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ATTORNEYS FOR DEFENDANT NEXPOINT REAL ESTATE PARTNERS, LLC F/K/A HCRE PARTNERS, LLC

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

In re: §
§
HIGHLAND CAPITAL MANAGEMENT, L.P., § **Case No. 19-34054**
§ **(Chapter 11)**
§
Debtor-Plaintiff. § **Adversary No. 21-03007-sgj**
v. §
§
HCRE PARTNERS, LLC (n/k/a §
NEXPOINT REAL ESTATE PARTNERS, §
LLC), §
§
Defendant. §

§
HIGHLAND CAPITAL MANAGEMENT, L.P., §
§
Plaintiff. § **Civil Case No. 3:21-cv-01379-X**
v. §
§
NEXPOINT REAL ESTATE PARTNERS, LLC, §
§
Defendant. §

APPENDIX IN SUPPORT OF LIMITED OBJECTION OF NEXPOINT REAL ESTATE PARTNERS, LLC TO REPORT AND RECOMMENDATION TO DISTRICT COURT ON THE MOTION TO WITHDRAW THE REFERENCE

Defendant NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC files this Appendix in Support of its Limited Objection to Report and Recommendation to District Court on



the Motion to Withdraw the Reference and requests the Court take judicial notice of the documents contained herein.

Exhibit	Document	Appendix Page(s)
A	Declaration of Michael P. Aigen in Support of Limited Objection of NexPoint Real Estate Partners, LLC to Report and Recommendation to District Court	App. 1-4
1	Excerpts from the Transcript of the Delaware Bankruptcy Court Hearing on December 2, 2019, Case No. 19-12239	App. 5-11
2	Excerpts from the Transcript of the Bankruptcy Court Hearing on May 20, 2021, Adv. Proc. Nos. 20-3195, 21-3003	App. 12-18
3	Appellants' Brief (filed by James Dondero, Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust, The Get Good Trust and NexPoint Real Estate Partners LLC), Case No. 3:21-CV-00879-K [Dkt. No. 16]	App. 19-52
4	Excerpts from the Transcript of the Bankruptcy Court Hearing on February 19, 2020, Case No. 19-34054	App. 53-64
5	Excerpts from the Transcript of the Bankruptcy Court Hearing on January 8, 2021, Adv. Proc. No. 20-3190	App. 65-70
6	Excerpts from the Transcript of the Bankruptcy Court Hearing on February 8, 2021, Case No. 19-34054	App. 71-79
7	Plaintiff Highland Capital Management, L.P.'s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief, Adv. Proc. No. 21-3010	App. 80-97
8	February 24, 2021 Order on Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021, Adv. Proc. No. 21-3010	App. 98-103
9	Excerpts from the Transcript of the Bankruptcy Court Hearing on February 23, 2021, Adv. Proc. Nos. 20-3190, 21-3010	App. 104-110
10	Excerpts from the Transcript of the Bankruptcy Court Hearing on June 10, 2021, Adv. Proc. Nos. 21-3006, 21-3007	App. 111-117
11	Debtor's proposed Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty, Adv. Proc. No. 21-3007	App. 118-140
12	Expert Report of Professor Bruce A. McGovern	App. 141-154
13	Expert Report of Alan M. Johnson	App. 155-181

Dated: July 27, 2021

Respectfully submitted,

/s/ Deborah Deitsch-Perez

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**ATTORNEYS FOR DEFENDANT
NEXPOINT REAL ESTATE PARTNERS, LLC F/K/A
HCRE PARTNERS, LLC**

CERTIFICATE OF SERVICE

I certify that on July 27, 2021, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/Michael P. Aigen _____

Michael P. Aigen

Exhibit A

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ATTORNEYS FOR DEFENDANT NEXPOINT REAL ESTATE PARTNERS, LLC F/K/A HCRE PARTNERS, LLC

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

In re:	§	
	§	Case No. 19-34054
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	(Chapter 11)
	§	
Debtor-Plaintiff.	§	Adversary No. 21-03007-sgj
v.	§	
	§	
HCRE PARTNERS, LLC (n/k/a	§	
NEXPOINT REAL ESTATE PARTNERS,	§	
LLC),	§	
	§	
Defendant.	§	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	Civil Case No. 3:21-cv-01379-X
v.	§	
	§	
NEXPOINT REAL ESTATE PARTNERS, LLC,	§	
	§	
Defendant.	§	
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**DECLARATION OF MICHAEL P. AIGEN IN SUPPORT OF LIMITED OBJECTION
OF NEXPOINT REAL ESTATE PARTNERS, LLC TO
REPORT AND RECOMMENDATION TO DISTRICT COURT**

I, Michael P. Aigen, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declare as follows:

1. I am a member of the law firm of Stinson LLP, counsel to Defendant NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC, and I submit this Declaration in support of the *Limited Objection of NexPoint Real Estate Partners, LLC to Report and Recommendation to District Court* being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of excerpts from the Transcript of the Delaware Bankruptcy Court Hearing on December 2, 2019.

3. Attached as **Exhibit 2** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on May 20, 2021.

4. Attached as **Exhibit 3** is a true and correct copy of the Appellants' Brief, filed by James Dondero, Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust, The Get Good Trust and NexPoint Real Estate Partners LLC [Case No. 3:21-CV-00879-K, Dkt. No. 16].

5. Attached as **Exhibit 4** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on February 19, 2020.

6. Attached as **Exhibit 5** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on January 8, 2021.

7. Attached as **Exhibit 6** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on February 8, 2021.

8. Attached as **Exhibit 7** is a true and correct copy of Plaintiff Highland Capital Management, L.P.'s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief [Adversary Proceeding No. 21-03010].

9. Attached as **Exhibit 8** is a true and correct copy of the Bankruptcy Court's Order on Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021, entered February 24, 2021 [Adversary Proceeding No. 21-03010].

10. Attached as **Exhibit 9** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on February 23, 2021.

11. Attached as **Exhibit 10** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on June 10, 2021.

12. Attached as **Exhibit 11** is a true and correct copy of Debtor's proposed Amended Complaint in Adversary Proceeding No. 21-03007.

13. Attached as **Exhibit 12** is a true and correct copy of the confidential Expert Report of Professor Bruce A. McGovern based upon his knowledge of deferred compensation and application of federal income tax to loans that may or may not be forgiven.

14. Attached as **Exhibit 13** is a true and correct copy of the confidential Expert Report of Alan M. Johnson based upon his knowledge and experience advising asset management and other financial service firms on compensation.

Dated: July 27, 2021.

/s/ Michael P. Aigen
Michael P. Aigen

Exhibit 1

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

- - - - -x

In the Matter of:

HIGHLAND CAPITAL MANAGEMENT, L.P., Case No.
Debtor. 19-12239(CSS)

- - - - -x

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

December 2, 2019
10:07 AM

B E F O R E:
HON. CHRISTOPHER S. SONTCHI
CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: LESLIE MURIN

HIGHLAND CAPITAL MANAGEMENT, L.P.

77

1 Acis, learned all about Acis' relationship to Highland. But
2 the real issue before Your Honor is what does that have to do
3 with this debtor, this debtor's assets and liabilities, and
4 this debtor's operations. And as my comments will show, we
5 think that's a significantly overblown argument.

6 Your Honor, during their presentation, Counsel really
7 strayed a little bit from what the motion and the joinders sort
8 of said. There they went through a painstaking analysis of the
9 various factors supporting venue. I know Your Honor said that
10 over three factors, you don't find that helpful, but the courts
11 have relied on a series of factors.

12 And I think the reason why they have strayed away from
13 that and focused on the committee being the one to support the
14 transfer-of-venue motion and the facts of the Acis case is
15 because when you pare it down, the actual factors demonstrate
16 that there is no way the committee can carry its burden to
17 demonstrate that venue should be transferred.

18 However -- Your Honor pointed to this at the
19 beginning, in mentioning comments about forum-shopping -- the
20 committee and Acis are really being disingenuous, and they have
21 not told you the real reason that they want the case before
22 Judge Jernigan.

23 At the first-day hearing, Your Honor, Acis said they
24 intended to file a motion for an appointed trustee. The
25 committee has told the debtor it intends to file a motion to

1 appoint a trustee after this hearing. The motion has not yet
2 been filed, Your Honor, because they want Judge Jernigan to
3 rule on that motion. And it's not because she's familiar with
4 this debtor's business, this debtor's assets, or this debtor's
5 liabilities, because she generally is not. It is because she
6 formed negative views regarding certain members of the debtor's
7 management that the committee and Acis hope will carry over to
8 this case.

9 The convenience of the parties and the interests of
10 justice and how this case is so unique are just a pretext.
11 They want a trustee to run the debtor, and they want Judge
12 Jernigan and not Your Honor to rule on that motion. That, Your
13 Honor, is not a proper reason to transfer venue, but rather a
14 transparent litigation ploy.

15 Similarly, Acis also wants the case to proceed in its
16 home court where it has enjoyed success in litigating against
17 the debtor. Your Honor mentioned the conflicts-of-interest
18 theories. They're not just conflicts of interest between two
19 jointly administered debtors. These go to the crux of what the
20 Acis case is about and significant claims against the debtor.

21 The Court may ask, appropriately -- and the Court
22 did -- why would the debtor file the case in Delaware? Chapter
23 11 is all about a fresh start. The debtor recognized concerns
24 that the creditors had with certain aspects of its pre-petition
25 conduct, and proactively appointed Brad Sharp as chief

1 restructuring officer with expanded powers, to oversee the
2 debtor's operations.

3 Mr. Sharp worked with the debtor and Counsel to craft
4 a protocol for transactions that would be subject to increased
5 transparency. The debtor didn't have to do that. As Your
6 Honor mentioned at the first-day hearing, the debtor operates
7 its business in the ordinary course. But given the
8 circumstances surrounding this case, given the history, we
9 felt, and the CRO, importantly, felt it was important to get on
10 the table what the debtor, through the CRO, believed was
11 ordinary and what was not, so we could have a transparent
12 discussion, discussion that, while we've made headway with the
13 committee, we have not yet been able to come to an agreement.

14 The debtor filed the case in this district because it
15 wanted a judge to preside over this case that would look at
16 what's going on with this debtor, with this debtor's
17 management, this debtor's post-petition conduct, without the
18 baggage of what happened in a previous case, which contrary to
19 what Acis and the committee says, has very little to do with
20 this debtor.

21 These form insufficient grounds, Your Honor, to
22 overturn the debtor's choice of venue, and the motion should be
23 denied.

24 I would like to now walk through the statutory
25 analysis, something that Counsel avoided, because again, I

1 more convenient. And this is really the crux, which I'll spend
2 some time over the next few minutes.

3 Texas is more convenient -- convenient -- because the
4 Texas bankruptcy court, where Acis is pending has, in their
5 words, already expended great time and effort familiarizing
6 itself with the debtor and its operations. You've heard
7 statements like "learning curve". You heard statements about
8 everything that the debtor -- that Judge Jernigan has found out
9 about this debtor, and how important and how helpful it is, and
10 how Your Honor will be behind the learning curve. We just
11 don't buy that, Your Honor.

12 And aside from that argument, the arguments that the
13 committee makes for transfer are arguments that could be made
14 in any case before Your Honor.

15 THE COURT: Yeah, I was going to say that's kind of an
16 interesting argument, because actually it assumes Judge
17 Jernigan's going to ignore the rules of evidence in making
18 factual findings, because you're limited to the record before
19 you on a specific motion. And what fact you may have learned
20 with regard to something a person has done, maybe that goes
21 into questions of credibility on cross-examination or direct
22 testimony, but to actually base your decision on a fact that's
23 not in the record for the specific proceeding would be
24 improper.

25 MR. POMERANTZ: Look, I agree, Your Honor. And the

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.



December 3, 2019

CLARA RUBIN

DATE

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Exhibit 2

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	)	Case No. 19-34054-sgj11
)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	
)	
Debtor.)	
<hr/>		
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	)	Adv. Proc. No. 20-03195-sgj
)	
Plaintiff,	)	<u>PLAINTIFF'S MOTION for CONTINUANCE</u>
)	
v.)	
)	
CLO HOLDCO, LTD., et al.,)	
)	
Defendants.)	
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Adv. Proc. No. 21-03003-sgj
)	
Plaintiff,)	
	)	<u>DEFENDANT DONDERO'S MOTION to COMPEL DISCOVERY, the TESTIMONY of JAMES P. SEERY, JR.</u>
)	
v.)	
)	
JAMES DONDERO,)	
)	
Defendant.	)	May 20, 2021
<hr/>		
	)	Dallas, Texas (Via WebEx)

Appearances in 21-03003:

For Plaintiff Highland Capital Management,	John A. Morris Pachulski Stang Ziehl & Jones LLP 10100 Santa Monica Boulevard, 13th Floor Los Angeles, California 90067
--	--

For Defendant-Movant James Dondero:	Michael P. Aigen Stinson, L.L.P. 3102 Oak Lawn Avenue, Suite 777 Dallas, Texas 75219
-------------------------------------	---

Bryan C. Assink
Bonds Ellis Eppich Schafer Jones LLP
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Appearances continued on next page.

Appearances in 20-3195:

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For Defendants Highland Dallas Foundation and CLO Holdco Ltd.: Louis M. Phillips
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Amelia L. Hurt
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For Defendants The Dugaboy Investment Trust and The Get Good Nonexempt Trust: Douglas S. Draper
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Palmer Reporting Services

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transcript produced by federally-approved transcription service.

Adversary 21-3003, Motion to Compel Discovery

12

1 it's relevant if loans were made to other employees or officers
2 besides Mr. Dondero and it's relevant if those loans were
3 forgiven or not as to these three notes?

4 MR. AIGEN: Correct, Your Honor. Because they are
5 challenging that this agreement took place, for the –

6 THE COURT: Well, –

7 MR. AIGEN: – fact that other similar –

8 THE COURT: – what if they did do this with another
9 employee, why is that relevant these three notes?

10 MR. AIGEN: Well, because they're challenging that our
11 oral agreement took place. The fact that oral agreements like
12 this were routine at Highland would make it more believable and
13 factual that our agreement took place, in light of their
14 challenge to the fact that the agreement took place.

15 Like I said, if they were just making legal challenges
16 to whether the agreement is enforceable, that would be one
17 thing. So instead they're also taking the position, hey, we
18 don't think this actually took place. So all – if Highland
19 routinely entered into agreements like this for other employees,
20 like I said, I understand that wouldn't be dispositive, but that
21 would tend to show that this pattern and practice of Highland
22 did include oral agreements like this.

23 THE COURT: Okay. I don't mean to get off on a
24 tangent here, but, you know, are there going to be a lot of
25 fraudulent-transfer lawsuits if in fact there was debt forgiven

Adversary 21-3003, Motion to Compel Discovery

13

1 in the couple of years or four years leading up to bankruptcy?
2 And are we going to have – well, I just don't understand, you
3 know, the obvious big tax exposure to your client and other
4 human beings if your – if your argument prevails, but I guess I
5 shouldn't – I shouldn't second guess legal strategy, but my
6 brain can't help to go there.

7 All right. But, again to the relevance, your defense
8 is: There was an agreement to forgive these notes. It was oral
9 and we're entitled to discovery regarding other loans to other
10 employees for which there might have been oral forgiveness
11 because that will help establish our defense; that's the sum and
12 substance of categories 14 through 17?

13 MR. AIGEN: That's correct, Your Honor.

14 THE COURT: Okay.

15 MR. AIGEN: And obviously I don't think there's any
16 need to try the ultimate legal issues here, but we're well aware
17 of these tax issues and we've worked into it, and so there are
18 different tax consequences depending on how conditions are
19 structured and it's my understanding that in situations like
20 this there wouldn't be sort of tax consequences, but that's an
21 issue for another day. But because you raised it, Your Honor, I
22 want to make sure that you know we are aware of that issue and
23 that is something we're prepared to address when it – when it
24 comes before this.

25 So should I move on to the last – last topic, Your

Adversary 21-3003, Motion to Compel Discovery

23

1 topics.

2 MR. MORRIS: Because there is no way to prepare a
3 witness for the vague statements that are being offered by
4 counsel. I'll point out that Mr. Aigen is yet another former –
5 a lawyer who formerly represented Highland and is now suing us,
6 but we'll dispense with the disqualification motion right now.

7 Your Honor, here is the deal. There have to be some
8 limits, there have to be some reasonable limits. As you
9 started, Your Honor, in law school you're taught that a
10 collection case under demand notes is the simplest thing there
11 is. In fact, in New York there's a special provision in state
12 law that permits a plaintiff to file a motion for summary
13 judgment in lieu of a complaint when they have an instrument
14 such as a note, which is exactly what we have here.

15 Mr. Dondero has already admitted in his answer, in his
16 interrogatories, and in his answers to several requests to admit
17 that the notes are valid, that he received the money
18 contemporaneously with the notes. When he signed the note, he
19 received the money. The debtor has made demand and he hasn't
20 paid, so we will be moving for summary judgment on that basis.

21 So let's look at what the defenses are and why we just
22 feel like it's a burden on the debtor to even entertain these
23 concepts. His first answer, Your Honor, said that the notes
24 were forgiven based on an agreement. So we asked him in the
25 interrogatory or request to admit, I forget which, show us your

Exhibit 3

CASE NO. 3:21-CV-00879-K

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,

(Debtor)

JAMES DONDERO, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,
NEXPOINT ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST, THE GET GOOD
TRUST, AND NEXPOINT REAL ESTATE PARTNERS, LLC,

(Appellants)

v.

HON. STACEY G.C. JERNIGAN AND HIGHLAND CAPITAL MANAGEMENT, L.P.

(Appellees)

On appeal from the United States Bankruptcy Court for the
Northern District of Texas, Dallas Division

APPELLANTS' BRIEF

Respectfully submitted by:

Michael J. Lang

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Counsel for Appellants



193405421062900000000003

APP. 68

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the FEDERAL RULES OF BANKRUPTCY PROCEDURE, and without waiver of any defenses and/or objections that they may have, Appellants James Dondero (“Mr. Dondero”), Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P.,¹ The Dugaboy Investment Trust, The Get Good Trust (collectively, The Dugaboy Investment Trust and The Get Good Trust are, at times, the “Trusts”), and NexPoint Real Estate Partners, LLC (“Appellants”) state as follows:

- (a) No publicly-held company owns 10% or more of Highland Capital Management Fund Advisors, L.P., nor does it have a parent corporation;
- (b) No publicly-held company owns 10% or more of NexPoint Advisors, L.P., nor does it have a parent corporation;
- (c) No publicly-held company owns 10% or more of The Dugaboy Investment Trust, nor does it have a parent corporation;
- (d) No publicly-held company owns 10% or more of The Get Good Trust, nor does it have a parent corporation; and
- (e) No publicly-held company owns 10% or more of the NexPoint Real Estate Partners, LLC, nor does it have a parent corporation.

¹ At times herein, Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. are collectively referred to as the “Advisors.”

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JURISDICTIONAL STATEMENT

Appellants file this Appellants' Brief regarding their April 1, 2021 appeal² from a final order entered by Judge Jernigan in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (hereinafter referred to as the "Bankruptcy Court") on March 23, 2021.³

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 158 & 1334 and Rules 8001 et. seq. of the FEDERAL RULES OF BANKRUPTCY PROCEDURE.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument, which they believe will aid the Court in deciding this matter.

