of this definition, control of a Person shall mean the power, direct or indirect, (A) to vote more than 50% of the securities having ordinary voting power for the election of directors of the Person; or (B) to direct the corporate management and corporate policies of the Person whether by contract or otherwise (this does not include the Servicing Agreement unless it is amended expressly to provide those services). For the purpose of this definition, the Administrator and its Affiliates are neither Affiliates of nor Affiliated with the Co-Issuers and the Co-Issuers are neither Affiliates of nor Affiliated with the Administrator, or any of their Affiliates.

Under this definition, none of the Defendants are "affiliates" of the Debtor. The Defendants do not directly or indirectly control the Debtor; nor does the Debtor control the Defendants. The Defendants are not directors, officers or employees of the Debtor. The Defendants are powerless to direct the management or policies of the Debtor, and hold no securities of the Debtor which they could otherwise vote. The opposite is also true; the Debtor is powerless to control the Defendants or direct their management or policies, and does not hold 50% ownership of the Defendants.

As a matter of contract, no reference to other laws is necessary to interpret the definition of "affiliate." However, likewise under the 1940 Act, which contains the broadest definition of affiliated person in any of the federal securities laws governing investment activities, the Defendants are not "affiliates" of the Debtor. *See* 15 U.S.C. § 80a-2(a)(3). In this regard, the

Debtor has no control relationship (controls, controlled by or under common control with) the Defendants nor does it hold 5% or more of any of the Defendants' securities. The reverse also is true. Neither does the Debtor serve as the Defendants' investment adviser or otherwise meet any other indicia of affiliation under the 1940 Act, even were that statute to apply. The reverse also is true with respect to the Defendants and the Debtor. As the Debtor has acknowledged, it has terminated all relationships with Mr. James Dondero, which was the only potential tie between the Defendants and the Debtor in terms of affiliation under the 1940 Act. Complaint ¶¶ 30, 44. Accordingly, the Complaint on its face reflects that any affiliate relationship between the Debtor and the Defendants was severed, contradicting any allegation that the parties are somehow affiliates under any law, much less the definition of Affiliate in the CLO documents. The Debtor has simply not alleged any facts that would prove otherwise under applicable law or the governing documents.

B. Second Claim for Relief (Violation of the Automatic Stay)

The Debtor claims that the Defendants violated the automatic stay under section 362(a) of the Bankruptcy Code, but the Complaint is utterly lacking any factual support for such a violation. Indeed, the Complaint fails to even specify which subsection of section 362(a) has allegedly been violated. Rather, the Debtor simply makes conclusory statements that the Defendants interfered with the Debtor's contractual rights and course of dealing, apparently by the Advisors' employees allegedly refusing to settle the CLOs' sale of certain securities that had been authorized by Mr. Seery, and by virtue of the December Letters.

However, as discussed above, the Complaint fails to allege *how* the Advisors' employees allegedly interfered with and impeded a sale of CLO assets and why their alleged refusal to settle

the sale of AVYA and SKY securities interfered with and impeded such sale. The Complaint does not even allege that the sales did not occur. As a matter of fact, the sales did occur.

The Complaint simply states that the Advisors' employees refused to settle the sale. Notably missing is any factual allegation that would support a finding that the employees had any duty - contractual or otherwise - or even any ability - to facilitate a sale of the CLOs' assets. Indeed, as the Complaint notes elsewhere, and as the Debtor seeks to affirm in the form of declaratory relief, it is the Debtor that possesses the sole contractual obligation and ability to facilitate sales of the CLOs' assets. Thus, the Complaint contradicts itself to the extent it alleges that the Advisors' employees somehow violated the automatic stay by refusing to settle a sale of the CLOs' assets. The Debtor's threadbare recital that the employees "interfered with and impeded the Debtor's business" is insufficient factually to support any such allegation, and, moreover, does not state a claim for a violation of the automatic stay. Further, even if the Advisors' employees refused to settle the CLOs' sale of securities, there is nothing in the Complaint that would indicate that such action (or refusal to act) violated the automatic stay.

Second, critically, the December Letters on their faces do not violate the automatic stay and the claim should be dismissed. The December Letters are communications between counsel, not impermissible demands or actions directed at the Debtor. "Open communication between opposing counsel should be strongly encouraged as a means to settle matters otherwise demanding of judicial attention." *In re Hazzard*, 1995 WL 110588, at *3 (Bankr. N.D. Ill. Feb. 10, 1995) (noting that if the automatic stay were interpreted to prohibit creditors from corresponding through counsel, it would "significantly impair the bankruptcy process.").