ISSUES PRESENTED

1. Whether the Bankruptcy Court abused its discretion in denying Appellants' Motion to Recuse Pursuant to 28 U.S.C. § 455 as untimely.⁴
2. Whether the Bankruptcy Court abused its discretion in denying Appellants' Motion to Recuse Pursuant to 28 U.S.C. § 455 on the merits.

² R. 1, Appellants' Notice of Appeal (amended on April 6, 2021, R. 16).

³ R. 31, the Order.

⁴ R. 2338, the Motion to Recuse; R. 2342, the Brief in Support; and R. 2379, the Appendix in Support.

Appellants⁵ file this Brief in Support of their Appeal of the Bankruptcy Court’s Order (the “Order”) Denying Appellants’ Motion to Recuse Pursuant to 28 U.S.C. § 455 (the “Motion”) ⁶ and would, in support thereof, respectfully show the Court as follows:

I. STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Debtor has acknowledged the Bankruptcy Court’s predisposition.

1. On October 16, 2019, Debtor Highland Capital Management, L.P. (“Highland” or “Debtor”) filed bankruptcy in Delaware (the “Highland Bankruptcy”) to get a “fresh start.”⁷ Highland’s creditors, including Acis (a debtor in a previous bankruptcy case before the Bankruptcy Court that involved Mr. Dondero (the “Acis Bankruptcy”), moved to transfer this case to the Northern District of Texas seeking to have it assigned to the Bankruptcy Court. In the hearing, Debtor’s current counsel, Jeff Pomerantz, expressly acknowledged that the “fresh start” was needed because the Bankruptcy Court had pre-existing, negative views of Debtor’s management, including Mr. Dondero:

... the committee and Acis are really being disingenuous, and they have not told you the real reason that they want the case before Judge Jernigan.⁸ ... *It is because she formed negative views regarding certain members of the debtor’s management that the committee and Acis hope will carry over to this case.*⁹

2. Debtor further acknowledged that the Bankruptcy Court’s predisposition against Mr. Dondero would render it incapable of being impartial and, thus, improperly impact the Highland Bankruptcy. In fact, Mr. Pomerantz specifically referred to the Bankruptcy Court’s opinions of Mr. Dondero as “*baggage*.”¹⁰ Ultimately, the Delaware bankruptcy court transferred the case,¹¹

⁵ For efficiency, Appellants are jointly represented by a single counsel for purposes of the Motion and this appeal.

⁶ 28 U.S.C. § 455 has been made applicable to bankruptcy judges under FED. R. BANKR. P. 5004.

⁷ R. 2382, the December 3, 2019 Transcript - Motion to Transfer, at 78:21-23 (R. 2459).

⁸ *Id.* at 77:18-22 (R. 2458).

⁹ *Id.* at 78:3-8 (emphasis added) (R. 2459).

¹⁰ *Id.* at 79:14-20 (emphasis added) (R. 2460).

¹¹ *Id.* at 90:15-24 (emphasis added) (R. 2471).

which was assigned to Judge Jernigan.

B. The Bankruptcy Court has acknowledged it holds permanent negative views of Mr. Dondero.

3. Although the Order attempts to downplay the impact of the Acis Bankruptcy, the record contradicts that insinuation. For example, during a January 9, 2020 hearing on a compromise regarding the management of Debtor (the “Compromise”), the Bankruptcy Court acknowledged that it: (a) possessed opinions regarding Mr. Dondero; (b) was unable to extract those opinions from its brain; and (c) was relying on those opinions *as a basis* for requiring certain language about Mr. Dondero’s involvement with Debtor be included in the Compromise order.¹²

4. Notably, at this time, the Highland Bankruptcy had only been in the Bankruptcy Court for approximately a month. There was nothing in the Highland Bankruptcy record to justify the Bankruptcy Court’s specific rulings and comments related to Mr. Dondero. Later, the Bankruptcy Court reiterated that it was relying on its knowledge from the Acis Bankruptcy to support its requirements regarding the contempt language directed at Mr. Dondero in the Compromise order:

And *I’m sure most of you can read my mind why*, but I want it crystal clear that if [Mr. Dondero] violates these terms, he’s violated a federal court order, and contempt will be one of the tools available to the Court.¹³

Importantly, the Bankruptcy Court made these references to the Acis Bankruptcy, despite refusing to admit an order from the Acis Bankruptcy as evidence during the same hearing because the order was prejudicial.¹⁴ Thus, the information the Bankruptcy Court relied upon was not in evidence.

¹² R. 2519, the January 9, 2020 Transcript at 14:4-11 (R. 2532) and at 78:23-79:16 (R. 2596-2597) (emphasis added). Mr. Dondero, however, remained a portfolio manager and an unpaid employee of Debtor. *Id.*

¹³ *Id.* at 80:3-6 (R. 2598).

¹⁴ *Id.* at 57:1-59:17 (R. 2575-2577).

C. Various events in the Highland Bankruptcy demonstrate that the Bankruptcy Court holds a perceptible, interfering bias against Mr. Dondero.

1. The February 19, 2020 Application to Employ Hearing

5. One of the ways the Bankruptcy Court's predisposition against Mr. Dondero manifested itself was through its rulings, including, for example, rulings dismissing the uncontroverted testimony of independent witnesses who testified in support of outcomes that could possibly benefit Mr. Dondero as testimony that was engineered by Mr. Dondero.

6. For example, on February 19, 2020, the Court held a hearing on Debtor's application to retain a law firm to, among other things, appeal an order against Neutra Ltd. ("Neutra") (a company owned by Mr. Dondero). A successful appeal would: (a) defeat a \$75 million claim against Debtor; and (b) result in Neutra owning Acis and Debtor being reinstated as the advisor to Neutra, which would generate fees and economic benefit for Debtor.¹⁵ Debtor's independent board, which included former Bankruptcy Judge Russell Nelms, determined that engaging the firm to represent Neutra was in the Debtor's best interest.¹⁶ Nevertheless, the Court concluded, without evidence, that Debtor's fully independent board was being unduly influenced by Mr. Dondero:

*... But I'm concerned that Dondero or certain in-house counsel has -- you know, they're smart, they're persuasive -- that -- what are the words I want to look for -- they have **exercised their powers of persuasion** or whatever to make the Board and the professionals think that there is some valid prospect of benefit to Highland with these appeals, **when it's really all about Neutra, HCLOF, and Mr. Dondero. That's what I believe.**¹⁷*

At the same hearing, the Bankruptcy Court indicated that it believed Mr. Dondero lacked credibility even though, at that point in time, Mr. Dondero had not yet testified.¹⁸

¹⁵ See R. 2610, the February 19, 2020 Transcript at 38:22-39:17 (R. 2647-2648) (emphasis added).

¹⁶ *Id.* at 62:6-17 (R. 2671) (emphasis added).

¹⁷ *Id.* at 177:7-178:3 (R. 2786-2787).

¹⁸ *Id.* at 174:22-175:1 (R. 2783-2784).

2. The December 2020 Restriction Motion

7. A second instance involves a motion for injunctive relief that was filed by entities (not including Mr. Dondero) involving certain collateralized loan obligation investment vehicles (“CLOs”) that Debtor manages pursuant to Portfolio Management Agreements (the “PMAs”). Generally, the PMAs impose a duty on Debtor, as portfolio manager, to maximize the value of the CLOs’ assets for the benefit of the CLOs’ noteholders and preference shareholders. The Retail Funds, which are governed by independent boards and owned primarily by third-party investors, collectively invested approximately \$368 million in the CLOs.¹⁹ Importantly, Debtor does not own an interest in the CLOs, and, thus, the CLOs are not assets of Debtor’s estate.

8. In approximately October 2020, Debtor decided to assume the PMAs (*i.e.*, continue managing the assets), release all Debtor’s employees, and simultaneously liquidate the CLOs’ assets over a two-year period. The Retail Funds and the Advisors (on behalf of the Retail Funds and pursuant to their obligations under their respective advisory agreements)²⁰ believed this decision would: (a) fail to maximize the value of the investments for the investors to whom the Advisors and the Retail Funds owed a fiduciary duty; and (b) was incompatible with the CLOs’ needs (which required an investment staff). Mr. Dondero, who was still a portfolio manager and unpaid employee of Debtor at that time, also disagreed with Debtor’s decision to liquidate.

¹⁹ Highland Income Fund (“HFRO”), NexPoint Strategic Opportunities Fund (“NHF”), and NexPoint Capital, Inc., publicly traded funds advised by the Advisors (defined below) are, at times referred to herein as the “Retail Funds.”

²⁰ The “Advisors” are Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. Each Advisor is registered with the U.S. Securities and Exchange Commission (“SEC”) as an investment advisor under the Investment Advisers Act of 1940, as amended. Each of the Advisors advises several funds, including the Retail Funds, which are primarily owned by third-party, “mom and pop” investors. Each of the Retail Funds is a registered investment company or business development company under the Investment Company Act of 1940 (as amended, the “1940 Act”). Each Retail Fund is overseen by a majority independent board of trustees subject to 1940 Act requirements. Those respective boards reviewed and approved, among other things, major contracts including the advisory agreement with the applicable Advisor for the respective Retail Fund. The Retail Funds do not have employees and rely on their respective Advisors, acting pursuant to an advisory agreement, to provide the services necessary for their operations.

9. The Advisors and the Retail Funds raised these same issues with Mr. Seery (Debtor's interim CEO) and requested that Debtor not liquidate the CLOs until the confirmation of Debtor's Plan of Reorganization, as further modified (the "Plan") (which was, at that time, scheduled for early January 2021). Debtor, as portfolio manager, declined and began attempting to leverage the Bankruptcy Court's increasingly perceptible bias against Mr. Dondero for Debtor's benefit. This manifested in a variety of ways.²¹

10. On December 8, 2020, because the Plan violated its statutory and contractual obligation to maximize the value of the CLO assets, pursuant to 11 U.S.C. §§105, 363, and 1107, the Advisors and the Retail Funds (*i.e.*, not Mr. Dondero) moved to maintain the status quo and prohibit Debtor from liquidating the CLOs for approximately 30 days (the "Restriction Motion").²²

11. On December 16, 2020, despite the express statutory basis, the Bankruptcy Court denied the Restriction Motion,²³ stating that it was "dumbfounded" by the motion and declaring the motion as having no statutory or contractual basis and being "almost Rule 11 frivolous."²⁴ Moreover, while the only evidence demonstrated that the Advisors' and Retail Funds' senior management and independent counsel decided to bring the Restriction Motion, the Bankruptcy Court inscrutably blamed Mr. Dondero for the Restriction Motion.²⁵ The Bankruptcy Court disregarded the Retail Funds' (publicly-traded, highly-regulated entities) and the Advisors' ability to independently decide to pursue action they deem in their best interest.

²¹ See R. 3892, the March 4, 2020 Transcript at 34:6-35:18 (R. 3925-3926); 50:14-52:15 (R. 3941-3942); 58:17-23 (R. 3949).

²² R. 2798-2823, the Restriction Motion.

²³ See R. 2824, the December 16, 2020 Transcript at 63:5-13 (R. 2886).

²⁴ *Id.* at 64:1-7 (R. 2887). The statutory basis for the relief requested was section 363(c)(1) or 1108 of the Bankruptcy Code, which generally provides that a debtor-in-possession may engage in its ordinary course of business, "unless the court orders otherwise." That was all that was being asked.

²⁵ *Id.* at 63:14-25 (R. 2886).

3. Debtor's Motion for Injunctive Relief

12. The Bankruptcy Court, however, took a different view of motions filed by Debtor. In December of 2020, K&L Gates, as counsel for the Advisors and the Retail Funds, wrote Debtor to: (a) reiterate the Advisors' and the Retail Funds' objection to Debtor liquidating the CLOs; and (b) notify Debtor that the Retail Funds, subject to applicable bankruptcy law and the underlying agreements, intended to initiate the procedure to remove Debtor as fund manager of the CLOs (the "K&L Gates Letters").²⁶

13. On January 6, 2021, Debtor filed an adversary proceeding seeking to enjoin²⁷ the Advisors and the Retail Funds from, among other things, exercising any contractual rights that they may have had to remove Debtor as portfolio manager (a contract that Debtor assumed under its plan).

14. On January 26, 2021, the Court commenced the preliminary injunction hearing on the matter (the "Injunction Hearing").²⁸ The issue at that hearing was whether the Advisors and the Retail Funds tortiously interfered with the PMAs by: (a) hindering Debtor's ability to sell certain CLO assets; (b) threatening to initiate the process for removing Debtor as the portfolio manager of the CLOs; and (c) otherwise attempting to influence and interfere with Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs.²⁹

15. During the Injunction Hearing, it became clear that there was no basis for the claims or an injunction. In fact, Mr. Seery/Debtor admitted that:

- (a) none of the alleged actions caused Debtor to breach any contract with a third party;³⁰
- (b) the Advisors and the Retail Funds had no contractual obligation to settle the trade (the basis of the alleged hinderance with Debtor's ability to sell CLO

²⁶ R. 4158-4172, the K&L Gates Letters.

²⁷ R. 2890-2908, *Highland Capital Mgmt. v. Highland Capital Management Fund Advisors, L.P., et al.* Adversary No. 21-03000-sgj.

²⁸ R. 2909, the January 26, 2021 Transcript.

²⁹ See R. 8069, Dkt. 1 in Adversary Proceeding No. 21-03000-sgj at ¶ 58 (R. 8082).

³⁰ See R. 2909, the January 26, 2021 Transcript, at 180:12-17 (R. 3088).

assets);³¹

- (c) every trade that he attempted to initiate in December (the period in question) closed;³²
- (d) the Debtor's business activities were unaffected by the K&L Gates Letters;³³ and
- (e) the K&L Gates Letters merely stated that the Advisors and the Retail Funds were "contemplating taking steps to terminate the CLO Agreements"³⁴ and no action was taken to remove Debtor as the portfolio manager.

16. Debtor never disputed that the Advisors and the Retail Funds were third-party beneficiaries under the PMAs with a conditional right to terminate the Portfolio Manager.³⁵ In addition, one cannot generally tortiously interfere by exercising one's own contractual rights and the law does not recognize any claim for "contemplating" action that was never taken.³⁶ Consequently, Debtor's motion was objectively baseless.

17. Nevertheless, at the hearing, rather than comment on the groundlessness of Debtor's motion, the Bankruptcy Court *focused on Mr. Dondero*, warning him that he was prohibited from terminating any agreement with Debtor³⁷ and stated that it was "leaning" toward finding Mr. Dondero in contempt and shifting the "whole bundle of attorney's fees" to Mr. Dondero as a result

³¹ Notably, Debtor itself had numerous authorized traders, whose job was to settle Debtor's trades.

³² See R. 2909, the January 26, 2021 Transcript, at 173:16-19 (R. 3081); 174:1-3 (R. 3082); 174:8-175:5 (R. 3082-3083).

³³ *Id.* at 178:14-24 (R. 3086).

³⁴ *Id.* at 103:21-23 (R. 3011).

³⁵ See R. 4747-4782 and 4783-4821, examples of Servicing Agreements at section 14 (R. 4762-4763); see also R. 4452, the February 2, 2021 Transcript of Hearing at 54:6-56:12 (R. 4505-4507); see also R. 5079-5080, a chart of holdings of preference shares in CLOs (showing Movants are preferred shareholders); see also R. 4822, February 3, 2021 Transcript of Hearing at 53:1-22 (R. 4874).

³⁶ See, e.g., *Wilkerson v. Univ. of N. Texas By & Through Bd. of Regents*, 878 F.3d 147, 161 (5th Cir. 2017) (To win, Wilkerson would have to prove that his employer interfered with his employment contract—a legal impossibility, as "one cannot tortiously interfere with one's own contract.").

³⁷ R. 3166, the January 8, 2021 Transcript, at 119:6-122:25 (R. 3284-3287). Notably, the Bankruptcy Court made the implied finding that Mr. Dondero caused the Retail Funds to send the K&L Gates Letters even though, in a hearing just a week earlier, it *sustained* Debtor's objections to Mr. Dondero testifying about the K&L Gates Letters because: (a) *Mr. Dondero lacked personal knowledge*; (b) any answer would be hearsay; and (c) the K&L Gates Letters (executed by K&L Gates, not Mr. Dondero) speak for themselves. Otherwise, Mr. Dondero should have been given the opportunity to answer the question, which the Court denied.

of this unwarranted motion filed by Debtor.³⁸

4. The February 2021 Confirmation Hearing

18. On February 2 and 3, 2021, the Court held a hearing on the Plan. The Advisors and the Retail Funds objected to provisions in the Plan that eliminated or altered their legal and contractual claims against Debtor under the PMAs (the “Objections”). Additionally, Appellants objected to the Plan’s release and exculpation provisions for the management of Debtor and the Plan’s “gatekeeper” provision that prohibited lawsuits against any exculpated party without prior permission from the Bankruptcy Court.

19. On February 8, 2021, the Court summarily rejected all of the Objections,³⁹ questioned the good faith basis for the Objections, and declared that it “ha[d] good reason to believe that [those] parties [were] not objecting to protect economic interests they have in the Debtor, but to be disruptors.”⁴⁰ The Bankruptcy Court, again without basis, concluded that the other entities objecting to the Plan were “controlled by” Mr. Dondero.⁴¹

...the Court has allowed all of these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Court questions their good faith. Specifically on that latter point, *the Court considers them all to be marching pursuant to the orders of Mr. Dondero*.⁴²

20. In doing so, the Bankruptcy Court disregarded witness testimony on the sole ground that the witness had, in coordination with Debtor, recently transitioned from Debtor to one of the Advisors.

...While the evidence presented was that [the Advisors and Retail Funds] have independent board members that run these companies, the Court was not convinced

³⁸ R. 2909, the January 26, 2021 Transcript, at 251:24-252:5 (R. 3159-3160).

³⁹ See R. 3371, February 8, 2021 Transcript at 15:15-16:5 (R. 3385-3386).

⁴⁰ *Id.* at 20:17-20 (R. 3390) (emphasis added).

⁴¹ *Id.* at 20:13-15 (R. 3390).

⁴² *Id.* at 22:12-21 (R. 3392).

of their independence from Mr. Dondero.⁴³

The witness who testified on these Objectors' behalfs at confirmation, Mr. Jason Post, their chief compliance officer, resigned from Highland after more than twelve years in October 2020, at the same time that Mr. Dondero resigned or was terminated by Highland. And a prior witness recently for these entities whose testimony was made part of the record at the confirmation hearing essentially testified that Mr. Dondero controlled these entities.⁴⁴

21. The Objections were made in good faith.⁴⁵ In fact, the U.S. Trustee, whose “good faith basis” was not questioned by the Bankruptcy Court, asserted some of the same objections.⁴⁶ Not even the Debtor alleged that the objections were filed bad faith.

22. Going further, at that hearing, even though no party had requested the Bankruptcy Court “to declare Mr. Dondero and his affiliated entities as vexatious litigants *per se*,”⁴⁷ the Bankruptcy Court summarily decreed that Mr. Dondero and any entity the Bankruptcy Court deemed to be controlled by Mr. Dondero (collectively, the “Affected Entities”)⁴⁸ were “vexatious litigants”⁴⁹ and held that the “gatekeeper” provision (which they objected to) “appears necessary and reasonable in light of the *litigiousness of Mr. Dondero* and his *controlled entities*.”⁵⁰ However, the “litigiousness” the Bankruptcy Court listed to support this ruling consisted of the following:

- (a) efforts taken by Mr. Dondero and other entities to defend against injunctions filed against them;
- (b) legitimate objections or responses to certain provisions of the Plan and other motions, made to preserve rights on appeal; and/or

⁴³ *Id.* at 21:22-24 (R.3391-3392).

⁴⁴ Notably, Jason Post resigned from Debtor and was hired by NPA because NPA and Debtor had to separate compliance programs, which were previously jointly administered. This decision was discussed with and approved by Thomas Surgent and Mr. Seery.

⁴⁵ R. 3371, the February 8, 2021 Transcript, at 23:8-11(R. 3393).

⁴⁶ *Id.*

⁴⁷ *Id.* at 46:20-22 (R. 3416).

⁴⁸ The definition of the “Affected Entities” includes, without limitation, the Advisors and the Retail Funds.

⁴⁹ R. 3371, the February 8, 2021 Transcript, at 46:20-25 (R. 3416).

⁵⁰ *Id.* at 45-47 (R. 3415-3417) (emphasis added).

- (c) lawsuits in which the pre-petition Debtor *had been sued* and was defending itself.⁵¹

These actions do not meet the factors necessary to deem someone a “vexatious litigant.”⁵² In fact, Appellants were not parties to these lawsuits, the record reflected little, if any, litigation and motion practice initiated by Appellants,⁵³ and notice that the issue of vexatiousness was being alleged or tried was never provided.

5. Other Issues Demonstrating Bias

23. The Bankruptcy Court’s inability to rule impartially because of its preconceived bias against Mr. Dondero and the other Appellants has also manifested itself in other ways.

24. *First*, the Bankruptcy Court relied upon extrajudicial information from an article that referenced “Mr. Dondero or Highland affiliates” receiving PPP loans and *sua sponte* directed Debtor’s counsel to investigate the loans and report back.⁵⁴ However, the PPP loans had *nothing* to do with Debtor.⁵⁵ Additionally, according to the Order, the Bankruptcy Court’s pre-existing negative views of Mr. Dondero had to come from somewhere other than the Acis Bankruptcy. The

⁵¹ See ECF 891 (Acis Action, in which Debtor filed a 65-page objection that it described as having “numerous basis” and in which USB filed an objection); ECF 895 (UBS Action, in which Debtor filed an objection to the claim and stated that it had, “meritorious defenses to most, if not all, of the UBS Claim ...”, [ECF 928] and in which the Redeemer Committee of the Crusader Funds also objected); ECF 895 (Daugherty Action, in which Debtor asserted that the Daugherty Claim lacked merit); and Dkt. 1384 (HarbourVest Action, in which Debtor “vigorously defen[ded]” the HarbourVest Claims on numerous grounds).

⁵² R. 3371, the February 8, 2021 Transcript, at 46:6-15 (R. 3416) (acknowledging the elements necessary to find a party vexatious are: (a) the party’s history of litigation; in particular, whether *he has filed* vexatious, harassing, or duplicative lawsuits; (b) whether the party had a good faith basis for *pursuing the litigation*, or perhaps intended to harass; (c) the extent of the burden on the courts and other parties resulting from the party’s filings; and (d) the adequacy of alternatives) (emphasis added).

⁵³ See R. 5081-5093 the Chart regarding this bankruptcy proceeding; *see also* R. 5094-5095, the Chart regarding the injunction proceeding.

⁵⁴ See R. 3422, the July 8, 2020 Transcript at 42:10-24 (R. 3463) (“THE COURT: Okay. All right. Two more questions. And this one has been a bit of a tough one for me to decide whether I should broach this topic or not. You know, *I read the newspapers, the financial papers, just like everyone else, and I saw a headline that I wished almost I wouldn’t have seen, and it was a headline about Dondero or Highland affiliates* getting three PPP loans. *And, you know, I’m only supposed to consider evidence I hear in the courtroom, right, or things I hear in the courtroom, but I’ve got this extrajudicial knowledge right now thanks to just keeping up on current events. I decided I needed to ask about this.* What can you tell me about this, Mr. Pomerantz? I mean, I assumed, from less-than-clear reporting, that it wasn’t Highland Capital Management, LP, but I’d like to hear anything you can report about this.”).

⁵⁵ See R. 3758, the July 14, 2020 Transcript at 53:17-59:3 (R. 3810-3816).

Bankruptcy Court now downplays and dismisses recalling (or the impact of) any specific detail from the Acis Bankruptcy relating to Mr. Dondero.⁵⁶

25. **Second**, the bias against Mr. Dondero has resulted in rulings against Affected Entities that are not legally supported. For example, CLO Holdco is a wholly owned subsidiary of a charitable Doner Advised Fund (“DAF”) established by Mr. Dondero. During the Highland Bankruptcy, CLO Holdco, through its independent trustee, moved to have \$2.5 million of its funds released from the registry of the Bankruptcy Court. The Bankruptcy Court admitted that CLO Holdco’s lawyer made “perfect arguments” and that continuing to hold a non-debtor’s assets in the registry of the Court is “tantamount to a prejudgment remedy.”⁵⁷ Nevertheless, the Bankruptcy Court, concluded that Mr. Dondero was behind the CLO Holdco filing and, therefore, questioned the “good faith” basis of the motion.⁵⁸ Even worse, the Bankruptcy Court acknowledged that it could not continue to hold the funds unless the objecting party obtained injunctive relief, which it has never sought, yet the funds have not been released (presumably because of the Bankruptcy Court’s unsubstantiated belief that Mr. Dondero might somehow benefit).⁵⁹

26. **Third**, in a September 2020 hearing in the Acis Bankruptcy, the Bankruptcy Court learned that the DAF and other entities sued Acis (and other non-Acis or Debtor entities) in New York concerning a post-confirmation dispute. ***Without having seen the lawsuit, the Bankruptcy Court declared it vexatious and, again, blamed Mr. Dondero:***

It’s just ridiculous, for lack of a better term, that Dondero and his entities would be doing some of the things it sounds like they’re doing: Suing Moody’s, for crying out loud, for not downgrading the Acis CLOs. ***If Mr. Dondero doesn’t think that is so transparently vexatious litigation, yeah, I’m going out there and saying that.***

⁵⁶ R. 31, the Order at pp. 8-9 (R. 38-39).

⁵⁷ See R. 3533, the June 30, 2020 Transcript at 85:17-22 (R. 3617).

⁵⁸ *Id.* at 82:3-11 (R. 3614); 85:4-16 (R. 3617).

⁵⁹ Needless to say, the Affected Entities and every entity that the Court believes has any affiliation with Mr. Dondero are gun-shy about filing any pleading out of fear of “sanctions” or accusations of “bad faith.” Conversely, the UCC, which has not alleged any basis for the Bankruptcy Court retaining the \$2.5 million, has not been chastised or otherwise threatened.

*I haven't seen it, but, come on.*⁶⁰

It is the Bankruptcy Court's admission that, "I haven't seen it," paired with its finding that the suit was "transparently vexatious litigation" that clearly illustrates the need for recusal.⁶¹

27. **Fourth**, the Advisors had a shared services agreement with Debtor in which the Advisors shared office space with Debtor, and each paid Debtor for resources and services. In February of 2021, Debtor terminated that agreement and baselessly moved for a mandatory injunction to force the Advisors and the Retail Funds to describe their plans to replace Debtor after the termination.⁶²

28. The Advisors and the Retail Funds did not contest the termination, which posed no harm to Debtor, and had no obligation to share their transition plan with Debtor following its termination of the shared services agreement. Nevertheless, the Bankruptcy Court held a seven-hour evidentiary hearing on the issue⁶³ and, while it ultimately held that the mandatory injunction was moot, it went beyond the pleadings and relief requested by Debtor **to issue findings of fact adverse to Mr. Dondero,**⁶⁴ **which were not even requested in the motion.** Moreover, rather than chastise Debtor's motions as being "almost Rule 11 frivolous," the Bankruptcy Court accused Mr. Dondero (*a non-movant*) of driving up legal fees.⁶⁵

29. **Fifth**, the Bankruptcy Court has permitted Debtor a different standard and set of rules than Appellants. In addition to the discrepancies in the Bankruptcy Court's views regarding the good

⁶⁰ See R. 3480, the September 23, 2020 Transcript at 51:10-16 (R. 3530).

⁶¹ Notably, the claims against Moody's relating to its ratings concerning the CLOs were the same issues raised in various lawsuits against Moody's following the 2008 crash. The action asserting the claims was initiated by DAF, an independent charity originally funded by Highland Capital. As a primary investor in the ACIS Collateralized Loan Obligations (CLO), the DAF lost almost 80% of its investment in ACIS CLOs as Josh Terry and sub-advisor Bridge circumvented CLO indenture covenants and materially increased the risk in the portfolio. Recently, JP Morgan highlighted ACIS 3-6 as the worst performing 1094 deals outstanding in 2019 through 2020. This action sought relief from the trustee (US Bank) for failing to properly administer the indenture and from Moody's for failing to update or suspend ratings given the breaches described above.

⁶² See R. 4173-4193, the Mandatory Injunction.

⁶³ See R. 4199-4437, the February 23, 2021 Transcript on Hearing for Mandatory Injunction.

⁶⁴ See R. 4194, the order on the Mandatory Injunction at pp. 3-5 (R. 4196-4198).

⁶⁵ See R. 4199, the February 23, 2021 Transcript on Hearing for Mandatory Injunction 232:3-234:19 (R. 4430-4432).

faith of Debtor’s filings versus Appellants’, the Bankruptcy Court also permits Debtor a wider latitude to, for example, make corrections and clarifications or present evidence. In particular, while the Bankruptcy Court denied Mr. Dondero’s request to re-open evidence to provide the Court with exculpatory evidence in a contempt hearing,⁶⁶ it permitted Debtor to walk back a judicial admission regarding the amount of bond Debtor requested from Mr. Dondero and even granted Debtor an entire evidentiary hearing to prove a higher bond amount.⁶⁷

D. Recusal is necessary for the pending and future Adversary Proceedings.

30. Importantly, there are numerous adversary proceedings currently pending before the Bankruptcy Court that involve Appellants (collectively, the “Adversary Proceedings”).⁶⁸ The claims in the Adversary Proceedings include various tort claims, breach of contract claims, and claw-back claims, as well as *alter ego* claims seeking to hold Appellants and others liable for any recovery ordered as to other entities.⁶⁹ Each of the Adversary Proceedings will require Appellants to take legal positions and defend themselves, which the Bankruptcy Court is predisposed to considering vexatious and sanctionable (regardless of their validity).

II. SUMMARY OF THE ARGUMENT

31. In March 2021, Appellants moved to recuse the Bankruptcy Court due to its undeniable animus against Mr. Dondero and the resulting prejudicial effect that animus has on the due process

⁶⁶ See R. 7716-7993 and 7994-8068, the transcript regarding the hearing held on Motion for Contempt on March 22 and March 24, 2021.

⁶⁷ See R. 6599-6680, the transcript regarding the hearing held on Motion to Stay Pending Appeal on March 19, 2021.

⁶⁸ The Adversary Proceedings include: *Highland Capital Management L.P. v. NexPoint Advisors, L.P. et al.*, Adversary Proceeding No. 21-03000; *Highland Capital Management, L.P. v. Nexpoint Advisors, L.P.*, Adversary No. 21-03005; *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*; Adversary No. 21-03004; *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*; Adversary No. 21-03006, in the United States Bankruptcy Court for the Northern District of Texas; *Highland Capital Management, L.P. v. HCRE Partners, LLC (N/K/A Nexpoint Real Estate Partners, LLC)*, Adversary No. 21-03007; *Highland Capital Management, L.P. v. HCRE Partners, LLC (N/K/A Nexpoint Real Estate Partners, LLC)*, Adversary No. 21-03007; *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., et al.*; Adversary No. 21-03010; *Highland Capital Management, L.P. v. James Dondero*; Adversary No. 21-03003; and *Official Committee of Unsecured Creditors v. CLO HOLDCO, LTD, et al.*; Adversary No. 20-03195.

⁶⁹ *Id.*

rights of Mr. Dondero, the Trusts, and the Affected Entities.

32. The Bankruptcy Court entered the Highland Bankruptcy with negative opinions of Mr. Dondero and subsequently the other Appellants by association. Over the course of the Highland Bankruptcy, the Bankruptcy Court's predisposition against Mr. Dondero manifested itself in actions that impaired Appellants' legal rights; favored Appellants' opponents; and created, at a minimum, the clear perception that the Bankruptcy Court was unwilling to act impartially where Mr. Dondero and the Affected Entities were concerned. Specifically, among other things, the record reflects that the Bankruptcy Court has:

- (a) repeatedly made negative statements about Mr. Dondero and questioned Mr. Dondero's credibility before he ever testified;
- (b) summarily disregarded the testimony of any witness favorable to Mr. Dondero (or any of the Appellants) as "under [Mr. Dondero's] control" and *per se* not credible;
- (c) repeatedly concluded, without evidence, that any entity the Bankruptcy Court deemed associated with Mr. Dondero was essentially an agent and no more than a pawn of Mr. Dondero;⁷⁰
- (d) declared that Mr. Dondero and his "controlled entities" are vexatious litigants because: (i) they defended lawsuits and motions filed against them; and/or (ii) have asserted valid legal positions (including to preserve their and the Affected Entities' legal rights and rights on appeal);
- (e) issued a *sua sponte* order demanding that so-called "Dondero-Affiliated Entities" disclose their ownership and control, including entities that have not appeared or filed anything in the Highland Bankruptcy; and
- (f) applied more favorable standards and rules to Debtor than those it afforded to Appellants.

Notably, the Affected Entities' investment base includes public investors beyond Mr. Dondero.⁷¹

⁷⁰ Specifically, the evidentiary record does not reflect, *e.g.*, that: (a) the corporate formalities have been ignored for the entities; (b) their corporate property has not been kept separate and apart; or (c) Mr. Dondero uses the companies for personal purposes.

⁷¹ For example, while deemed "Dondero controlled entities," HFRO and NHF are controlled by boards the majority of whom are independent in accordance with NYSE and SEC requirements; Mr. Dondero owns less than 13% of NHF

Appellants brought the Motion to safeguard the impartiality that they are entitled to receive as litigants, regardless of Mr. Dondero's history with the Bankruptcy Court.

33. The Bankruptcy Court denied the Motion for the following three reasons:

- (a) The Bankruptcy Court's finding the Motion was untimely;
- (b) The Bankruptcy Court's subjective belief that it was not biased and that, generally, all of its orders, actions, and findings were proper; and
- (c) Criticism of counsel (which was not a ground that Appellants asserted in the Motion) did not justify recusal.⁷²

34. The Bankruptcy Court abused its discretion when it denied the Motion. *First*, Appellants filed the Motion a reasonable time after the Bankruptcy Court's bias manifested itself and only sought relief on a prospective basis. *Second*, Appellants did not seek recusal based upon "criticism of counsel" or routine docket management actions, and the Bankruptcy Court failed to address the Motion's actual and specific grounds.⁷³ *Finally*, and most importantly, a judge's subjective belief that he or she is capable of impartiality⁷⁴ or whether the judge *actually has* a bias (or actually knows of grounds requiring recusal) is irrelevant.⁷⁵ Instead, "[t]he *appearance* of impartiality controls the § 455 analysis,"⁷⁶ and the test is whether the "average person on the street who knows all the relevant facts of a case" might *reasonably question* the judge's impartiality.⁷⁷

35. Appellants, like every litigant, are entitled to the opportunity to make their case in a fair and impartial forum.⁷⁸ The impartiality of judges is fundamental to the judiciary and the public's

and less than 1% of HFRO; and the remaining interests are owned by third-party, "mom and pop" investors.

⁷² R. 31, the Order at pp. 7-10 (R. 37-40).

⁷³ *Id.*

⁷⁴ *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).

⁷⁵ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 805 (1988).

⁷⁶ *Ferrera-Parra v. United Airlines, Inc.*, No. 4:19-CV-1053, 2021 WL 1795702, at *3 (S.D. Tex. Mar. 30, 2021) (citing *Haskett v. Orange Energy Corp.*, 161 F. Supp. 3d 471, 473 (S.D. Tex. 2015)).

⁷⁷ *In re Kansas Pub. Employees Retirement Sys.*, 85 F.3d 1353, 1358 (8th Cir.1996).

⁷⁸ *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021).

confidence in the proceedings over which they preside.⁷⁹ Here, recusal of the Bankruptcy Court is the only way to ensure that the Appellants receive the requisite impartiality and fair trial.

III. ARGUMENTS & AUTHORITY

A. Appellants' Motion was timely.

36. The Bankruptcy Court held that the Motion was untimely because it was filed: (a) “more than 15 months after the Highland Bankruptcy was transferred;” (b) “after many dozens of orders have been issued by the court, including a confirmation order that Movants have now appealed;” and (c) “on the eve of a contempt hearing.”⁸⁰ The Bankruptcy Court abused its discretion in finding the Motion untimely.

37. **First**, unlike 28 U.S.C. § 144, timeliness is not an express condition of a recusal motion under § 455, and the sole case cited by the Bankruptcy Court to the contrary, *Davies v. C.I.R.*, 68 F.3d 1129, 1130-31 (9th Cir. 1995), is factually distinguishable from the facts of this case. Cases finding that a recusal motion was untimely generally involve situations in which the complaining party obtained specific, definitive knowledge that the court had a disqualifying circumstance **and** either: (a) intentionally delayed raising the issue until a strategically advantageous time; or (b) raised the issue for the first time after a final judgment.⁸¹ This includes *Davies*. In *Davies*, the judge notified the complaining party, taxpayers, that he had served as IRS Deputy Counsel and Acting Chief Counsel.⁸² The taxpayers did not object at the time but, instead, almost a year later, moved to recuse the judge after he had ruled against them.⁸³ As such, *Davies* does not support the

⁷⁹ *Id.*

⁸⁰ See R. 31, the Order at p. 7 (R. 37).

⁸¹ See, e.g., *United States v. Sanford*, 157 F.3d 987, 989 (5th Cir. 1998) (holding that motion to recuse was untimely because defendant's attorney had testified against judge in judicial council proceedings, but defendant made no motion before district court for recusal in two months before sentencing, or at sentencing itself, and thus, defendant both waited after knowing facts to challenge judge and raised issue for first time on appeal).

⁸² *Davies v. C.I.R.*, 68 F.3d 1129, 1130-31 (9th Cir. 1995).

⁸³ *Id.*

Order.

38. **Second**, the general amount of time that passed since the Highland Bankruptcy was transferred from Delaware (*i.e.*, 15 months) is not relevant. The timeliness of a recusal motion is determined from the point a judge's bias (or her appearance of bias) has manifested in the case (*i.e.*, after the grounds for recusal, beyond speculation, are actually known).⁸⁴ A judge, suspected of bias, cannot sit on that bias and then—after a certain amount of time passes—take action confirming the bias (or appearance thereof) and claim it is too late to recuse and force a party to be judged by a partial jurist.