Furthermore, the December Letters themselves directly contradict the Debtor's allegations, as they make abundantly clear that any action with respect to replacing the Debtor as

manager under the Portfolio Management Agreements would only proceed if relief from stay were granted by the Court to take any action with respect to the Debtor. *See* Dec. 23 Letter ("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*. . . . Because the process of removal is being initiated, *subject to the applicable provisions of the Bankruptcy Code*, we respectfully 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.") (emphasis added). The automatic stay does not prohibit activity that is taken within the confines of the Bankruptcy Code and the Court. *See Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 356 (5th Cir. 2008) ("The automatic stay serves to protect the bankruptcy estate from actions taken by creditors outside the bankruptcy court forum, not legal actions taken within the bankruptcy court.") (quoting *In re Sammon*, 253 B.R. 672, 681 (Bankr. D.S.C. 2000)).

In addition, the December Letters themselves make abundantly clear that any correspondence relating to sales of CLO assets merely communicated *requests* to the Debtor and reserved all other rights and remedies. *See* Dec. 22 Letter ("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. . . . 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."); Dec. 23 Letter ("Because the process of removal is being initiated, subject to the applicable provisions of the Bankruptcy Code, we respectfully 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.").

Finally, the December 31 letter, *see* Appx. 26, which again, was a communication between counsel, simply expressed the Funds and Advisors' concerns that Mr. Dondero's loss of access to the office and services could harm the Funds and Advisors if Mr. Dondero was hindered in his ability to provide services to the Funds and Advisors, and requested that the Debtor reconsider its position. The letter did not contain any threat and the idea that it was an act by the Fund and Advisors to somehow interfere with the Debtor's business is simply ludicrous.

Moreover, as section 362(a)(3) of the Bankruptcy Code makes clear, only an "act" to remove property from the estate or to exercise control over property of the estate is stayed. Mere communication, without more, is not an "act" as a matter of law.

C. Third Claim for Relief (Tortious Interference with Contract)

The Debtor alleges that the Defendants have willfully and intentionally impeded the Debtor's ability to fulfill its contractual duties and obligations under the CLO management contracts by (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 for the CLOs, and (3) attempting to influence and interfere with the Debtor's decisions concerning the purchase and sale of assets by the CLOs. Again, for the reasons stated above, the Debtor has not alleged facts that would support such a claim.

In any event, a cause of action for tortious interference with contract involves the following elements: (1) an existing contract subject to interference; (2) a willful and intentional act of interference with the contract; (3) that proximately caused plaintiff injury; and (4) caused actual damages or loss. *McGehee v. Hagan*, 367 S.W.3d 848, 854 (Tex. App. 2012). Further, under Texas (and New York) law, tortious interference with contract "requires a third-party stranger to the contract who wrongly induces another contracting party to breach the contract." *McCall v. Dallas Independent Sch. Dist.*, 169 F. Supp. 2d 627, 639 (N.D. Tex. 2001) (quoting *Grizzle v. Tex. Commerce Bank*, 38 S.W.3d 265, 286 (Tex. App. 2001)); *see also Iacono v. Pilavas*, 125 A.D.3d 811, 812, 4 N.Y.S.3d 250, 252 (N.Y. App. Div. 2015) (under New York law, a claim for tortious interference with contract requires that the defendant intentionally procured a breach of a third party's contract and damages). Notably, the Debtor has not alleged that it breached any contract at all, much less as a result of any alleged interference, and the Debtor has not alleged any injury, let alone specific damages or loss. For this reason, the claim has not been adequately pled and must be dismissed.

Even if the claim did not fail on its face, the Complaint contains insufficient allegations to sustain this claim. The Debtor fails to allege how the Advisors allegedly hindered the Debtor's ability to sell CLO assets or that the sales did not in fact occur, and the Debtor fails to explain how or why any such failure of the sales to occur would be a breach of any of the underlying contracts. Indeed, Debtor only alleges that the employees of the Advisors failed to consent -- but, as discussed above, the Debtor fails to explain whether, and if so, why, the Debtor's ability to perform under the terms of its CLO management contracts rested upon the Advisors' employees.