39. Here, the Bankruptcy Court's bias (or appearance thereof) did not immediately show itself such that it would support a recusal motion. While Debtor acknowledged the Bankruptcy Court's preexisting negative views of Mr. Dondero,⁸⁵ the presence of preexisting negative views *alone* is not grounds to recuse. As described above, the Delaware bankruptcy court indicated that such arguments (that the Bankruptcy Court's potential bias might negatively impact the case) were premature because the Bankruptcy Court should enjoy a presumption that it would still follow the rules in making findings:

Yeah, I was going to say that's kind of an interesting argument, because actually it ***assumes Judge Jernigan's going to ignore the rules of evidence*** in making factual findings, ***because you're limited to the record before you on a specific motion***. And what fact you may have learned with regard to something a person has done, maybe that goes into questions of credibility on cross-examination or direct testimony, ***but to actually base your decision on a fact that's not in the record for the specific proceeding would be improper***.⁸⁶

40. Consequently, Appellants hoped the Delaware bankruptcy court was correct and were willing to extend that prescribed presumption to the Bankruptcy Court.

⁸⁴ *Davies v. C.I.R.*, 68 F.3d 1129, 1130-31 (9th Cir. 1995) (citing *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992)).

⁸⁵ R. 2382, the December 2, 2019 Transcript, at 78:3-8 (emphasis added) (R. 2459).

⁸⁶ *Id.* at 90:15-24 (emphasis added) (R. 2471).

41. Moreover, while the Bankruptcy Court’s language in an earlier January 2020 order is an example of its bias, a single adverse ruling is not grounds for recusal, as it could be an isolated incident. In other words, while a part of the Bankruptcy Court’s pattern of bias, a recusal motion based upon this single January 2020 order ruling *alone* would likewise be considered premature.

42. Here, the Bankruptcy Court’s inability to rule impartially in matters involving Mr. Dondero and the Affected Entities did not manifest itself until late 2020 and early 2021, after various comments, events, and rulings, exemplified above. It is *that* manifestation of bias (or appearance of bias) that is the relevant demarcation line as it relates to timeliness of the Motion, and Appellants indisputably filed the Motion a reasonable time thereafter (*i.e.*, March 18, 2021).

43. *Third*, the Bankruptcy Court concludes that the Motion was untimely merely because “many dozens of orders have been issued by the court, including a confirmation order that Movants have now appealed.”⁸⁷ However, the Bankruptcy Court does not identify any order that it claims should have resulted in the Motion being filed earlier. In fact, the sole referenced “Confirmation Order” was entered *just over a month before the Motion was filed*.

44. *Fourth*, the fact that Debtor had filed a motion for contempt and a hearing on that motion was pending when Appellants filed the Motion is further irrelevant. Appellants moved to recuse the Bankruptcy Court from Adversary Proceedings—not from hearing any contempt issue.⁸⁸ Consequently, the Bankruptcy Court’s finding that the Motion was not timely was an abuse of discretion.

B. The Bankruptcy erred in denying the Motion on the merits.

45. Next, with respect to the merits, the Bankruptcy Court denied the Motion because: (a) it subjectively believes that it is not biased (“[t]he Presiding Judge does not believe she harbors, or

⁸⁷ R. 31, the Order, at p. 7 (R. 37).

⁸⁸ R. 2338-2378, the Motion (including the Motion and Brief in Support).

has shown, any personal bias or prejudice against the Movants”);⁸⁹ (b) criticism of counsel did not justify recusal;⁹⁰ and (c) without addressing any of Appellants’ allegations, the Bankruptcy Court’s deemed any statements, criticism and orders proper and concluded that the allegations did not establish “doubt in the mind of a reasonable observer as to the judge’s impartiality.”⁹¹

1. The Bankruptcy Court erred in relying on its subjective denials of actual bias.

46. It is irrelevant if a judge subjectively believes he or she is capable of impartiality⁹² or if the judge actually has a bias (or actually knows of grounds requiring recusal).⁹³ Instead, “[t]he appearance of impartiality controls the § 455 analysis,”⁹⁴ and the test is whether the “average person on the street who knows all the relevant facts of a case” might *reasonably question* the judge’s impartiality.⁹⁵ As a result, the Bankruptcy Court abused its discretion in denying Appellants’ Motion based upon its subjective declarations and beliefs regarding its bias and the propriety of its actions.

2. Appellants do not seek recusal based upon “criticism of counsel” or routine docket management actions.

47. While the Bankruptcy Court denied the Motion based on an assertion that criticism of counsel did not justify recusal,⁹⁶ Appellants did not seek recusal on this ground.⁹⁷ Instead, Appellants filed the Motion because the Bankruptcy Court’s actions (including the non-exhaustive examples described in the Motion and herein) began to reveal a deep-seated antagonism toward Mr. Dondero and the Affected Entities that went well beyond “normal” admonishment—rendering

⁸⁹ R. 31, at Order at p. 10 (R. 40).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).

⁹³ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 805 (1988).

⁹⁴ *Ferrera-Parra v. United Airlines, Inc.*, No. 4:19-CV-1053, 2021 WL 1795702, at *3 (S.D. Tex. Mar. 30, 2021) (citing *Haskett v. Orange Energy Corp.*, 161 F. Supp. 3d 471, 473 (S.D. Tex. 2015)).

⁹⁵ *In re Kansas Pub. Employees Retirement Sys.*, 85 F.3d 1353, 1358 (8th Cir.1996).

⁹⁶ R. 31 the Order at p. 10 (R. 40).

⁹⁷ R. 2341, the Motion at ¶ 70 (R. 2376).

the perception of fair judgment and impartiality toward Appellants impossible.⁹⁸

48. Moreover, the only evidence in the Motion that could arguably be considered “criticism of counsel” does not constitute regular admonishment or “criticism of counsel.” As alleged in the Motion, the Bankruptcy Court has, among other things: (a) repeatedly threatened sanctions on and questioned Appellants’ good-faith basis for: (i) asserting valid legal positions (including in defense of suits and motions filed against them); and/or (ii) preserving their rights (including in the exact same manner in which others are permitted to do so (*e.g.*, the U.S. Trustee’s objections to the Plan)); (b) declared a lawsuit Appellants filed as “vexatious” despite admitting that it has never seen the lawsuit; and (c) recommended claims for opposing counsel to bring against Appellants to avoid a reference being withdrawn. This is well beyond ordinary “criticism” and justifies recusal.

3. The Motion’s actual and specific grounds, which the Bankruptcy Court failed to address, establish actual bias or an objective appearance of bias.

49. “The review of a recusal order under § 455(a) is ‘extremely fact intensive and fact bound,’ thus a close recitation of the factual basis for the [party’s] recusal motion is necessary.”⁹⁹ Moreover, section 455(a), which is “designed to promote public confidence in the impartiality of the judicial process,”¹⁰⁰ requires recusal whenever a judge’s partiality might reasonably be questioned, *even if the judge does not have actual personal bias or prejudice*.¹⁰¹ The judge’s failure to recuse herself in such circumstances would constitute an abuse of discretion.¹⁰²

50. The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.¹⁰³ As Congress recognized when enacting section 455, litigants “ought

⁹⁸ *Id.*

⁹⁹ *Republic of Panama v. Am. Tobacco Co.*, 217 F.3d 343, 346 (5th Cir. 2000).

¹⁰⁰ *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (quoting H.R.Rep. No. 1453, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6354–55); *Liljeberg*, 486 U.S. at 859–60.

¹⁰¹ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 n. 8 (1988); *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).

¹⁰² *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999).

¹⁰³ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877

not have to face a judge where there is a reasonable question of impartiality.”¹⁰⁴ This neutrality requirement helps guarantee that no person will be deprived of his interests in the absence of a proceeding in which the arbiter is not predisposed to find against him.¹⁰⁵ As a result, the Fifth Circuit has held that “*if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.*”¹⁰⁶

51. *First*, the Bankruptcy Court’s Order ignored most of the grounds in the Motion, which itself further demonstrates the Bankruptcy Court’s predisposition to rule against Appellants without objective analysis. The evidence in the Motion shows that the Bankruptcy Court’s actions reveal such a high degree of antagonism toward Appellants (and favoritism toward any party adverse to Appellants) to make fair judgment impossible, including:

- (a) repeated negative statements about Mr. Dondero;
- (b) admission that its negative opinions about Mr. Dondero could not be excised from the Court’s mind;
- (c) repeated reference to proceedings in the Acis Bankruptcy to justify findings made in the Highland Bankruptcy that were not otherwise supported by the Highland record;
- (d) indication that it was predisposed to disregard the presumption of corporate formalities and conclude, without supporting evidence, that any entity the Bankruptcy Court considered affiliated with Mr. Dondero (*i.e.*, including the highly regulated Affected Entities, which are governed by independent boards) was essentially Mr. Dondero’s alter ego;¹⁰⁷ and
- (e) repeatedly disregarding, without basis, of the testimony of any witness with a connection to Mr. Dondero as *per se* not credible, including testimony of attorneys and persons who owe fiduciary duties and ethical obligations.¹⁰⁸

(2009) (“It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process.”); see also *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam) (“Trial before ‘an unbiased judge’ is essential to due process.”) (quoting *Bloom v. Illinois*, 391 U.S. 194, 205 (1968)).

¹⁰⁴ H. Rep. No. 1453, 93d Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.

¹⁰⁵ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citations omitted).

¹⁰⁶ *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (emphasis added).

¹⁰⁷ R. 3371, the February 8, 2021 Transcript at 13:17-24 (R. 3383); 20:18-20 (R. 3390); 21:18-22:3 (R. 3391-3392).

¹⁰⁸ See, e.g., ECF 1943 at p. 19 (“At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not

The failure to address any of these grounds in the Order is further evidence of the root issue.

52. **Second**, the Bankruptcy Court, in the Order, appears to be distancing itself from its prior admissions regarding the Acis Bankruptcy, which raises an issue regarding the source of the “extrajudicial knowledge” supporting the Bankruptcy Court’s bias against Mr. Dondero. In its Order, the Bankruptcy Court contends that: (a) it does not recall any specific ruling from the *Acis* case relating to Mr. Dondero;¹⁰⁹ (b) it only recalls Mr. Dondero testifying once in court during the *Acis* case;¹¹⁰ and (c) it has vague recollection that deposition testimony may have been presented another time.¹¹¹ Nevertheless, on February 19, 2020, approximately two months after the Highland Bankruptcy was transferred *and before Mr. Dondero had ever testified in the Highland Bankruptcy*, the Bankruptcy Court prefaced a statement in a hearing with the phrase, “[i]f you can trust Mr. Dondero... .”¹¹²

53. If the Court does not recall anything from the Acis Bankruptcy, then this statement could only be based on extrajudicial knowledge. As a result, the Bankruptcy Court’s statements in the Order have created a fact issue over the source of its knowledge to support its expressed doubt as to anyone’s ability to “trust” Mr. Dondero.

54. **Third**, even a lack of extrajudicial knowledge is not fatal because Appellants are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history

convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post’s credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors’ request, and he is currently employed by Mr. Dondero.”); *see also*, R. 3166, the January 8, 2021 Transcript, at 175:8-176:25 (R. 3340-3341).

¹⁰⁹ R. 31, Order at p. 8 (R. 38).

¹¹⁰ *Id.* at p. 9 (R. 39).

¹¹¹ *Id.*

¹¹² R. 2610, the February 19, 2020 Transcript, at 174:22-175:1 (emphasis added) (R. 2783-2784).

with that forum.¹¹³ The Supreme Court has recognized that predispositions developed during the course of a trial can create a valid basis for a bias or partiality motion.¹¹⁴ While the presence of an extrajudicial source is *a* factor in favor of finding recusal under section 455,¹¹⁵ it is *not necessary* for recusal.¹¹⁶ Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, will support recusal under section 455(a) “*if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.*”¹¹⁷

55. As stated above, the Bankruptcy Court has admitted a predisposition against Mr. Dondero and made repeated statements and took actions (including doubting the credibility of any witness connected to Mr. Dondero; ignoring evidence in the record, *e.g.*, evidence of corporate formalities; and disregarding the required presumption that Mr. Dondero’s filings by his counsel are made in good-faith) demonstrating that the Bankruptcy Court is not capable of ruling impartially where Mr. Dondero is concerned. Additionally, as described herein (*e.g.*, paragraphs 11, 16-17 and 27-28 above), the Bankruptcy Court has two different standards for Appellants and anyone adverse to Appellants, showing a high degree of favoritism.

56. Importantly, even after the Bankruptcy Court denied the Motion, the Bankruptcy Court’s antagonism toward Appellants and favoritism toward any party adverse to Appellants continued.¹¹⁸ For example, at a hearing on June 10, 2021 after Appellants moved to withdraw the reference, the Bankruptcy Court *sue sponte* recommended Debtor file fraudulent transfer claims

¹¹³ *Miller v. Sam Houston State University*, 986 F.3d 880, 893 (5th Cir. 2021) (citing *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)).

¹¹⁴ *Liteky v. United States*, 510 U.S. 540, 554 (1994) (emphasis added).

¹¹⁵ *Bell v. Johnson*, 404 F.3d 997, 1004 (6th Cir. 2005) (citations omitted).

¹¹⁶ *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).

¹¹⁷ *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citation omitted) (emphasis added).

¹¹⁸ Appellants have moved to supplement the record, which is unopposed and pending before the court. The supplemental documents will demonstrate ongoing bias.

(suggesting that those might affect the reference from being withdrawn).¹¹⁹

57. At that same hearing, the Bankruptcy Court refused to grant Dugaboy's motion to compel Debtor to file the "periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or debtor . . . in which the estate holds a substantial or controlling interest" as required by Fed. R. Bankr. P. 2015.3(a).¹²⁰ The Court raised concerns that the statutorily required information might be used to "cobble together a new adversary alleging mismanagement" against the Debtor¹²¹ and did not grant the motion because, among other things, it would be unduly burdensome.¹²²

58. Then, just seven days later, on June 17, 2021, the Bankruptcy Court entered a *sua sponte* order claiming to question Appellants' standing to as creditors to object to various settlements and the handling of the estate (the "June 17 Order").¹²³ The June 17 Order requires Appellants (and other entities with ties to Mr. Dondero) to "file a Notice in this case disclosing: (1) who owns the entity (showing percentages); (2) whether Mr. Dondero or the Trusts have either a direct or indirect ownership interest in the entity and, if so, what percentage; (3) who are the officers, directors, managers and/or trustees of the Non-Debtor Dondero-Related Entity; and (4) whether the entity is a creditor of the Debtor (explaining in reasonable detail the amount and substance of its claims)."¹²⁴ Importantly, the June 17 Order actually establishes Appellants' standing and

¹¹⁹ June 10, 2021 Transcript at 81:5-16 (App. 81); 83:1-12 (App. 83), a true and correct copy of which is attached to Appellants' Appendix as Tab 1 (App. 1-91).

¹²⁰ *Id.* at 49:12-14 (App. 49).

¹²¹ *Id.* at 46:11-13 (App. 46).

¹²² *Id.* at 49:12-51:3 (App. 49).

¹²³ See June 17 Order at p. 1 (App. 92), a true and copy of which is attached to Appellants' Appendix as Tab 2 (App. 92-104) ("This Order is issued by the court sua sponte pursuant to Section 105 of the Bankruptcy Code and the court's inherent ability to efficiently monitor its docket and evaluate the standing of parties who ask for relief in the above-referenced case. More specifically, the Order is directed at clarifying the party-in-interest status or standing of numerous parties who are regularly filing pleadings in the above-referenced 20-month-old Chapter 11 bankruptcy case.").

¹²⁴ *Id.* at p. 12-13 (App. 103-104).

unjustifiably requires action that have nothing to do with standing.

C. Recusal was and remains proper.

59. Here, the Bankruptcy Court seeks to sit as both judge and jury in various pending and future Adversary Proceedings and contested matters and has demonstrated a willingness to retain jurisdiction whenever possible.¹²⁵ To do so, the Bankruptcy Court must, but appears unable to, set aside any prejudice or bias against Appellants in those proceedings. A reasonable person, knowing the facts, would doubt the Bankruptcy Court's impartiality regarding Appellants. At a minimum, that is the perception that has been created.¹²⁶ The Bankruptcy Court cannot escape this reality by subjectively concluding, without analysis, that it does not believe the allegations in the Motion to be true. As a result, the Bankruptcy Court abused its discretion in denying the Motion.

IV. CONCLUSION AND PRAYER

FOR THE FOREGOING REASONS, Appellants respectfully request that the Court reverse the Bankruptcy Court's order denying Appellants' Motion to Recuse; order that the Bankruptcy Court is recused from the Adversary Proceedings and any future contested matters involving Appellants or any entity connected to Mr. Dondero; and grant Appellants all other further relief, at law or equity, to which they are justly entitled.

¹²⁵ See, e.g., R. 3480, the September 23, 2020 Transcript, at 50:4-52:7 (R. 3529-3530).

¹²⁶ *Liteky v. United States*, 510 U.S. 540, 551 (1994).

CERTIFICATE OF COMPLIANCE

In compliance with Rules 8014 and 8015, I hereby certify that:

- (a) This document complies with the type-volume limit of FED. R. BANKR. P. 8015(a)(7)(B) because, excluding the parts of the document exempted by FED. R. BANKR. P. 8015(g), this document contains 9,285 words.
- (b) This document complies with the typeface requirements of FED. R. BANKR. P. 8015(a)(5) and the type-style requirements of FED. R. BANKR. P. 8015(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft word, version 2008, in size 12, Times New Roman.

Dated: June 28, 2021

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 28, 2021, a true and correct copy of the above and foregoing document was served on all parties of record via the Court's e-filing system.

/s/ Michael J. Lang
Michael J. Lang

Exhibit 4

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

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In Re:)	Case No. 19-34054-sgj-11
)	
HIGHLAND CAPITAL)	Dallas, Texas
MANAGEMENT, L.P.,)	February 19, 2020
	)	9:30 a.m.
Debtor.)	
	)	MOTIONS

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtor:	Greg Demo
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For the Debtor:	Melissa S. Hayward
	Zachery Z. Annable
	HAYWARD & ASSOCIATES, PLLC
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2 For the Official Committee of Unsecured Creditors: Juliana Hoffman
3 SIDLEY AUSTIN, LLP
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5 For Acis Capital Management GP, LLC,
6 et al.: Rakhee V. Patel
Annmarie Antoinette Chiarello
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9 For Acis Capital Management GP, LLC,
10 et al.: Brian Patrick Shaw
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12 For the Issuer Group: Amy K. Anderson
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15 For the Issuer Group: James T. Bentley
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19 the Highland Crusader FROST BROWN TODD, LLC
Fund: 100 Crescent Court, Suite 350
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(214) 580-5852

21 For Redeemer Committee of Marc B. Hankin
22 the Highland Crusader JENNER & BLOCK, LLP
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25

1 APPEARANCES, cont'd.:

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7 (214) 767-8967 Ext. 1080

8 Recorded by: Michael F. Edmond
9 UNITED STATES BANKRUPTCY COURT
10 1100 Commerce Street, 12th Floor
11 Dallas, TX 75242
12 (214) 753-2062

13 Transcribed by: Kathy Rehling
14 311 Paradise Cove
15 Shady Shores, TX 76208
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25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 Second, Foley is not being retained to conduct the
2 Debtor's bankruptcy case. That's my firm, Pachulski Stang.
3 Again, nobody has objected on that basis.

4 Third, Foley represented the Debtor prior to the petition
5 date on these matters. Again, nobody has objected on that
6 basis.

7 And, fourth, you know, as Judge Nelms will testify, the
8 retention of Foley and Foley's continued prosecution of the
9 Acis matters is in the best interest of the Debtor's estate.

10 And then fifth and finally, Foley has no adverse interest
11 with respect to the matters on which it is being retained.

12 Now, as I mentioned, there were two omnibus objections
13 that were filed. There was the Committee's objection and then
14 there was Acis's objection. Both of these objections really
15 had one common theme, which was that there was insufficient
16 disclosure as to how the fees were going to be allocated, and,
17 honestly, whether or not Mr. James Dondero would benefit from
18 Foley's retention without paying his share of those fees.

19 Now, we had a meeting with the Committee on Friday and we
20 walked through this issue. And as a result of that, the
21 Committee withdrew its objection.

22 What we told to the Committee is that, prior to the Acis
23 bankruptcy -- and this goes primarily to the retention -- or,
24 the prosecution of the involuntary petition appeal. In that
25 appeal, Foley is representing just Neutra. Foley is not

1 representing the Debtor. Now, the economic benefit to the
2 estate, though, in that appeal accrues almost solely to the
3 Debtor. It does not accrue to Neutra or to Neutra's economic
4 interest owners, which, full disclosure, are Mr. James Dondero
5 and Mr. Mark Okada.

6 The reason why the Debtor -- and you'll hear, again, hear
7 this from Judge Nelms -- believes that it's in the economic
8 best interest of its estate to pay for Neutra's fees in that
9 appeal is that, if Neutra is successful in that appeal, the
10 involuntary petition obviously will be struck, the involuntary
11 will be unwound, and the economic interest and the economic
12 ownership of Acis will revert to Neutra.

13 Upon that reversion, Highland Capital Management will be
14 reinstated as the advisor to Neutra.

15 Now, if Neutra -- I'm sorry, if Acis then generates fees,
16 those fees are going to be paid about 85 percent to satisfy
17 the contractual obligations under that advisory agreement.

18 So, on a go-forward basis, again, if Neutra is successful,
19 85 percent of the revenue generated by Acis will go to Neutra.
20 That remaining 15 percent will be used to satisfy the claim
21 that Acis -- I'm sorry, that Highland Capital Management has
22 against Acis for the pre-, post-petition, and gap period
23 services that it provided to Acis under the advisory
24 agreements. That claim is about \$8 million.

25 So, 85 percent of the revenue on a go-forward basis is

1 Q Okay. So, that, plus the Neutra appeal, are two -- I
2 mean, I apologize, withdrawn. That, plus the DAF matter, are
3 two examples where the Board exercised its judgment not to
4 pursue pending litigation; is that fair?

5 A That's correct.

6 Q Okay. Is the Board supportive of the Debtor's application
7 to retain Foley for the three matters you have described?

8 A It is.

9 Q And without revealing privileged communications, can you
10 describe generally the diligence that the Board conducted to
11 reach that decision?

12 A Well, we met with some of the people that work at
13 Highland. We met with the Debtor's attorneys, the Pachulski
14 firm. We did have a couple of meetings with Ms. Patel and Mr.
15 Terry. Some of us have reviewed the pleadings, some more than
16 others. And, well, we may have done other things, but those
17 are the ones that come to mind right now.

18 Q I don't know if you mentioned it, but did you confer with
19 Ms. O'Neil?

20 A Oh, yes, we did. We talked with Ms. O'Neil about it.

21 Q Okay. And what was the purpose of the diligence that you
22 just described for the Court?

23 A Well, ultimately, what we as a board were trying to do was
24 to conduct kind of a cost-benefit analysis to the estate: How
25 much will this potentially cost us? What's the potential

1 receiving a benefit from this, the Committee has standing to
2 pursue that.

3 So it's not a null set, Your Honor, whereas cutting off
4 the appeal now does take away that possibility.

5 THE COURT: How would I be cutting off the appeal?
6 I'm not cutting off the appeal. King & Spalding can go in
7 there and fight hard. Foley can go in there and fight hard
8 for Neutra. So, --

9 MR. DEMO: One second, Your Honor.

10 (Counsel confer.)

11 MR. DEMO: And I guess, you know, Your Honor, and I
12 do want to reiterate that there is no other party with an
13 economic incentive to fight the Neutra appeal the way that the
14 Debtor has an economic incentive.

15 THE COURT: That makes no sense to me. HCLOF is the
16 one who hated this injunction.

17 MR. DEMO: That's not the Neutra appeal, Your Honor.
18 That's the confirmation order.

19 THE COURT: Well, okay. Neutra gets its company back
20 if they win.

21 MR. DEMO: And we would get our contracts back.

22 THE COURT: And arguably, it can control Acis, maybe,
23 okay, and it can assign management contracts to whoever it
24 wants. That just -- and it says it'll assign them to
25 Highland. If you can trust Jim Dondero, then Highland's going

1 to benefit if Neutra wins that appeal. Right?

2 MR. DEMO: Yes. Yes, Your Honor.

3 THE COURT: Okay. So that --

4 MR. DEMO: Highland would benefit greatly --

5 THE COURT: Okay.

6 MR. DEMO: -- if Neutra were to win that appeal.

7 THE COURT: Okay. Okay. Well, but first Neutra
8 benefits, right? And then --

9 MR. DEMO: No.

10 THE COURT: -- Highland only secondarily benefits --

11 MR. DEMO: I -- I --

12 THE COURT: -- if Jim Dondero keeps his word and
13 gives the management contracts back to Highland.

14 MR. DEMO: Jim Dondero would also have to repay the
15 \$8 million in claim, even if he didn't reinstate those
16 contracts. And that \$8 million would be hundred-cent dollars.

17 THE COURT: Okay.

18 MR. DEMO: So, worst case, --

19 THE COURT: It would have been nice to have him
20 testify as to all of this.

21 MR. DEMO: Worst --

22 THE COURT: It would be more compelling if I had him.

23 MR. DEMO: Well, --

24 THE COURT: Okay? But I don't think --

25 MR. DEMO: -- I can only do so much, Your Honor.

1 you know, I hate it that we were here, but I understand it.

2 But I'm concerned. I'm concerned -- well, here's the
3 deal. We have a great board, and I totally get that
4 Bankruptcy Courts should defer heavily to the reasonable
5 exercise of business judgment by a board. And we've got great
6 professionals. And we've got this case, I think, on a good
7 track as a general matter now. But I'm concerned that Dondero
8 or certain in-house counsel has -- you know, they're smart,
9 they're persuasive -- that -- what are the words I want to
10 look for -- they have exercised their powers of persuasion or
11 whatever to make the Board and the professionals think that
12 there is some valid prospect of benefit to Highland with these
13 appeals, when it's really all about Neutra, HCLOF, and Mr.
14 Dondero. That's what I believe.

15 I mean, this is awkward, right, because you want to defer
16 to the debtor-in-possession, but I have this long history, and
17 I can think through the scenarios. If this is reversed, here
18 is how it will play out. If this is reversed, here is how it
19 might play out. And I know, you know, there are multiple ways
20 it might play out, but I cannot believe there is a chance in
21 the world there is economic benefit to Highland if these
22 things get reversed. Economic benefit to Neutra: Yeah,
23 maybe. Economic benefit to HCLOF: Well, they'll get what
24 they want. You know, whether it's an economic benefit, I
25 don't know. But benefit to Highland? I just don't think the

1 evidence has been there to convince me it's reasonable
2 business judgment for Highland to pay the legal fees
3 associated with the appeal.

4 And even more concerning to me is a valid point was made
5 that Highland is in bankruptcy because of litigation,
6 litigation, litigation. The past officers and directors and
7 controls' propensity to fight about everything. This isn't a
8 balance sheet restructuring, okay? It's not a Chapter 11
9 caused by operational problems or revenue disruption or who
10 knows what kind of disruption. It's about years of litigation
11 finally coming home to roost. And this just appears to be
12 more of the same, potentially.

13 Okay. Parties have a right to appeal. I respect that.
14 Neutra, go for it. HCLOF, go for it. But this estate and its
15 creditors should not bear the burden of having Highland pay
16 for that, when, again, I don't think there's any evidence to
17 suggest they could benefit at the end of the day.

18 So what I'm going to do is I'm going to approve the
19 retention of Foley to represent Highland in the Acis case. We
20 all know the adversary is stayed right now. It may or may not
21 ever be un-stayed, depending on what strategies people want to
22 pursue. But Highland, I think a meritorious case has been
23 presented, and under 327(e) I will approve Foley representing
24 Highland in all Acis matters. Okay? The Acis bankruptcy
25 case. The adversary proceeding, if it goes forward. And so

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THE COURT: Okay. Thank you all.
(Proceedings concluded at 1:44 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling

02/20/2020

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

Exhibit 5

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

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In Re:)	Case No. 19-34054-sgj-11
)	Chapter 11
)	
HIGHLAND CAPITAL)	Dallas, Texas
MANAGEMENT, L.P.,)	Friday, January 8, 2021
	)	9:30 a.m. Docket
Debtor.)	
<hr/>		
HIGHLAND CAPITAL	)	Adversary Proceeding 20-3190-sgj
MANAGEMENT, L.P.,)	
)	
Plaintiff,	)	PRELIMINARY INJUNCTION
	)	HEARING [#2]
v.)	
)	
JAMES D. DONDERO,)	
)	
Defendant.)	
<hr/>		

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX/TELEPHONIC APPEARANCES:

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3 Defendant:

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8 of Unsecured Creditors:

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11 Advisors:

Davor Rukavina
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17 Recorded by:

Michael F. Edmond, Sr.
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Dallas, TX 75242
(214) 753-2062

20 Transcribed by:

Kathy Rehling
311 Paradise Cove
Shady Shores, TX 76208
(972) 786-3063

25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 action and it was destroyed to keep us from having that
2 evidence.

3 And they brought forth all kinds of case law. It's a hard
4 area. It's a really, really hard area. But I ended up --
5 again, it's not in the main opinion. It was in subsequent
6 orders. I ended up saying, yeah, I think you've met the
7 standard here to draw adverse inferences.

8 So, again, this is a very unpleasant message for me to
9 deliver today. But the destruction of the phone is my biggest
10 takeaway of concern today, how that might have ramifications.
11 You know, there are other bad things, too, about that. I'm
12 not even going to go there right now. But the, you know,
13 Title 18, you can ask your lawyer what that means, but okay.

14 My second big takeaway before we get to the hopeful stuff
15 is -- and this is kind of harsh, what I'm about to say -- but
16 Ellington and Leventon maybe care more about you, Mr. Dondero,
17 than their law license. You know, I guess it's great to have
18 people in your life who are very, very loyal to you. I mean,
19 loyalty is a wonderful thing. But I am just so worried about
20 things I've heard. Again, the phone and in-house lawyers.
21 The biggest concerns in my brains right now. I have worried
22 about them for a while.

23 You all will -- well, Mr. Dondero, you might not know
24 this. But we had a hearing a few months ago, maybe September,
25 October, where the Creditors' Committee was trying to get

1 discovery of documents. And we had some sort of hearing,
2 maybe a motion to compel production. And we had many, many
3 entities that you control file objections: NexPoint, NexBank.
4 I can't even remember. We just had a whole slew. CLO Holdco.
5 Many, many of these entities objected. And I was trying to
6 figure out that day who was instructing them. And oh my
7 goodness, I hope the in-house layers are not involved in this
8 document discovery dispute, because, you know, they have
9 fiduciary duties. And are -- you know, is it -- it feels like
10 it's breaching a duty to the bankruptcy estate when it's in
11 the bankruptcy estate's best interest to get these documents
12 if you're meanwhile hiring lawyers for these other entities,
13 Holdco, et cetera, and saying, Fight this.

14 I never really pressed it very hard back then, but I
15 raised the issue and I said, I'm really, really concerned
16 about this. And I continue to be concerned about it. I had
17 experiences with Mr. Ellington in the *Acis* case where he
18 testified on the witness stand, and later it looked a heck of
19 a lot like he might have committed perjury. I hate to use
20 such blunt terms. But I let it go. I'm just like, you know,
21 I'm not going to -- you know, I'm going to just hope for the
22 best that he misspoke.

23 But I'm getting a really bad taste in my mouth about
24 Ellington and Leventon, and I hope that they will be careful
25 and you will be careful, Mr. Dondero, in future actions.

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MR. BONDS: Thank you, Your Honor.
(Proceedings concluded at 4:09 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling

01/11/2021

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

Exhibit 6

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

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In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Monday, February 8, 2021
) 9:00 a.m. Docket
Debtor.)
) BENCH RULING ON CONFIRMATION
) HEARING [1808] AND AGREED
) MOTION TO ASSUME [1624]
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz
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For James Dondero: D. Michael Lynn
John Y. Bonds, III
Bryan C. Assink
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Raleigh, NC 27609
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8 Recorded by:

Michael F. Edmond, Sr.
UNITED STATES BANKRUPTCY COURT
1100 Commerce Street, 12th Floor
Dallas, TX 75242
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Transcribed by:

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(972) 786-3063

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 least \$37.4 million" relating to alleged breached employment-
2 related agreements and for the tort of defamation arising from
3 a 2017 press release posted by the Debtor.

4 The Debtor and Patrick Daugherty recently announced a
5 settlement of the Patrick Daugherty claim in the amount of
6 \$750,000 cash on the effective date, an \$8.25 million general
7 unsecured claim, and a \$2.75 million subordinated claim.
8 Other aspects and details of this settlement are being
9 omitted.

10 Additionally, an entity known as HarbourVest, who invested
11 more than \$70 million with an entity in the Highland complex,
12 asserted a \$300 million proof of claim against Highland,
13 alleging, among other things, fraud and RICO violations. The
14 HarbourVest claim was settled during the bankruptcy case for a
15 \$45 million general unsecured claim and a \$35 million junior
16 claim.

17 Other than these claims just described, most of the other
18 claims in this case are claims asserted against the Debtor by
19 other entities in the Highland complex, most of which entities
20 the Court finds to be controlled by Mr. Dondero; claims of
21 employees who believe that they are entitled to large bonuses
22 or other types of deferred compensation; and claims of
23 numerous law firms that did work for Highland and were unpaid
24 for amounts due to them on the petition date.

25 Yet another reason this is not your garden-variety Chapter

1 that the Debtor filed shortly before the confirmation hearing
2 that, among other things, show the estimated distribution to
3 creditors and compare plan treatment to a likely disbursement
4 in a Chapter 7.

5 These do not constitute a materially adverse change to the
6 treatment of any creditors or interest holders. They merely
7 update likely distributions based on claims that have now been
8 settled, and they've otherwise incorporated more recent
9 financial data. This happens often before confirmation
10 hearings. The Court finds that it did not mislead or
11 prejudice any creditors or interest holders, and certainly
12 there was no need to resolicit the Plan.

13 The only Objectors to the Plan left at this time were Mr.
14 Dondero and entities that the Court finds are controlled by
15 him. The standing of these entities to object to the Plan
16 exists, but the remoteness of their economic interest is
17 noteworthy, and the Court questions the good faith of the
18 Objectors. In fact, the Court has good reason to believe that
19 these parties are not objecting to protect economic interests
20 they have in the Debtor, but to be disruptors.

21 Mr. Dondero wants his company back. This is
22 understandable. But it's not a good faith basis to lob
23 objections to the Plan. The Court has slowed down
24 confirmation multiple times on the current Plan and urged the
25 parties to talk to Mr. Dondero. The parties represent that

1 they have, and the Court believes that they have.

2 Now, to be specific about the remoteness of the objectors'
3 interests, the Court will address them each separately.

4 First, Mr. Dondero has a pending objection. Mr. Dondero's
5 only economic interest with regard to the Debtor at this point
6 is an unliquidated indemnification claim. And based on
7 everything this Court has heard, his indemnification claim
8 will be highly questionable at this juncture.

9 Second, a joint objection has been filed by the Dugaboy
10 Trust and the Get Good Trust. As for the Dugaboy Trust, it
11 was created to manage the assets of Mr. Dondero and his
12 family, and it owns a 0.1866 percent limited partnership
13 interest in the Debtor. The Court is not clear what economic
14 interest the Get Good Trust has, but it likewise seems to be
15 related to Mr. Dondero, and it has been represented to the
16 Court numerous times that the trustee is Mr. Dondero's college
17 roommate.

18 Another group of Objectors that has joined together in one
19 objection is what the Court will refer to as the Highland and
20 NexPoint Advisors and Funds. The Court understands they
21 assert disputed administrative expense claims against the
22 estate. While the evidence presented was that they have
23 independent board members that run these companies, the Court
24 was not convinced of their independence from Mr. Dondero.
25 None of the so-called independent board members of these

1 entities have ever testified before the Court. Moreover, they
2 have all been engaged with the Highland complex for many
3 years.

4 The witness who testified on these Objectors' behalves at
5 confirmation, Mr. Jason Post, their chief compliance officer,
6 resigned from Highland after more than twelve years in October
7 2020, at the same time that Mr. Dondero resigned or was
8 terminated by Highland. And a prior witness recently for
9 these entities whose testimony was made part of the record at
10 the confirmation hearing essentially testified that Mr.
11 Dondero controlled these entities.

12 Finally, various NexBank entities objected to the Plan.
13 The Court does not believe they have liquidated claims. Mr.
14 Dondero appears to be in control of these entities as well.

15 To be clear, the Court has allowed all of these objectors
16 to fully present arguments and evidence in opposition to
17 confirmation, even though their economic interests in the
18 Debtor appear to be extremely remote and the Court questions
19 their good faith. Specifically on that latter point, the
20 Court considers them all to be marching pursuant to the orders
21 of Mr. Dondero.

22 In the recent past, Mr. Dondero has been subject to a TRO
23 and preliminary injunction by the Bankruptcy Court for
24 interfering with the current CEO's management of the Debtor in
25 specific ways that were supported by evidence. Around the

1 under the All Writs Act, 28 U.S.C. § 1651. And additionally,
2 under the Bankruptcy Code, a bankruptcy court can issue any
3 order, including a civil contempt order, necessary or
4 appropriate to carry out the provisions of the Code, citing,
5 of course, 105 of the Bankruptcy Code.

6 The Fifth Circuit stated that, when considering whether to
7 enjoin future filings against a vexatious litigant, a
8 bankruptcy court must consider the circumstances of the case,
9 including four factors: (1) the party's history of
10 litigation; in particular, whether he has filed vexatious,
11 harassing, or duplicative lawsuits; (2) whether the party had
12 a good faith basis for pursuing the litigation, or perhaps
13 intended to harass; (3) the extent of the burden on the courts
14 and other parties resulting from the party's filings; and (4)
15 the adequacy of alternatives.

16 In the *Baum* case, the Fifth Circuit stated that the
17 traditional standards for injunctive relief -- *i.e.*,
18 irreparable harm and inadequate remedy at law -- do not apply
19 to the issuance of an injunction against a vexatious litigant.