Further, the allegations in support of items (2) and (3) consist solely of correspondence between lawyers relating to the parties' respective positions. The Debtor has not alleged that the Funds and Advisors have actually caused the Debtor to be removed as portfolio manager or that the Funds and Advisors actually interfered with, influenced, or intervened in any sales of assets by the CLOs. Moreover, the correspondence at issue was between the Funds and Advisors' counsel and *Debtor's counsel* -- thus, if the correspondence caused any interference with the Portfolio Management Agreements, the interference was on the Debtor's end, not the CLO issuers. It is nonsensical for the Debtor to allege that its own counsel's communications with the Funds and Advisors' counsel was the interference with the Debtor's contracts with third parties. Accordingly, this claim fails and should be dismissed.

D. Fourth Claim for Relief (Injunctive Relief)

With respect to the Debtor's fourth claim for relief for injunctive relief, the Funds and Advisors incorporate by reference their *Objection and Brief Opposed to Debtor's Motion for Preliminary Injunction*. This claim is premature and speculative at best.

II. The Court Lacks Subject Matter Jurisdiction

A court must dismiss an action if it determines that it lacks subject matter jurisdiction. *Lucky v. Haynes*, 2015 WL 4525689, at *2 (N.D. Tex. July 23, 2015). Subject matter jurisdiction may be challenged in one of two ways: facially or factually. *Id.* A facial attack is based on the complaint alone and requires the court to decide whether the allegations in the complaint, which are presumed to be true, sufficiently presents a basis for subject matter jurisdiction. *Id.* If the challenge to subject matter jurisdiction is supported by evidence, the attack is factual and "no presumptive truthfulness attaches to plaintiff's allegations[.]" *Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). "Regardless of the nature of

the attack, the party asserting federal jurisdiction continually carries the burden of proof to show it exists." *Id.*

The Debtor's Complaint, and in particular, the fourth claim for injunctive relief, seeks prematurely to prevent the Funds and Advisors from giving instructions to the CLOs regarding actions the CLOs are legally permitted to take under the Portfolio Management Agreements -- which are to be assumed by the Debtor -- at some undetermined and speculative point in the future. The Portfolio Management Agreements are to be assumed by the Debtor under its Plan, following which, the Agreements will be reinstated as obligations of the Debtor and disputes under the Agreements are left to be resolved by applicable nonbankruptcy courts. A claim based on contemplative future conduct under the assumed Agreements is speculative at best and essentially boils down to preemptive breach of contract claim. Such a claim is not ripe and is not appropriate for adjudication. Moreover, if and when such a claim vests, the Court would lack subject matter jurisdiction, as any such claim would not have any relation to the bankruptcy case. *See In re Superior Air Parts, Inc.*, 516 B.R. 85, 92 (Bankr. N.D. Tex. 2014) (concluding that court lacked subject matter jurisdiction over dispute between post-confirmation debtor and contract counterparty because the dispute went "well beyond enforcing the Plan and Confirmation Order."); *In re Craig's Stores of Texas, Inc.*, 266 F.3d 388, 391 (5th Cir. 2001) (no post-confirmation jurisdiction over breach of contract claim with respect to assumed contract); *see also Battle Ground Plaza, LLC v. Ray (In re Ray)*, 624 F.3d 1124, 1131 (9th Cir. 2010) (bankruptcy court lacks post-confirmation jurisdiction over state law contract claim).

Accordingly, the Complaint, or at least the fourth claim for injunctive relief, should be dismissed for lack of subject matter jurisdiction.

WHEREFORE, the Funds and Advisors request that the Court grant the Motion to Dismiss and dismiss the Debtor's Complaint with prejudice pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: January 24, 2021

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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Counsel for Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2021, I caused the foregoing document to be served via electronic email through the Court's CM/ECF system to the parties that have requested or consented to such service.

/s/ Davor Rukavina
Davor Rukavina

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03000-sgj
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.	§	

APPENDIX IN SUPPORT OF MOTION
TO DISMISS PLAINTIFF'S COMPLAINT

December 22, 2020

A. Lee Hogewood, III
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T: 1-919-743-7306

Jeffrey N. Pomerantz
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John A. Morris
Gregory V. Demo
Hayley R. Winograd
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10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067

Dear Counsel:

I am writing to you on behalf of our clients Highland Capital Management Fund Advisors, L.P. ("HMCFA") and NexPoint Advisors, L.P. ("NexPoint", and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "Funds"). CLO Holdco, Ltd. ("CLO Holdco") whose counsel is copied below, joins in this notice and request.