20 Here, although I have not been asked to declare Mr.
21 Dondero and his affiliated entities as vexatious litigants *per*
22 *se*, it is certainly not beyond the pale to find that his long
23 history with regard to the major creditors in this case has
24 strayed into that possible realm, and thus this Court is
25 justified in approving this provision.

1 to win, I turned it off.

2 I'm sorry. That's terrible. You know, my law clerk, my
3 law clerk that you can't see, Nate, he is from Ann Arbor,
4 Michigan, University of Michigan, and he almost cried when I
5 said I didn't like Tom Brady the other day. So, I apologize.

6 MR. POMERANTZ: Your Honor, one other comment. We
7 had our motion to assume our nonresidential real property
8 lease that was also on. It got missed in all the fanfare, but
9 it was -- it has been unopposed and essentially done pursuant
10 to stipulation. So we'd like to submit an order on that as
11 well.

12 THE COURT: Okay. I have seen that, and I approve it
13 under 365. You may submit the order. Okay. Thank you.

14 MR. POMERANTZ: Thank you, Your Honor.

15 THE CLERK: All rise.

16 (Proceedings concluded at 10:35 a.m.)

17 --oOo--

18

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

02/09/2021

24

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

25

Exhibit 7

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Counsel for Highland Capital Management, L.P.

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

 In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

 HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT FUND
 ADVISORS, L.P., AND NEXPOINT ADVISORS,
 L.P.,

Defendants.

§
 § Chapter 11
 §
 § Case No. 19-34054-sgj11
 §
 §
 §
 § Adversary Proceeding No.
 §
 §
 §
 §
 §
 §
 §

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.



**PLAINTIFF HIGHLAND CAPITAL MANAGEMENT, L.P.’S
VERIFIED ORIGINAL COMPLAINT FOR DAMAGES
AND FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (“Plaintiff” or the “Debtor”), by its undersigned counsel, files this *Verified Original Complaint for Damages and for Declaratory and Injunctive Relief* (the “Complaint”) against defendants Highland Capital Management Fund Advisors, L.P. (“HCMFA”) and NexPoint Advisors, L.P. (“NPA,” and together with HCMFA, the “Defendants” or the “Advisors”), seeking damages and declaratory and injunctive relief pursuant to sections 105(a), 362, 542, and 1107 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 7001(7) and 7065 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of its Complaint, the Debtor alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT²

1. The Advisors serve as the investment manager, either directly or indirectly, to a number of investment vehicles (collectively, the “Funds”) regulated pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. Certain of the Funds are publicly traded and have thousands of retail investors who are at risk due to the Advisors’ deleterious conduct.

2. The Advisors are owned and controlled by James Dondero. Pursuant to certain Shared Services Agreements, the Debtor has historically provided back-office and middle-office services that enable the Advisors to manage the Funds. Although the Debtor is paid for these

² Capitalized terms not specifically defined in this Preliminary Statement shall have the meanings ascribed to them below.

services, providing the services requires the Debtor to maintain a full staff, the cost of which has historically caused substantial net losses to the Debtor.

3. Each of the Shared Services Agreements gives either party the unilateral right to terminate the respective Shared Services Agreement by providing prior written notice. On November 30, 2020, the Debtor provided written notice of its intent to terminate the Shared Services Agreements effective as of January 31, 2021.

4. The Termination Notices could not have come as a surprise to the Advisors because the Debtor was in bankruptcy and had been pursuing an “asset monetization” plan of reorganization that would leave it with a substantially scaled-down work force since at least August 2020. With that in mind, the Debtor began developing a plan pursuant to which the shared services would be transitioned to an entity that would be created, owned, and operated by certain of the Debtor’s employees who were expected to be terminated as part of the implementation of the Debtor’s Plan.

5. At the same time, the Debtor continued to provide the services required under the Shared Services Agreements – despite the Advisors being in substantial arrears with an outstanding amount due to the Debtor in excess of \$3 million – and otherwise continued in its attempts to transition those services in a smooth and orderly manner. Indeed, in order to give the Advisors more time to engage and complete the transition, the Debtor has extended the termination date on two occasions, with the current termination deadline being February 19, 2021.³

³ Although the Shared Services Agreement will terminate on February 19, 2021, the Debtor is willing to further extend the termination dates of the Shared Services Agreements through February 28, 2021, solely to prevent catastrophic harm to the retail investors in the Funds, but the Debtor will be unable to extend the termination date any further as the Debtor is expected to reduce its workforce at the end of February and will have insufficient personnel thereafter to perform under the Shared Services Agreements.

6. Regrettably, as described in more detail below, and notwithstanding the Debtor's best efforts to aid in the transition of services, the Advisors have willfully failed and refused to adopt and effectuate a transition plan, choosing instead to spend the last months threatening the Debtor and certain of its employees and seeking to deflect responsibility for their own wrongful conduct.

7. The status quo is untenable. The Debtor has the contractual right to terminate the Shared Services Agreements and has exercised that right. Pursuant to the Debtor's Plan, there will shortly be a substantial reduction in the Debtor's work force and the Debtor will be unable to provide services to the Advisors. The Advisors' failure to work with the Debtor or to otherwise develop a transition plan of their own has put thousands of retail investors at risk.

8. The Debtor is faced with an awful choice. It can either (a) exercise its rights to terminate the Shared Services Agreements to the detriment of the Funds and their investors, and be sucked into more litigation because of Mr. Dondero's conduct, or (b) attempt to provide services to the Advisors under the Shared Services Agreements at substantial losses and risk material delays in the implementation of the Debtor's Plan.

9. Therefore, in addition to seeking damages and declaratory relief, the Debtor is filing a separate emergency motion for a mandatory injunction compelling the Advisors to adopt and implement a transition plan by February 28, 2021, when the Debtor is expected to substantially reduce its workforce. In the absence of such a mandate, the Funds (together with their thousands of investors) and the Debtor will be irreparably harmed.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and § 1334(b). This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

12. This adversary proceeding is commenced pursuant to Bankruptcy Rules 7001 and 7065, Bankruptcy Code sections 105(a) and 362, 28 U.S.C. §§ 2201 and 2202, and applicable Delaware law.

THE PARTIES

13. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

14. Upon information and belief, HCMFA is a limited partnership with offices located in Dallas, Texas.

15. Upon information and belief, NPA is a limited partnership with offices located in Dallas, Texas.

CASE BACKGROUND

16. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"), Case No. 19-12239 (CSS) (the "Highland Bankruptcy Case").

17. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors with the following members: (a) Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS

AG London Branch, and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC.

18. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].⁴

19. The Debtor has continued to operate and manage its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in this chapter 11 case.

20. On November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the “Plan”).

21. On February 2 and 3, 2021, the Court conducted a confirmation hearing with respect to the Plan. [Docket No. 1808].

22. On February 8, 2021, the Court rendered an opinion in which it approved the Plan. [Docket No. 1924].

STATEMENT OF FACTS

A. The Debtor Has the Contractual Right to Terminate the Shared Services Agreements, and It Timely Exercised that Right

23. The Debtor is party to the Shared Services Agreements pursuant to which it has a contractual right of termination upon written notice.

The Debtor’s Shared Services Agreement with HCMFA

24. The Debtor and HCMFA are parties to that certain *Second Amended and Restated Shared Services Agreement*, effective as of February 8, 2013 (the “HCMFA Shared Services Agreement”), a copy of which is attached hereto as **Exhibit A**.

⁴ All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

25. Pursuant to section 2.01 of the HCMFA Shared Services Agreement and Annex A affixed thereto, the Debtor provides certain services to HCMFA that enable HCMFA to manage the Funds.

26. The HCMFA Shared Services Agreement was for a one-year term, subject to automatic one-year renewals “unless sooner terminated under Section 7.02.”

27. Section 7.02 of the Shared Services Agreement provides that “[e]ither Party may terminate this Agreement, with or without cause, upon at least 60 days advance written notice at any time prior to the expiration of the Term.”

28. On November 30, 2020, the Debtor provided written notice to HCMFA that it intended to terminate the HCMFA Shared Services Agreement as of January 31, 2021 (the “HCMFA Termination Notice”). A copy of the HCMFA Termination Notice is attached hereto as **Exhibit B**.

The Debtor’s Shared Services Agreement with NPA

29. The Debtor and NPA are parties to that certain *Amended and Restated Shared Services Agreement*, effective as of January 1, 2018 (the “NPA Shared Services Agreement” and together with the HCMFA Shared Services Agreement, the “Shared Services Agreements”), a copy of which is attached hereto as **Exhibit C**.

30. Pursuant to Article II of the NPA Shared Services Agreement, the Debtor provides certain services to NPA that enable NPA to manage the Funds.

31. The NPA Shared Services Agreement did not have a fixed term. Instead, section 7.01 provided that “[e]ither Party may terminate this Agreement at any time upon at least thirty (30) days’ written notice to the other.”

32. On November 30, 2020, the Debtor provided written notice to NPA that it intended to terminate the NPA Shared Services Agreement as of January 31, 2021 (the “NPA

Termination Notice” and together with the HCMFA Termination Notice, the “Termination Notices”). A copy of the NPA Termination Notice is attached hereto as **Exhibit D**.

B. Prior to Providing the Termination Notices, the Debtor Worked on a Transition Plan, but the Advisors Failed to Engage or Pay for Services Rendered

33. On August 12, 2020, after considering its strategic options, the Debtor filed an “asset monetization” plan of reorganization pursuant to which, in general, the Debtor proposed to reduce staff, reject certain contracts, and monetize its assets consistent with maximizing value for all stakeholders. [Docket No. 944].

34. Thus, at least as of that time, all stakeholders – including the Advisors – were on notice that the Debtor intended to continue operations on a scaled-down basis with the goal being an orderly monetization of assets.⁵

35. Consistent with that intent, the Debtor began formulating a plan for the transition of services provided under the Shared Services Agreements.

36. Specifically, beginning in the summer of 2020, the Debtor attempted to negotiate for the orderly transition of services with James Dondero, the individual who owns and controls each of the Advisors.

37. The Debtor’s proposal contemplated the transition of services to the Advisors from the Debtor to an entity that would be created, owned, and operated by certain of the Debtor’s employees (“NewCo”) who were expected to be terminated as part of the Debtor’s asset monetization plan.

⁵ Furthermore, on November 13, 2020, the Debtor filed its *Third Amended Plan of Reorganization of Highland Capital Management* [Docket No. 1383] (the “Third Amended Plan”). In its Third Amended Plan (and subsequent plans), the Debtor explicitly stated that it did not intend to continue providing services under the Shared Service Agreements precisely because they are money losers. Third Amended Plan, Art. IV.A (“[I]t is currently anticipated that neither the Reorganized Debtor nor the Claimant Trust will assume or assume and assign the contracts between the Debtor and certain Related Entities pursuant to which the Debtor provides shared services and sub-advisory services to those Related Entities. The Debtor believes that the continued provision of the services under such contracts will not be cost effective.”)

38. With Mr. Dondero in control, the Advisors never provided any constructive response to the Debtor's proposal. Indeed, Mr. Dondero specifically informed the Debtor that he intended to make the transition difficult for the apparent purpose of creating leverage in plan negotiations.

39. In addition to failing to engage in any process designed to provide for the orderly transition of services, the Advisors also failed to pay the Debtor for the services provided under the Shared Services Agreement.

40. Since the Petition Date, each of the Advisors has failed to meet certain of its payment obligations under the Shared Services Agreements. For the period between the Petition Date and January 31, 2021, (a) HCMFA owes the Debtor \$2,121,276 for services rendered under the HCMFA Shared Services Agreement, and (b) NPA owes the Debtor \$932,977 for services rendered under the NPA Shared Services Agreement. These amounts exclude amounts owed for services provided prior to the Petition Date.

41. The Debtor loses significant money providing services under the Shared Services Agreements, which is why it publicly stated its intention in the Third Amended Plan (and each subsequent amendment and modification to the Plan) not to assume or assume and assign them. While that is bad enough, the Advisors failure to pay for services previously rendered is a blatant breach of the Agreements.

C. The Debtor Offers to Extend the Termination Date to Avoid a Catastrophe and Attempts to Engage the Funds' Board to Aid in the Adoption of a Transition Plan

42. Instead of engaging in the process, the Advisors and certain of their employees were more focused on threatening the Debtor and its employees, all in a transparent effort to deflect responsibility for their own obstinate and wrongful conduct.

43. With the January 31, 2021 termination date fast approaching, and with the Advisors continuing to fail to work cooperatively on a transition plan, the Debtor took the initiative and offered to extend the termination date by two weeks (i) in order to avoid catastrophic consequences for the Funds and their investors that would result from an abrupt termination, and (ii) in the hope that the Advisors would use the extended time to finally and constructively engage.

44. Thus, on January 29, 2021, the parties executed an agreement extending the termination date to February 14, 2021 in exchange for the Advisors paying in advance for services to be rendered by the Debtor during that two-week period. A copy of the January 29, 2021, agreement is attached hereto as **Exhibit E**.

45. During the two-week period, the Debtor and its employees and professionals made every effort to bring the issue of the transition of services to a resolution. Among other things, the Debtor continued to refine the proposal for the transition of services to NewCo.

46. The Debtor also attempted to get the attention of the Funds' Boards because it was concerned that the Boards were either uninformed, not engaged, or were under the influence and control of Mr. Dondero.

47. Among other communications, James P. Seery, Jr., the Debtor's Chief Executive Officer, sent formal written communications to the Board of Directors for the Funds on January 27, 2021, February 8, 2021, and February 12, 2021.⁶ Copies of Mr. Seery's letters are attached hereto as **Exhibits F, G and H**, respectively.

48. Despite the efforts of certain of the Advisors' professionals, and despite the Debtor's willingness to make all reasonable concessions on a transition agreement, Mr. Dondero

⁶ Mr. Seery's formal correspondence was in addition to his informal correspondence and communications with the Funds' Board and the substantial communications between counsel to the Debtor, the Advisors, and the Funds.

and the Advisors have refused to “say yes” or to otherwise take steps to formulate a transition plan for the protection of the Funds and their investors.

49. Faced with an untenable situation, the Debtor again agreed to extend the termination date, this time to February 19, 2021. *See Exhibit I.*

50. Finally, on February 16, 2021, the Debtor made its last attempt to reach an agreement before being forced to take alternative actions to protect itself, the Funds, and investors, by sending the Advisors a proposed term sheet (the “Term Sheet”) that provided a reasonable transition plan. A copy of the Term Sheet is attached as **Exhibit J**. The Advisors refused to agree to the terms thereunder.

51. Given that the Court will soon enter an order confirming the Debtor’s Plan, and the reduction in the Debtor’s work force will follow soon thereafter, the Debtor will be unable to provide services to the Advisors much longer. The Advisors’ failure to agree on or formulate a transition plan is creating catastrophic risk for the Funds and their investors. The Advisors’ failure to plan for a transition is also creating material risk to the Debtor.

FIRST CLAIM FOR RELIEF

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

52. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

53. A bona fide, actual, present dispute exists between the Debtor and the Advisors concerning their respective rights and obligations under the Shared Services Agreements.

54. A judgment declaring the parties’ respective rights and obligations will resolve their disputes.

55. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- Each of the Advisors is owned and controlled by Mr. Dondero;
- The Debtor has the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice;
- The Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice;
- The Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement (or otherwise) will terminate on February 19, 2021;
- The Debtor has the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice;
- The Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice; and
- The Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement (or otherwise) will terminate on February 19, 2021.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

56. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

57. The Shared Services Agreements are valid and binding contracts.

58. The Debtor has fully performed all obligations under the Shared Services Agreements.

59. The Advisors have breached the Shared Services Agreements by failing to pay for certain services rendered by the Debtor to the Advisors under the Shared Services Agreements.

60. The Advisors have failed to pay the Debtor all amounts due and owing under the Shared Services Agreements despite the Debtor's demands.

61. The Advisors' breach of the Shared Services Agreements has damaged the Debtor in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(For Injunctive Relief -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7065)

62. The Debtor repeats and realleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

63. Pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065, the Debtor seeks a mandatory injunction directing the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo or any other entity of the Advisors' choosing.

64. Bankruptcy Code section 105(a) authorizes the Court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

65. Bankruptcy Rule 7065 incorporates by reference Rule 65 of the Federal Rules of Civil Procedure and authorizes the Court to issue injunctive relief in adversary proceedings.

66. The Debtor will succeed on the merits of its claims for (a) a declaratory judgment that it has the contractual right to terminate each of the Shared Services Agreements, that it properly exercised those rights, and that, effective February 19, 2021, it has no further legal or equitable obligation to provide any services to the Advisors; (b) damages for breach of contract; and (c) for a mandatory injunction requiring the Advisors to adopt and implement a plan for the orderly transition of shared services.

67. The Advisors' failure to adopt and implement a transition plan is untenable because – as the Advisors have known for months – the Debtor will soon be unable to provide services under the Shared Services Agreements, and such willful misconduct and gross

negligence will cause irreparable harm to the Funds and their investors and to the Debtor and its estate.

68. Given that (a) the Advisors were on notice since at least August 2020, that the Debtor was unlikely to provide services under the Shared Services Agreement for an extended period of time; (b) the Debtor has been pursuing a transition plan since the summer of 2020; (c) the Third Amended Plan filed on November 13, 2020 (and each subsequent version of the Plan), expressly stated that the Debtor would not assume or assume and assign the Shared Services Agreements; (d) the Debtor timely provided notice of termination of the Shared Services Agreements on November 30, 2020; (e) upon information and belief, the Advisors (and not the Debtor) owe contractual and other duties to the Funds, the entities most at risk; and (f) the Debtor has acted in good faith by, among other things, twice extending the anticipated termination date, the balance of the equities strongly favors the Debtor.

69. Finally, the public interest virtually requires that the Advisors be directed to adopt and implement a transition plan. In the absence of a mandatory injunction, thousands of retail investors are likely to suffer catastrophic losses, and there will likely be substantial market disruptions with unforeseeable consequences.

70. Based on the foregoing, the Debtor requests that the Court direct the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021.

PRAYER

WHEREFORE, the Debtor prays for judgment as follows:

- On the First Cause of Action, a judgment declaring that: (i) each of the Advisors is owned and controlled by Mr. Dondero; (ii) the Debtor has the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice; (iii) the Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice; (iv) the Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement (or otherwise) will terminate on February 19, 2021; (v) the Debtor has the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice; (vi) the Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice; and (vii) the Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement (or otherwise) will terminate on February 19, 2021.
- On the Second Cause of Action, damages in an amount to be determined at trial arising from the Advisors' breach of the Shared Services Agreements;
- On the Third Cause of Action, a mandatory injunction directing the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021; and
- For such other and further relief as this Court deems just and proper.

Dated: February 17, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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Ira D. Kharasch (CA Bar No. 109084)
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-and-

HAYWARD PLLC

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Counsel for Plaintiff Highland Capital Management, L.P.

VERIFICATION

I have read the foregoing VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF and know its contents.

- .. I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

- I am the Chief Executive Officer and Chief Restructuring Officer of Highland Capital Management, L.P., the Plaintiff in this action, and am authorized to make this verification for and on behalf of the Plaintiff, and I make this verification for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

- .. I am one of the attorneys of record for _____, a party to this action. Such party is absent from the county in which I have my office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct as of this 17th day of February 2021.