As you are aware, certain registered investment companies and a business development company managed by either NexPoint or HCMFA own preference shares in many of the CLOs. In the following cases those companies own a majority of such shares[1]:

- Stratford CLO, Ltd. 69.05%
- Grayson CLO, Ltd. 60.47%
- Greenbriar CLO, Ltd. 53.44%

[1] These ownership percentages are derived from information provided by the Debtor. If the Debtor contends that the ownership percentages are inaccurate, please inform us of the Debtor's differing calculations.

In other cases, such companies in combination with CLO Holdco hold all, a super-majority, or a majority of the preference shares in the following CLOs:

- Liberty CLO, Ltd. 70.43%
- Stratford CLO, Ltd. 69.05%*[2]
- 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%*

Additionally, such companies own significant minority stakes in the following CLO's:

- Eastland CLO, Ltd. 41.69%
- Red River CLO, Ltd. 33.33%

The ownerships described above represent in many cases the total remaining outstanding interests in such CLOs, because the noteholders have been paid in full. In others, the remaining noteholders represent only a small percentage of remaining interests. Thus, the economic ownership of the registered investment companies, business development company, and CLO Holdco largely represent the investors in the CLOs identified above.

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.

As you know, HCMLP's duties are set forth in the portfolio management agreements of the CLOs, which themselves have been adopted under the Investment Advisers Act of 1940 ("Advisers Act"). As HCMLP readily admits, it is: (i) terminating employees on January 31, 2021, which will result in a loss of the employees that have traditionally serviced those CLOs; (ii) ignoring the requests of the Advisors, Funds, and CLO Holdco, which together account for all or a majority of interests in certain CLOs, and selling assets of those CLOs prior to plan-confirmation; and (iii) adding a replacement manager as subadviser prior to January 31, 2021. The Advisors, Funds, and CLO Holdco assert that those actions run in contravention to HCMLP's duty to maximize value for the holders of preference shares and thus what HCMLP has agreed to under the portfolio management agreement, as well as its duties under the Advisers Act, which ultimately will adversely impact the economic owners noted above.

[2] CLO's marked with an asterisk (*) appear in the foregoing list as well.

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.

Sincerely,

A. Lee Hogewood, III

A. Lee Hogewood, III

K&L GATES

December 23, 2020

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Dear Counsel:

I am writing to you on behalf of our clients Highland Capital Management Fund Advisors, L.P. ("HMCFA") and NexPoint Advisors, L.P. ("NexPoint", and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "Funds"). CLO Holdco, Ltd. ("CLO Holdco") whose counsel is copied below, joins in this notice and request.

As you are aware, certain registered investment companies and a business development company managed by either NexPoint or HCMFA own preference shares in many of the CLOs. In the following cases those companies own a majority of such shares[1]:

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[1] These ownership percentages are derived from information provided by the Debtor. If the Debtor contends that the ownership percentages are inaccurate, please inform us of the Debtor's differing calculations.

In other cases, such companies in combination with CLO Holdco hold, a super-majority, or a majority of the preference shares in the following CLOs:

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- Stratford CLO, Ltd. 69.05%*[2]
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- Greenbriar CLO, Ltd. 53.44%*

Additionally, such companies own significant minority stakes in the following CLO's:

- Eastland CLO, Ltd. 41.69%
- Red River CLO, Ltd. 33.33%

The ownerships described above represent in many cases the total remaining outstanding interests in such CLOs, because the noteholders have been paid in full. In others, the remaining noteholders represent only a small percentage of remaining interests. Thus, the economic ownership of the registered investment companies, business development company, and CLO Holdco largely represent the investors in the CLOs identified above.

In pleadings filed with the Bankruptcy Court, you asserted that one or more of the entities identified above lacked the authority to seek a replacement of the Debtor as fund manager because of the alleged affiliate status of the beneficial owners of such entities. We disagree.

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. The basis for initiating the process for such removal includes, but is not limited to, the fact that HCMLP's duties, as set forth in the portfolio management agreements of the CLOs, are subject to the requirements of the Investment Advisers Act of 1940 ("Advisers Act"). HCMLP appears to be acting contrary to those duties under the agreements and where HCMLP is not fulfilling its duties under the portfolio management agreement it is therefore violating the Advisers Act. Thus, because HCMLP is (i) terminating employees on January 31, 2021, which will result in a loss of the employees that have traditionally serviced, including key investment professionals identified in the transactional documents for those CLOs (generally Mark Okada and Jim Dondero); (ii) ignoring the requests of the Advisors, Funds, and CLO Holdco, which together account for all or a majority of interests in certain CLOs, and selling assets of those CLOs prior to plan confirmation; (iii)

[2] CLO's marked with an asterisk (*) appear in the foregoing list as well.

adding a replacement manager as subadviser prior to January 31, 2021; and (iv) for other cause, the Advisors, Funds, and CLO Holdco have concluded that they have no choice but to initiate HCMLP's removal as fund manager where such entities are contractually and legally permitted or obligated to do so.

Because the process of removal is being initiated, subject to the applicable provisions of the Bankruptcy Code, we respectfully 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. To the extent there are CLO transactions prior to the confirmation, we intend to fully explore the business justification for doing so, as we do not believe there is any rational business reason to liquidate securities prior to that time.

Sincerely,

A. Lee Hogewood, III

A. Lee Hogewood, III

PACHULSKI STANG ZIEHL & JONES

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Gregory Demo

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December 24, 2020

Via E-mail

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Re: *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj (Bankr. N.D. Tex)

Dear Counsel:

As you know, we represent Highland Capital Management, L.P. (the "Debtor"), the debtor-in-possession in the above-captioned bankruptcy case.

On December 8, 2020, your firm filed that certain *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [D.I. 1528] (the "Motion")[1] on behalf of Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (collectively, the "Movants"). After hearing the sworn testimony of the Movants' witness and the arguments made on the Movants' behalf, Judge Jernigan found that the Motion was "a very, very frivolous motion" and that your firm "wasted [her]

[1] All capitalized terms used but not defined herein shall have the meanings given to them in the Motion.

PACHULSKI STANG ZIEHL & JONES

LAW OFFICES

time." (Transcript, 64:5-12) An order was entered denying the Motion on December 18, 2020 [D.I. 1605].

On December 22, we received the letter attached as Exhibit A (the "Letter") from your firm on behalf of the Movants and CLO Holdco, Ltd. (an entity affiliated with James Dondero) re-asserting almost verbatim the frivolous arguments raised in the Motion. Concurrently, we received notice that certain of the Movants' employees would not settle trades on behalf of the CLOs that were authorized by the Debtor acting in its capacity as the CLOs' portfolio manager. The Movants' employees who interfered with the Debtor's directions justified their conduct by asserting – again almost verbatim – the frivolous arguments raised in the Motion.

The Movants have caused the Debtor to incur substantial costs defending itself against the Motion and preparing to defend against the frivolous suits forecasted in the Letter. The Debtor demands that the Movants withdraw the letter by 5:00 p.m. CT on Monday, December 28, 2020, and confirm that the Movants and anyone acting on their behalf will take no further steps to interfere with the Debtor's directions as the CLOs' portfolio manager. If the Movants fail to timely comply with these demands, the Debtor shall seek prompt judicial relief, including seeking sanctions under Federal Rule of Bankruptcy Procedure 9011.

The Debtor reserves all rights it may have, whether in law equity, or contract, including the right to seek reimbursement of any and all fees and expenses incurred in seeking sanctions.

Please feel free to contact me with any questions.

Sincerely,

Gregory Demo

Enclosure
cc: Jeffrey Pomerantz, Esq.
Ira Kharasch, Esq.
John Morris, Esq.
John J. Kane, Esq.

Exhibit A

December 22, 2020

A. Lee Hogewood, III
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T: 1-919-743-7306

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Dear Counsel:

I am writing to you on behalf of our clients Highland Capital Management Fund Advisors, L.P. ("HMCFA") and NexPoint Advisors, L.P. ("NexPoint", and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "Funds"). CLO Holdco, Ltd. ("CLO Holdco") whose counsel is copied below, joins in this notice and request.

As you are aware, certain registered investment companies and a business development company managed by either NexPoint or HCMFA own preference shares in many of the CLOs. In the following cases those companies own a majority of such shares[1]:

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- Greenbriar CLO, Ltd. 53.44%

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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.

As you know, HCMLP's duties are set forth in the portfolio management agreements of the CLOs, which themselves have been adopted under the Investment Advisers Act of 1940 ("Advisers Act"). As HCMLP readily admits, it is: (i) terminating employees on January 31, 2021, which will result in a loss of the employees that have traditionally serviced those CLOs; (ii) ignoring the requests of the Advisors, Funds, and CLO Holdco, which together account for all or a majority of interests in certain CLOs, and selling assets of those CLOs prior to plan-confirmation; and (iii) adding a replacement manager as subadviser prior to January 31, 2021. The Advisors, Funds, and CLO Holdco assert that those actions run in contravention to HCMLP's duty to maximize value for the holders of preference shares and thus what HCMLP has agreed to under the portfolio management agreement, as well as its duties under the Advisers Act, which ultimately will adversely impact the economic owners noted above.