/s/ James P. Seery, Jr.
James P. Seery, Jr.

Exhibit 8

This matter having come before the Court on the *Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. 2] (the “Motion”)² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession in the above-captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff in the above-captioned adversary proceeding, and this Court having considered (i) the Motion; (ii) *Plaintiff Highland Capital Management, L.P.’s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief* [Docket No. 1] (the “Complaint”); (iii) the arguments and law cited in the Debtor’s *Memorandum of Law in Support of its Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. 3] (the “Memorandum of Law,” and together with the Motion and Complaint, the “Debtor’s Papers”); (iv) the *Objection to Mandatory Injunction and Brief in Support Thereof* [Docket No. 20] (the “Objection”), filed on February 22, 2021, by the Advisors; (v) the testimonial and documentary evidence admitted into evidence during the hearing held on February 23, 2021 (the “Hearing”), including the credibility of witnesses Mr. James P. Seery, Jr., Mr. James Dondero, and Mr. Dustin Norris; and (vi) the arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding³ pursuant to 28 U.S.C. § 157(b)(2);

² Capitalized terms used but not herein defined shall have the meanings ascribed to such terms in the Motion.

³ The court orally stated at the hearing that, at a minimum, there is bankruptcy subject matter jurisdiction in this action, since: (a) there is a conceivable effect on the bankruptcy estate being administered (i.e., the pre-confirmation test for bankruptcy subject matter jurisdiction), since there is a risk of potential liability or regulatory actions being pursued against the estate, if the Debtor does not obtain relief in this action, and, also (b) the outcome of this action could bear on the interpretation, implementation, and execution of a confirmed plan (i.e., the post-confirmation test for bankruptcy subject matter jurisdiction). The court also concluded, upon further analysis, that the action should be deemed to present a “core” matter, with regard to which the bankruptcy court may issue final orders and exercise Constitutional authority, since, among other things, the relief sought is, in essence, supplemental to the confirmation order and in furtherance of implementation of the confirmed plan. See 11 U.S.C. § 1142(b). In all events, should this order ever be subject to an appeal, and the District Court concludes that “noncore” matters are involved, the bankruptcy

and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate and that no other notice need be provided; and upon all of the proceedings had before this Court, the legal and factual bases set forth in the Debtor's Papers, and the evidence submitted at the Hearing; and after due deliberation and sufficient cause appearing therefor, and for the reasons set forth in the record on this Motion, the Court makes the following findings of fact:

1. Each of the Advisors is controlled by Mr. Dondero.
2. The Debtor had the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice.
3. The Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice.
4. The HCMFA Shared Services Agreement and the Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement terminated on February 19, 2021.
5. The Debtor had the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice.
6. The Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice.
7. The NPA Shared Services Agreement and the Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement terminated on February 19, 2021.

court requests that the District Court regard this ruling as a *proposed* set of findings, conclusions and order from the bankruptcy court and that the District Court adopt this ruling, pursuant to 28 U.S.C. § 157(c)(1).

8. Except as expressly set forth herein, effective as of February 19, 2021, the Debtor has no obligation to provide any services, software, or assistance to any of HCMFA, NPA, the Funds, or any servicer or personnel retained by any of HMCFA, NPA, or the Funds.

9. As of February 20, 2021, each of HCMFA and NPA had adopted an operating plan to obtain or provide all services previously provided by the Debtor that are necessary to fully perform under their agreements with the Funds without the aid or assistance of the Debtor.

10. Except as expressly set forth herein, as of February 20, 2021, neither HCMFA nor NPA needs any services, including contractual arrangements and software, previously provided by the Debtor or its employees under the Shared Services Agreements that are necessary to fully perform under their agreements with the Funds.

11. On or prior to February 28, 2021, the Advisors will promptly provide the Debtor with written notice of the documents, data, and books and records (collectively, the “Data”) that the Advisors’ believe constitute their property. If the Debtor in reasonable good faith determines such Data is the Advisors’ property, the Debtor will take reasonable efforts to provide the Advisors with a copy of such Data. **Subject to paragraph 13 below, on and prior to February 28, 2021, each party will bear its own costs and expenses associated with the copying of the Data.** Under no circumstances will the Debtor be required to erase or otherwise remove any Data from the Debtor’s systems. For the avoidance of doubt, the Debtor will have no obligation to provide any Data that constitutes the Debtor’s privileged, confidential, or proprietary information.

12. Subject to paragraph 14, the Debtor will have no obligation to provide any Data to the Advisors after February 28, 2021. If the Debtor in reasonable good faith cannot satisfy any request for Data made pursuant to paragraph 11 by the close of business on February 28, 2021, the Debtor will have no further obligation to provide such Data.

13. The Debtor will not be required to incur any *material* time, cost, or expense in furtherance of its obligations set forth in paragraph 11—**the Advisors’ witness having represented to the court that the copying and/or transfer of the Data would be fairly easy to achieve and that the Advisors stood by ready to receive the Data.** To the extent any requests require material time, cost, or expense, the Debtor may petition this Court for the payment of any fees, costs, or expenses incurred in connection with the fulfillment of its obligations under paragraph 11 (including the cost of such petition) and shall have no obligation to provide such Data until the Court has ruled on such petition.

14. If the Debtor cannot in reasonable good faith provide requested Data by February 28, 2021, or if the Advisors request any Data after February 28, 2021, and in each case if the parties cannot agree on the propriety of such request after conferring in good faith, the Advisors may petition this Court for access to such Data. Regardless, the Advisors will bear any and all costs associated with any requests for Data and the delivery of such Data under this paragraph.

15. Notwithstanding anything herein to the contrary, the delivery of Data to the Advisors will not constitute a waiver of any privileges, including attorney-client privilege, or any confidentiality requirements.

16. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

17. Based on the foregoing, the Motion is dismissed as moot.

End of Order

Exhibit 9

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

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In Re:)	Case No. 19-34054-sgj-11
)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	Dallas, Texas
	)	Tuesday, February 23, 2021
Debtor.	)	9:00 a.m. Docket
<hr/>		
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Adversary Proceeding 20-3190-sgj
)	
Plaintiff,	)	PLAINTIFF'S MOTION FOR ORDER
v.	)	REQUIRING JAMES DONDERO TO
JAMES D. DONDERO,)	SHOW CAUSE WHY HE SHOULD NOT
)	BE HELD IN CIVIL CONTEMPT FOR
Defendant.)	VIOLATING THE TRO [48]
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HIGHLAND CAPITAL MANAGEMENT, L.P.,)	Adversary Proceeding 21-3010-sgj
)	
Plaintiff,)	DEBTOR'S EMERGENCY MOTION FOR
v.	)	MANDATORY INJUNCTION REQUIRING
HIGHLAND CAPITAL MANAGEMENT	)	THE ADVISORS TO ADOPT AND
FUND ADVISORS, L.P.,)	IMPLEMENT A PLAN FOR THE
et al.,)	TRANSITION OF SERVICES BY
)	FEBRUARY 28, 2021 [2]
Defendants.)	
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX/TELEPHONIC APPEARANCES:

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APPEARANCES, cont'd.:

For the Debtor/Plaintiff: John A. Morris
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Recorded by: Michael F. Edmond, Sr.
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1100 Commerce Street, 12th Floor
Dallas, TX 75242
(214) 753-2062

Transcribed by: Kathy Rehling
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Shady Shores, TX 76208
(972) 786-3063

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 to really say anything lest I get myself in trouble. But I
2 thank you for your time today.

3 THE COURT: All right. Well, they are what they are,
4 and I hope we're not in an argument about that down the road.
5 But it seems like my hopes are always dashed when I want
6 things to be worked out.

7 I don't want you to think my calm demeanor means I am a
8 happy camper. I am not. I am beyond annoyed. I mean, I
9 can't even begin to guesstimate how many wasted hours were
10 spent on the drafting Option A, Option B. Wait. Let me pull
11 up the exact words. Mr. Norris confirming, We withdrew Option
12 B after the Debtor accepted it.

13 I mentioned fee-shifting once before in a different
14 context, and, of course, we haven't even gotten to the motion
15 for a show cause order declaring Mr. Dondero in contempt. I
16 don't know if the lawyers fully appreciate how this looks.
17 Mr. Rukavina, you said that I have formed opinions that you
18 don't think are fair and made comments about vexatious
19 litigation and whatnot. But while I continue, I promise you,
20 to have an open mind, it is days like this that make me come
21 out with statements that Mr. Dondero, repeating his own words,
22 apparently, he's going to burn the house down if he doesn't
23 get his baby back.

24 I mean, it seems so obviously transparent that he's just
25 driving the legal fees up. It's as though he doesn't want the

1 creditors to get anything, is the way this looks. If he wants
2 me to have a different impression, then he needs to start
3 behaving differently. I mean, I can't even imagine how many
4 hundreds of thousands of dollars of legal fees were probably
5 spent the past two weeks on Option A, Option B, and all the
6 different sub-agreements and whatnot. And as recently as
7 Friday afternoon, the K&L Gates lawyer saying we have a deal,
8 and then, oh, wait, maybe not, maybe we do, maybe we don't.
9 And then Mr. Dondero acting like he had no clue what the K&L
10 Gates lawyers were saying as far as we have a deal. And Mr.
11 Norris distancing himself from having seen any of that, and I
12 didn't have power. You know, I'm sure he had a cell phone,
13 like the rest of us, that gets emails. I'm making a
14 supposition. I shouldn't make that. But it just feels like
15 sickening games.

16 And again, if this keeps on, if this keeps on, one day,
17 one day, there may be an enormous attorney fee-shifting order.
18 And, of course, I would have to find bad faith, and I wouldn't
19 be surprised at all if I get there.

20 So I don't know if Mr. Dondero is listening. I suspect,
21 if he is, he doesn't care much. But I am --

22 MR. DONDERO: I'm on the line, Judge.

23 THE COURT: Okay.

24 MR. DONDERO: I'm on the line.

25 THE COURT: I'm glad you're on the line. I cannot

1 overstate how very annoyed I am by hearing all these hours of
2 testimony and to feel like none of it was necessary. None of
3 it was necessary. Okay? There could have been a consensual
4 deal --

5 MR. DONDERO: Judge, you have to pay attention --
6 Judge, you have to pay attention to what's going on, okay?

7 THE COURT: I am --

8 MR. DONDERO: When I was president of Highland, --

9 THE COURT: -- razor-sharp focused on what is going
10 on. Okay? I read every piece of paper. I listen to every
11 sentence of testimony. And what is going on --

12 MR. DONDERO: Okay. How about this, Your Honor?

13 THE COURT: -- is an enormous waste of parties and
14 lawyer time and resources. People need to get their eye on
15 the ball. Well, certain people do have their eye on the ball,
16 but certain people do not. Okay? So we're done. You've got
17 your divorce now. Okay? And if the operating plan is all
18 shored up, as Mr. Norris testified, it sounds like you're in
19 good shape. All right?

20 Mr. Morris, I'll look for the order from you.

21 MR. MORRIS: Thank you, Your Honor.

22 THE CLERK: All rise.

23 (Pause.)

24 THE COURT: Oh, Michael?

25 (Court confers with Clerk.)

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THE CLERK: All rise.
(Proceedings concluded at 4:23 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling

02/24/2021

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

Exhibit 10

1 WEBEX APPEARANCES:

2 For the Get Good Trust
3 and Dugaboy Investment
4 Trust:

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19 Parties:

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Transcribed by:

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311 Paradise Cove
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(972) 786-3063

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 cost, \$70 million of notes get forgiven? How is that
2 possible? How is that possible? It doesn't pass the good
3 faith test. The Court should deny the motion.

4 Thank you, Your Honor.

5 THE COURT: Mr. Morris, in all of your listing of
6 allegedly problematic things, one trail my brain was going
7 down is this: Is this adversary going to morph even further
8 to add fraudulent transfer allegations? I mean, if notes --

9 MR. MORRIS: Here's the --

10 THE COURT: -- were forgiven or agreements were made
11 --

12 MR. MORRIS: Yeah, I --

13 THE COURT: -- that they would be forgiven if, you
14 know, assets are sold at a dollar more than cost, is the
15 Debtor going to say, well, okay, if this is an agreement,
16 there was a fraudulent transfer?

17 MR. MORRIS: Your Honor, that is an excellent
18 question, one which I was discussing with my partners just
19 this morning. You know, we have to -- we're balancing a
20 number of things on our side, including the delay that that
21 might entail; including, you know, what happens if we go down
22 that path. You know, the benefit of suing under the notes, of
23 course, is that he's contractually obligated to pay all of our
24 fees.

25 And so we're balancing all of those things as these -- as

1 THE COURT: Well, one of the reasons I'm asking is I
2 would not set the motion to withdraw the reference status
3 conference on an expedited basis, which I was asked to do a
4 few days ago in these two adversary proceedings, and I can't
5 remember when I've set it, but now I'm even worried, if I
6 grant this motion, is it going to be premature to have that
7 status conference in a month or so, whenever I've set it,
8 because if I grant this motion I'm wondering, am I going to
9 have your motion to amend to add fraudulent transfer claims?
10 It's -- you know, I want to give as complete a package to the
11 District Court as I can whenever I have that motion to
12 withdraw the reference.

13 All right. Ms. Drawhorn, back to you. As I said --

14 MS. DRAWHORN: Yes.

15 THE COURT: -- before inviting Mr. Morris to make his
16 argument, I know the law is very much on your clients' favor
17 as far as the law construing Rule 15(a). But my goodness, I'm
18 wondering if your client needs -- your client needs to be
19 careful what they're asking for here, after what I've just
20 heard.

21 Anyway, what -- you get the last word on this.

22 MS. DRAWHORN: Yes. Thank you, Your Honor. My
23 response is that Mr. Morris's argument was all on the merits
24 of the defenses, and certainly he is free to argue on the
25 merits, but that's not a determination for today and that's

1 THE COURT: Please upload an order, Ms. Drawhorn,
2 granting your motion with these specific requirements that
3 I've orally worked in.

4 I think clients need to be careful what they ask for. I'm
5 very concerned. And I know it was just argument and I'll hear
6 evidence, but of all of the things that I guess -- well, I'm
7 concerned about a lot of things, but do we have audited
8 financial statements that didn't disclose these agreements
9 with regard to --

10 MR. MORRIS: Yes, Your Honor.

11 THE COURT: I mean, that's -- I'm just -- you know,
12 there's a lot to be concerned about on that point alone, I
13 would think. But, all right. If there's nothing further, we
14 are adjourned. Thank you.

15 THE CLERK: All rise.

16 (Proceedings concluded at 11:58 a.m.)

17 --oOo--

18

19 CERTIFICATE

20 I certify that the foregoing is a correct transcript from
21 the electronic sound recording of the proceedings in the
above-entitled matter.

22 **/s/ Kathy Rehling**

06/12/2021

23

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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Exhibit 11

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 2405397) (*admitted pro hac vice*)
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Counsel for Highland Capital Management, L.P.

**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.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Adversary Proceeding No.
Plaintiff,	§	
vs.	§	<u>21-03007</u>
HCRE PARTERS, LLC (N/K/A/ NEXPOINT REAL ESTATE PARTNERS, LLC, <u>JAMES DONDERO, NANCY DONDERO, AND</u>	§	

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.

DUGABOY INVESTMENT TRUST

~~Defendant~~Defendants.

**AMENDED COMPLAINT FOR (I) BREACH OF CONTRACT,
~~AND (II) TURNOVER OF PROPERTY OF THE DEBTOR'S ESTATE, (III)
FRAUDULENT TRANSFER, AND (IV) BREACH OF FIDUCIARY DUTY~~**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff (the “Plaintiff”) in the above-captioned adversary proceeding (the “Adversary Proceeding”), by its undersigned counsel, as and for its amended complaint (the “Complaint”) against ~~defendant~~defendants HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) (“HCRE” ~~or “Defendant~~), James Dondero (“Mr. Dondero”), Nancy Dondero (“Ms. Dondero”), and Dugaboy Investment Trust (“Dugaboy” and together with HCRE, Mr. Dondero, and Ms. Dondero, the “Defendants”), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against ~~HCRE as a result of~~Defendants in connection with HCRE’s defaults under (i) four demand notes, in the aggregate principal amount of \$4,250,000, and payable upon the Debtor’s demand, and (ii) one term note, in the aggregate principal amount of \$6,059,831.51, payable in the event of default, all executed by HCRE in favor of the Debtor. HCRE has failed to pay amounts due and owing under the notes and the accrued but unpaid interest thereon.

2. In paragraph 58 of HCRE’s First Amended Answer to Plaintiff’s Complaint [Docket No. 34], HCMS contends that the Debtor orally agreed to relieve it of the

obligations under the Notes (as defined below) upon fulfillment of “conditions subsequent” (the “Alleged Agreement”). HCRE further contends that the Alleged Agreement was entered into between James Dondero and his sister, Nancy Dondero, as representative of a majority of the Class A shareholders of the Plaintiff, including Dugaboy (the “Representative”), acting on behalf of the Debtor. At the time Mr. Dondero entered into the Alleged Agreement on behalf of HCRE, he controlled both HCRE and the Debtor and was the lifetime beneficiary of Dugaboy.

3. Based on its books and records, discovery to date, and other facts, the Debtor believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the Notes.

4. Nevertheless, the Debtor amends its Complaint to add certain claims and name additional parties who would be liable to the Debtor if the Alleged Agreement were determined to exist and be enforceable. Specifically, in addition to pursuing claims against HCMS for breach of its obligations under the Notes and for turnover, the Debtor adds alternative claims (a) against HCMS for actual fraudulent transfer and aiding and abetting Dugaboy in its breach of fiduciary duty, (b) against Dugaboy for declaratory relief and for breach of fiduciary duty, and (c) against Nancy Dondero for aiding and abetting Dugaboy in the breach of his fiduciary duties.

5. ~~2. Through this Complaint~~As remedies, the Debtor seeks (a) damages from HCRE in an amount equal to (i) the aggregate outstanding principal due under the Notes (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor’s costs of collection (including all court costs and reasonable attorneys’ fees and expenses, as provided for in the notes), for HCRE’s breach of its obligations

under the Notes, and (b) turnover by HCRE to the Debtor of the foregoing amounts; (c) avoidance of the Alleged Agreement and the transfers thereunder and recovery of the funds transferred from the Plaintiff to, or for the benefit of, HCRE pursuant to the Notes; (d) declaratory relief, and (e) damages arising from the Defendants' breach of fiduciary duties or aiding and abetting thereof.

JURISDICTION AND VENUE

6. ~~3.~~ This adversary proceeding arises in and relates to the Debtor's case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court") under chapter 11 of the Bankruptcy Code.

7. ~~4.~~ The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

8. ~~5.~~ This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. ~~6.~~ Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

10. ~~7.~~ The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

11. ~~8.~~ Upon information and belief, HCRE is a limited liability company with offices located in Dallas, Texas, and is organized under the laws of the state of Delaware.

12. Upon information and belief, Mr. Dondero is an individual residing in Dallas, Texas. He is the co-founder of the Debtor and was the Debtor's President and Chief

Executive Officer until his resignation on January 9, 2020. At all relevant times, Mr. Dondero controlled HCRE; Mr. Dondero also controlled the Debtor until January 9, 2020.