[2] CLO's marked with an asterisk (*) appear in the foregoing list as well.

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.

Sincerely,

A. Lee Hogewood, III

A. Lee Hogewood, III

PACHULSKI STANG ZIEHL & JONES

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Gregory Demo

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December 24, 2020

Via E-mail

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Boston, Massachusetts 02111

A. Lee Hogewood III
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4350 Lassiter at North Hills Ave.
Suite 300
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Re: *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj (Bankr. N.D. Tex)

Dear Counsel:

As you know, we represent Highland Capital Management, L.P. (the "Debtor"), the debtor-in-possession in the above-captioned bankruptcy case.

On December 8, 2020, your firm filed that certain *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [D.I. 1528] (the "Motion")[1] on behalf of Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (collectively, the "Movants"). After hearing the sworn testimony of the Movants' witness and the arguments made on the Movants' behalf, Judge Jernigan was convinced that the Movants were in fact Mr. James Dondero seeking to disrupt

[1] All capitalized terms used but not defined herein shall have the meanings given to them in the Motion.

PACHULSKI STANG ZIEHL & JONES

LAW OFFICES

HCMP's estate by using different controlled entities to accomplish his ends.

On December 23, we received the letter attached as Exhibit A (the "Letter") from your firm on behalf of the Movants and CLO Holdco, Ltd. (an entity affiliated with James Dondero) informing us that they were seeking to terminate certain CLO management agreements for "cause." For the reasons set forth herein, among others, such action is sanctionable under the circumstances and is otherwise prohibited by the CLOs' governing documents.

First, the Movants are owned and/or controlled by Mr. Dondero. These facts were disclosed in the Movants' public filings with the Securities and Exchange Commission and confirmed by Mr. Dustin Norris's testimony at the hearing held on December 16, 2020. Consequently, the Movants' attempt to terminate the CLO management agreements violates the order entered on January 9, 2020 [D.I. 339] (the "January Order"), which prohibits Mr. Dondero from "caus[ing] any Related Entity to terminate any agreements with the Debtor." A copy of the January Order is attached as Exhibit B.

Second, "cause" does not exist to terminate the CLO management agreements. The Debtor has a duty under the Investment Advisers Act of 1940 to the CLOs, not to any specific investor in the CLOs. *See, e.g., Goldstein v. SEC,* 451 F.3d 873, 881-82 (D.C. Cir. 2006) ("[t]he adviser owes fiduciary duties only to the fund, not to the fund's investors. . ."). The Debtor has, at all times, fulfilled its statutory and contractual duties to the CLOs and will continue to do so. As counsel, you have a duty to investigate the spurious allegations in your pleadings, but you failed to do so. Your clients' desire to re-assert control over the CLOs is not evidence to the contrary.

Third, the Movants, by their own admission, consider themselves affiliates of the Debtor. Under the management agreements, affiliates of a manager cannot replace a manager, and therefore, are prohibited from removing a manager.

Please confirm to us, in writing, no later than 5:00 p.m. CT on Monday, December 28, 2020, that you are withdrawing the Letter and that the Movants and CLO Holdco, Ltd., commit not to take any

PACHULSKI STANG ZIEHL & JONES
LAW OFFICES

actions, either directly or indirectly, to terminate the CLO management agreements. If we do not receive such confirmation, the Debtor will seek immediate relief from the bankruptcy court, including an action for contempt for violating the January Order and sanctions under Federal Rule of Bankruptcy Procedure 9011 or otherwise.

The Debtor reserves all rights it may have, whether in law equity, or contract, including the right to seek reimbursement of any and all fees and expenses incurred in seeking sanctions.

Please feel free to contact me with any questions.

Sincerely,

Gregory Demo

Enclosure
cc: Jeffrey Pomerantz, Esq.
Ira Kharasch, Esq.
John Morris, Esq.
John J. Kane, Esq.

Exhibit A

December 23, 2020

A. Lee Hogewood, III
Lee.hogewood@klgates.com

T: 1-919-743-7306

Jeffrey N. Pomerantz
Ira D. Kharasch
John A. Morris
Gregory V. Demo
Hayley R. Winograd
Pachulski Stang Ziehl & Jones, LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067

Dear Counsel:

I am writing to you on behalf of our clients Highland Capital Management Fund Advisors, L.P. ("HMCFA") and NexPoint Advisors, L.P. ("NexPoint", and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "Funds"). CLO Holdco, Ltd. ("CLO Holdco") whose counsel is copied below, joins in this notice and request.

As you are aware, certain registered investment companies and a business development company managed by either NexPoint or HCMFA own preference shares in many of the CLOs. In the following cases those companies own a majority of such shares[1]:

- Stratford CLO, Ltd. 69.05%
- Grayson CLO, Ltd. 60.47%
- Greenbriar CLO, Ltd. 53.44%

[1] These ownership percentages are derived from information provided by the Debtor. If the Debtor contends that the ownership percentages are inaccurate, please inform us of the Debtor's differing calculations.

In other cases, such companies in combination with CLO Holdco hold, a super-majority, or a majority of the preference shares in the following CLOs:

- Liberty CLO, Ltd. 70.43%
- Stratford CLO, Ltd. 69.05%*[2]
- 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%*

Additionally, such companies own significant minority stakes in the following CLO's:

- Eastland CLO, Ltd. 41.69%
- Red River CLO, Ltd. 33.33%

The ownerships described above represent in many cases the total remaining outstanding interests in such CLOs, because the noteholders have been paid in full. In others, the remaining noteholders represent only a small percentage of remaining interests. Thus, the economic ownership of the registered investment companies, business development company, and CLO Holdco largely represent the investors in the CLOs identified above.

In pleadings filed with the Bankruptcy Court, you asserted that one or more of the entities identified above lacked the authority to seek a replacement of the Debtor as fund manager because of the alleged affiliate status of the beneficial owners of such entities. We disagree.

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. The basis for initiating the process for such removal includes, but is not limited to, the fact that HCMLP's duties, as set forth in the portfolio management agreements of the CLOs, are subject to the requirements of the Investment Advisers Act of 1940 ("Advisers Act"). HCMLP appears to be acting contrary to those duties under the agreements and where HCMLP is not fulfilling its duties under the portfolio management agreement it is therefore violating the Advisers Act. Thus, because HCMLP is (i) terminating employees on January 31, 2021, which will result in a loss of the employees that have traditionally serviced, including key investment professionals identified in the transactional documents for those CLOs (generally Mark Okada and Jim Dondero); (ii) ignoring the requests of the Advisors, Funds, and CLO Holdco, which together account for all or a majority of interests in certain CLOs, and selling assets of those CLOs prior to plan confirmation; (iii)

[2] CLO's marked with an asterisk (*) appear in the foregoing list as well.

adding a replacement manager as subadviser prior to January 31, 2021; and (iv) for other cause, the Advisors, Funds, and CLO Holdco have concluded that they have no choice but to initiate HCMLP's removal as fund manager where such entities are contractually and legally permitted or obligated to do so.

Because the process of removal is being initiated, subject to the applicable provisions of the Bankruptcy Code, we respectfully 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. To the extent there are CLO transactions prior to the confirmation, we intend to fully explore the business justification for doing so, as we do not believe there is any rational business reason to liquidate securities prior to that time.

Sincerely,

A. Lee Hogewood, III

A. Lee Hogewood, III

Exhibit B

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

Signed January 9, 2020

United States Bankruptcy Judge

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj11
Debtor.	§	Related to Docket Nos. 7 & 259

ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the "Motion"),[2] filed by the above-captioned debtor and debtor in possession

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

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

(the "Debtor"); the Court having reviewed the Motion, and finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein, and the United States Trustee's objection to the Motion is OVERRULED.

2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) implementing the Document Production Protocol; and (ii) implementing the Protocols.

3. The Debtor is authorized (A) to compensate the Independent Directors for their services by paying each Independent Director a monthly retainer of (i) $60,000 for each of the first three months, (ii) $50,000 for each of the next three months, and (iii) $30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month and (B) to reimburse each Independent Director for all reasonable travel or other expenses, including expenses of counsel, incurred by such Independent Director in connection with its service as an Independent Director in accordance with the Debtor's expense reimbursement policy as in effect from time to time.

4. The Debtor is authorized to guarantee Strand's obligations to indemnify each Independent Director pursuant to the terms of the Indemnification Agreements entered into by Strand with each Independent Director on the date hereof.

5. The Debtor is authorized to purchase an insurance policy to cover the Independent Directors.

6. All of the rights and obligations of the Debtor referred to in paragraphs 3 and 4 hereof shall be afforded administrative expense priority under 11 U.S.C. § 503(b).

7. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

8. Pursuant to the Term Sheet, Mr. James Dondero will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title; provided, however, that Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors and Mr. Dondero shall receive no compensation for serving in such capacities. Mr. Dondero's role as an employee of the Debtor will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero shall resign immediately upon such determination.

9. Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor.

10. No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent

Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

11. Nothing in the Protocols, the Term Sheet or this Order shall affect or impair Jefferies LLC's rights under its Prime Brokerage Customer Agreements with the Debtor and non-debtor Highland Select Equity Master Fund, L.P., or any of their affiliates, including, but not limited to, Jefferies LLC's rights of termination, liquidation and netting in accordance with the terms of the Prime Brokerage Customer Agreements or, to the extent applicable, under the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code. The Debtor shall not conduct any transactions or cause any transactions to be conducted in or relating to the Jefferies LLC accounts without the express consent and cooperation of Jefferies LLC or, in the event that Jefferies withholds consent, as otherwise ordered by the Court. For the avoidance of doubt, Jefferies LLC shall not be deemed to have waived any rights under the Prime Brokerage Customer Agreements or, to the extent applicable, the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code, and shall be entitled to take all actions authorized therein without further order of the Court

12. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

END OF ORDER

K&L GATES

R. Charles Miller
202.778.9372
chuck.miller@klgates.com

December 31, 2020

Jeffrey N. Pomerantz
Ira D. Kharasch
John A. Morris
Gregory V. Demo
Hayley R. Winograd
Pachulski Stang Ziehl & Jones, LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067

Re: Termination of Dondero access to office and services

Dear Counsel:

We are writing to you on behalf of our clients Highland Capital Management Fund Advisors, L.P. ("HMCFA") and NexPoint Advisors, L.P. ("NexPoint", and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc. and the other retail funds advised by the Advisors (together, the "Funds").

We have been provided a copy of your December 23, 2020 letter to Mr. Lynn regarding the termination of Mr. Dondero's access to the office and services. We are extremely concerned that the loss of such access by Mr. Dondero could have serious effects for our clients and do unintended damage to their interests. In particular, the Funds, many of which are publicly-listed, registered with and regulated by the Securities and Exchange Commission, and have thousands of shareholders, may be economically disadvantaged to the extent that the Debtor's actions deny Mr. Dondero the access and ability to provide the necessary and contractual services to them.

Mr. Dondero is portfolio manager and/or officer of various entities which occupy space in the premises and have shared access to email accounts, computers and other relevant material pursuant to the terms of various shared services agreements (the "Agreements"), which the Debtor has not rejected and for which such entities pay the Debtor significant fees. We are not aware of any provisions under the Agreements which give the Debtor the power to determine which employees of NexPoint Advisors,

L.P. and other entities may enter the premises or have access to the email and related systems. If there are, please direct us to those provisions. The Debtor has given written notice to the Advisors and the Funds that the Agreements will remain in place until January 31, 2021, at which time they will terminate, and our clients have been and are acting in reliance on those written representations from the Debtor.

Mr. Dondero is the lead (and in some cases the sole) portfolio manager for certain of the Funds. He is intimately involved in the day-to-day operations and investment decisions regarding those Funds and in the operations of the Advisors. We believe that denying Mr. Dondero access to the premises, email and related systems will materially and adversely affect the function and reputation of the Advisors and the Funds. We ask that the Debtor reconsider its position refusing Mr. Dondero necessary access to the email, operating systems and building required to serve the Funds and the Advisors.

Sincerely,

/s R. Charles Miller

R. Charles Miller

Cc:

D. Michael Lynn (via email)

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	)	Case No. 19-34054 (SGJ11)
Debtors.	)	(Jointly Administered)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	
Plaintiff,	)	
v.	)	Adv. Pro. No. 21-03000 (SGJ11)
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.	)	

ORDER GRANTING MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Upon the Motion to Dismiss Plaintiff's Complaint and the brief in support thereof (together, the "**Motion**")[1] filed by Defendants Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (together, the "**Advisors**"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "**Funds**"); and the Court, having reviewed the Motion; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and a hearing having been held on the Motion; and upon the record before the Court; and it appearing to the Court that good cause exists to grant the relief requested in the Motion;

IT IS HEREBY ORDERED THAT the Motion is, in all respects, GRANTED, and that all claims and causes of action asserted in the Complaint are DISMISSED WITH PREJUDICE.

END OF ORDER # #

Submitted by:

MUNSCH HARDT KOPF & HARR, P.C.
/s/ Davor Rukavina, Esq.
Davor Rukavina, Esq.
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Counsel for Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc.

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.