13. Upon information and belief, Dugaboy is (a) a limited partner of the Debtor, and (b) one of Mr. Dondero's family investment trusts for which is he a lifetime beneficiary.

14. Upon information and belief, Nancy Dondero is an individual residing in the state of Florida and who is Mr. Dondero's sister, and a trustee of Dugaboy.

CASE BACKGROUND

15. ~~9.~~ On October 16, 2019, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"), Case No. 19-12239 (CSS) (the "Highland Bankruptcy Case").

16. ~~10.~~ On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the "Committee") with the following members: (a) Redeemer Committee of Highland Crusader Fund ("Redeemer"), (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) ~~the Defendants~~, Acis LP and Acis GP Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

17. On June 25, 2021, the U.S. Trustee in this Court filed that certain *Notice of Amended Unsecured Creditors' Committee* [Docket No. 2485] notifying the Court that Acis and Redeemer had resigned from the Committee.

18. ~~11.~~ On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

² All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

19. ~~12.~~ The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. The HCRE Demand Notes

20. ~~13.~~ HCRE is the maker under a series of demand notes in favor of the Debtor.

21. ~~14.~~ Specifically, on November 27, 2013, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$100,000 (“HCRE’s First Demand Note”). A true and correct copy of HCRE’s First Demand Note is attached hereto as **Exhibit 1.**

22. ~~15.~~ On October 12, 2017, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$2,500,000 (“HCRE’s Second Demand Note”). A true and correct copy of HCRE’s Second Demand Note is attached hereto as **Exhibit 2.**

23. ~~16.~~ On October 15, 2018, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$750,000 (“HCRE’s Third Demand Note”). A true and correct copy of HCRE’s Third Demand Note is attached hereto as **Exhibit 3**

24. ~~17.~~ On September 25, 2019, HCRE executed a demand note in favor of the Debtor, as payee, in the original principal amount of \$900,000 (“HCRE’s Fourth Demand Note,” and collectively, with HCRE’s First Demand Note, HCRE’s Second Demand Note, and HCRE’s Third Demand Note, the “Demand Notes”). A true and correct copy of HCRE’s Fourth Demand Note is attached hereto as **Exhibit 4.**

25. ~~18.~~ Section 2 of the Demand Notes provide: “**Payment of Principal and Interest.** The accrued interest and principal of this Note shall be due and payable on demand of the Payee.”

26. ~~19.~~ Section 4 of the Demand Notes provide:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

27. ~~20.~~ Section 6 of the Demand Notes provide:

Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

B. HCRE’s Defaults Under Each Demand Note

28. ~~21.~~ By letter dated December 3, 2020, the Debtor made demand on HCRE for payment of the Demand Note Repayment Amount by December 11, 2020 (the “Demand Letter”). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 5**. The Demand Letter provides:

By this letter, Payee is demanding payment of the accrued interest and principal due and payable on the Notes in the aggregate amount of \$5,012,260.96, which represents all accrued interest and principal through and including December 11, 2020.

Payment is due on December 11, 2020, and failure to make payment in full on such date will constitute an event of default under the Notes.

Demand Letter (emphasis in the original).

29. ~~22.~~ Despite the Debtor's demand, HCRE did not pay all or any portion of the amount demanded by the Debtor on December 11, 2020, or at any time thereafter.

30. ~~23.~~ As of December 11, 2020, there was an outstanding principal amount of \$171,542 on HCRE's First Demand Note and accrued but unpaid interest in the amount of \$526.10, resulting in a total outstanding amount as of that date of \$172,068.10.

31. ~~24.~~ As of December 11, 2020, there was an outstanding principal balance of \$3,149,919.12 on HCRE's Second Demand Note and accrued but unpaid interest in the amount of \$41,423.60, resulting in a total outstanding amount as of that date of \$3,191,342.72.

32. ~~25.~~ As of December 11, 2020, there was an outstanding principal balance of \$874,977.53 on HCRE's Third Demand Note and accrued but unpaid interest in the amount of \$10,931.23, resulting in a total outstanding amount as of that date of \$885,908.76.

33. ~~26.~~ As of December 11, 2020, there was an outstanding principal balance of \$750,279.14 on HCRE's Fourth Demand Note and accrued but unpaid interest in the amount of \$12,662.24, resulting in a total outstanding amount as of that date of \$762,941.38.

34. ~~27.~~ Thus, as of December 11, 2020, the total outstanding principal and accrued but unpaid interest due under the Demand Notes was \$5,012,260.96.

35. ~~28.~~ Pursuant to Section 4 of each Note, each Note is in default, and is currently due and payable.

C. The HCRE Term Note

36. ~~29.~~ HCRE is the maker under a term note in favor of the Debtor.

37. ~~30.~~ Specifically, on May 31, 2017, HCRE executed a term note in favor of the Debtor, as payee, in the original principal amount of \$6,059,831 (the "Term Note," and together with the Demand Notes, the "Notes"). A true and correct copy of the Term Note is attached hereto as **Exhibit 6**.

38. ~~31.~~ Section 2 of the Term Note provides: “**Payment of Principal and**

Interest. Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the “**Annual Installment**”) until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the “**Maturity Date**”).

39. ~~32.~~ Section 3 of the Term Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

40. ~~33.~~ Section 4 of the Term Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

41. ~~34.~~ Section 6 of the Term Note provides:

Attorneys’ Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys’ fees and expenses incurred by the holder hereof.

D. HCRE's Default Under the Term Note

42. ~~35.~~ HCRE failed to make the payment due under the Term Note on December 31, 2020.

43. ~~36.~~ By letter dated January 7, 2021, the Debtor made demand on HCRE for immediate payment under the Term Note (the "Second Demand Letter"). A true and correct copy of the Second Demand Letter is attached hereto as **Exhibit 7**. The Demand Letter provides:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$6,145,466.84; however, interest continues to accrue under the Note.

The Term Note is in default, and payment is due immediately.

Second Demand Letter (emphasis in the original).

44. ~~37.~~ Despite the Debtor's demands, HCRE did not pay the amount demanded by the debtor on January 7, 2021, or at any time thereafter.

45. ~~38.~~ As of January 8, 2021, the total outstanding principal and accrued but unpaid interest under the Term Note was 6,145,466.84.

46. ~~39.~~ Pursuant to Section 4 of the Term Note, the Note is in default, and is currently due and payable.

E. The Debtor Files the Original Complaint

47. On January 22, 2021, the Debtor filed the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate* [Docket No. 1] (the "Original Complaint"). In the Original Complaint, the Debtor brought claims for (i) breach of contract for HCRE's breach of its obligations under the Notes and (ii) turnover by HCRE for the outstanding amounts under the Notes, plus all accrued and unpaid interest until the date of payment plus the Debtor's costs of collection and reasonable attorney's fees.

E. HCRE's Affirmative Defenses

48. On March 13, 2021, HCMS filed *Highland Capital Management Services, Inc.'s Answer to Plaintiff's Complaint* [Docket No. 6] (the "Original Answer"). In its Original Answer, HCMS asserted four affirmative defenses: (i) the claims are barred in whole or in part under the doctrines of justification or repudiation, (ii) waiver, (iii) estoppel, and (iv) offset and/or setoff (the "Setoff Defense"). See *id.* ¶¶ 55-58.

49. On June 11, 2021, HCRE filed its *First Amended Answer to Plaintiff's Complaint* [Docket No. 34] (the "Amended Answer"), that omitted the Setoff Defense but asserted two affirmative defenses: (i) the Debtor previously agreed that it would not collect on the Notes "upon fulfillment of conditions subsequent" (*i.e.*, the Alleged Agreement) *id.* ¶ 58, and (ii) the Notes are "ambiguous," *id.* ¶ 59.

50. According to HCRE, the Alleged Agreement was orally entered into "sometime between December of the year each note was made and February of the following year."

51. According to HCRE, Mr. Dondero, acting on its behalf, entered into the Alleged Agreement with his sister, Nancy Dondero, acting as the Representative.

52. Mr. Dondero controlled the Debtor at the time he entered into the Alleged Agreement on behalf of HCRE.

53. Upon information and belief, the Debtor's books and records do not reflect the Alleged Agreement.

G. Dugaboy Lacked Authority to Act on Behalf of the Debtor

54. Under section 4.2 of the *Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.* (the "Limited Partnership Agreement"), and attached hereto as **Exhibit 8**, Dugaboy was not authorized to enter into the

Alleged Agreement on behalf of the Partnership, or otherwise bind the Partnership (as “Partnership” is defined in the Limited Partnership Agreement).

55. Section 4.2(b) of the Limited Partnership Agreement states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

Exhibit 8, § 4.2(b).

56. No provision in the Limited Partnership Agreement authorizes any of the Partnership’s limited partners to bind the Partnership.

57. Nancy Dondero also lacked authority to enter into the Alleged Agreement or to otherwise bind the Debtor.

FIRST CLAIM FOR RELIEF
(Against HCRE)

(For Breach of Contract)

58. ~~40.~~ The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

59. ~~41.~~ Each Note is a binding and enforceable contract.

60. ~~42.~~ HCRE breached each Demand Note by failing to pay all amounts due to the Debtor upon the Debtor’s demand.

61. ~~43.~~ HCRE breached the Term Note by failing to pay all amounts due to the Debtor upon HCRE’s default and acceleration.

62. ~~44.~~ Pursuant to each Note, the Debtor is entitled to damages from HCRE in an amount equal to (i) the aggregate outstanding principal due under each Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the

Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for HCRE's breach of its obligations under each of the Notes.

63. ~~45.~~ As a direct and proximate cause of HCRE's breach of each Demand Note, the Debtor has suffered damages in the amount of at least \$5,012,260.96, as of December 11, 2020, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

64. ~~46.~~ As a direct and proximate cause of HCRE's breach of the Term Note, the Debtor has suffered damages in the amount of at least \$6,145,466.84, as of January 8, 2021, plus an amount equal to all accrued but unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF

(Against HCRE)

(Turnover by HCRE Pursuant to 11 U.S.C. § 542(b))

65. ~~47.~~ The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

66. ~~48.~~ HCRE owes the Debtor an amount equal to (i) the aggregate outstanding principal due under each of the Notes, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for HCRE's breach of its obligations under each of the Notes

67. ~~49.~~ Each Demand Note is property of the Debtor's estate and the amounts due under each Demand Note is matured and payable upon demand.

68. ~~50.~~ The Term Note is property of the Debtor's estate and the amounts due under the Term Note is matured and payable upon default and acceleration.

69. ~~51.~~ The Debtor has made demand for turnover of the amounts due under each of the Notes.

70. ~~52.~~ As of the date of filing this Complaint, HCRE has not turned over to the Debtor all or any of the amounts due under each of the Notes.

71. ~~53.~~ The Debtor is entitled to the turnover of all amounts due under each of the Notes.

THIRD CLAIM FOR RELIEF

(Against HCRE)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550)

72. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

73. The Debtor made the transfers pursuant to the Alleged Agreement within two years of the Petition Date.

74. Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with actual intent to hinder, delay, or defraud a present or future creditor, demonstrated by, *inter alia*:

(a) The transfers were made to, or for the benefit of, HCRE, an insider of the Debtor.

(b) Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with his sister, Nancy Dondero.

(c) Mr. Dondero did not inform the Debtor's CFO or outside auditors about the Alleged Agreement.

(d) The Debtor's books and record do not reflect the Alleged Agreement.

(e) The Alleged Agreement was not subject to negotiation.

(f) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

75. The pattern of conduct, series of transactions, and general chronology of events under inquiry in connection with the debt HCRE incurred under the Notes demonstrates a scheme of fraud.

76. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from HCRE.

77. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer thereunder, and (ii) recovering from HCRE an amount equal to all obligations remaining under the Notes.

FOURTH CLAIM FOR RELIEF

(Against HCRE)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

78. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

79. The Debtor made the transfers pursuant to the Alleged Agreement after, or within a reasonable time before, creditors' claims arose.

80. Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with actual intent to hinder, delay, or defraud a present or future creditor of the Debtor, demonstrated by, *inter alia*:

(g) The transfers were made to, or for the benefit of, HCRE, an insider of the Debtor.

(h) Mr. Dondero entered into the Alleged Agreement on behalf of HCRE with his sister, Nancy Dondero.

(i) Mr. Dondero did not inform the Debtor's CFO or outside auditor's about the Alleged Agreement.

(j) Upon information and belief, the Debtor's books and record do not reflect the Alleged Agreement.

(k) The Alleged Agreement was not subject to negotiation.

(l) The value of the consideration received by the Debtor for the transfers was not reasonably equivalent in value.

81. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from HCRE.

82. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer thereunder, and (ii) recovering from HCRE an amount equal to all obligations remaining under the Notes.

FIETH CLAIM FOR RELIEF

(Against Dugaboy and Ms. Dondero)

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

83. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

84. A bona fide, actual, present dispute exists between the Debtor, on the one hand, and Dugaboy and Ms. Dondero on the other hand, concerning whether Dugaboy and/or Ms.

Dondero, acting as the Representative, were authorized to enter into the Alleged Agreement on the Debtor's behalf.

85. A judgment declaring the parties' respective rights and obligations will resolve their dispute.

86. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement.
- (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership.
- (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and
- (d) the Alleged Agreement is null and void.

SIXTH CLAIM FOR RELIEF

(Against Dugaboy and Ms. Dondero)

(Breach of Fiduciary Duty)

87. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

88. If Dugaboy, as a limited partner, or Ms. Dondero, as Representative, had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero would owe the Debtor a fiduciary duty.

89. If Dugaboy or Ms. Dondero (as Representative) had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero breached their fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.

90. Accordingly, the Debtor is entitled to recover from Dugaboy and Ms. Dondero (a) actual damages that the Debtor suffered as a result of their breach of fiduciary duty, and (b) for punitive and exemplary damages.

SEVENTH CLAIM FOR RELIEF

(Against James Dondero and Nancy Dondero)

(Aiding and Abetting a Breach of Fiduciary Duty)

91. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

92. James Dondero and Nancy Dondero (together, the “Donderos”) were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor.

93. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

94. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duty to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

95. Accordingly, the Donderos are jointly and severally liable (a) for the actual damages that the Debtor suffered as a result of aiding and abetting Dondero's breaches of fiduciary duties, and (b) for punitive and exemplary damages.

WHEREFORE, the Debtor prays for judgment as follows:

(i) On its First Claim for Relief, damages in an amount to be determined at trial but includes (a) the aggregate outstanding principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's cost of collection (including all court costs and reasonable attorneys' fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by HCRE to the Debtor of an amount equal to (a) the aggregate principal due under each Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's cost of collection (including all court costs and reasonable attorneys' fees and expenses);

(iii) On its Third Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement arising from actual fraudulent transfer under section 548 of the Bankruptcy Code;

(iv) On its Fourth Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement of funds arising from actual fraudulent transfer under Tex. Bus. & C. Code § 24.005(a)(1);

(v) On its Fifth Claim for Relief, a declaration that: (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business,

transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement, (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership, (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and (d) the Alleged Agreement is null and void;

(vi) On its Sixth Claim for Relief, actual damages from Dugaboy and Ms. Dondero, in an amount to be determined at trial, that Debtor suffered as a result of their breach of fiduciary duty, and for punitive and exemplary damages;

(vii) On its Seventh Claim for Relief, actual damages from the Donderos, jointly and severally, in an amount to be determined at trial, that Debtor suffered as a result of aiding and abetting Dugaboy's breaches of fiduciary duty, and for punitive and exemplary damages; and

(iii) Such other and further relief as this Court deems just and proper.

Dated: ~~January 18, July~~, 2020~~2021~~

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Description	DOCS_NY-#42002-v5-HCRE_Complaint
Rendering set	Standard

Legend:	
Insertion	
Deletion	
Moved from	
Moved to	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	239
Deletions	67
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	306

Exhibit 12



South Texas
COLLEGE OF LAW
— HOUSTON —
PRIVATE AND INDEPENDENT
SINCE 1923.

May 28, 2021

Michael Aigen, Esq.
Stinson LLP
3102 Oak Lawn Avenue
Suite 777
Dallas, TX 75219

Re: Cause No. 19-34054-SGJ-11, Adversary No. 21-03003, *Highland Capital Management, L.P. v. James D. Dondero*, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division

Dear Mr. Aigen:

In response to your request, I am writing to provide my views on whether loans made by Highland Capital Management, L.P. (Highland Capital) to your client, James Dondero, were properly structured to have the potential to be deferred compensation such that they would not have caused Mr. Dondero to have income for federal income tax purposes when the loans were made but rather only when and if forgiven. I understand that this issue has arisen in the adversary proceeding brought by Highland Capital against Mr. Dondero in the matter referenced above.

As discussed in more detail below, I conclude that the loans between Highland Capital and Mr. Dondero would not have caused Mr. Dondero to have income from the discharge of indebtedness for federal income tax purposes when made, or even when the conditions for forgiveness were agreed upon, but rather only when and if the loans are actually forgiven.

Documents Reviewed

For purposes of preparing this report, I reviewed the following documents, which you provided to me:

1. The complaint filed by Highland Capital in the adversary proceeding referenced above.
2. The amended answer filed by Mr. Dondero in the adversary proceeding referenced above.
3. The promissory note dated February 2, 2018, signed by Mr. Dondero in which he promised to pay to Highland Capital \$3,825,000.
4. The promissory note dated August 1, 2018, signed by Mr. Dondero in which he promised to pay to Highland Capital \$2,500,000.
5. The promissory note dated August 13, 2018, signed by Mr. Dondero in which he promised to pay to Highland Capital \$2,500,000.

Qualifications

I am a Professor of Law at South Texas College of Law Houston, where I have been a member of the faculty since 1997. Prior to joining the faculty at South Texas, I was a visiting professor for one year in the Graduate Tax Program at the University of Florida Levin College of Law. I

Michael Aigen, Esq.

Stinson, LLP

May 28, 2021

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have also held a visiting appointment at Loyola University Chicago School of Law. Over the last twenty-four years I have taught a wide variety of tax courses and have written extensively in the area of federal taxation. I regularly give presentations on federal taxation at conferences around the country.

Prior to teaching, I was an associate at the law firm of Covington & Burling in Washington, DC, for five years, where I practiced in the area of federal taxation.

My curriculum vitae, which lists all of my publications, is attached as an appendix.

Previous Experience as an Expert Witness

I have been designated as an expert in the following four cases. I have testified by deposition in the first matter and testified both by deposition and at trial in the second matter. I have not testified by deposition or at trial in the third or fourth matter:

1. Cause No. 2014-10394A, *Lion Polymers, LLC v. Lion Copolymer Holdings LLC*, in the 190th Judicial District Court, Harris County, Texas.
2. Cause No. D-1-GN-19-007155, *Conagra Brands, Inc. v. Glenn Hegar, Comptroller of Public Accounts*, in the 345th Judicial District Court, Travis County, Texas.
3. Cause No. D-1-GN-18-004006, *Equistar Chemicals, LP v. Glenn Hegar, Comptroller of Public Accounts*, in the 126th Judicial District Court, Travis County, Texas.
4. Cause No. D-1-GN-20-002649, *Hibernia Energy, LLC v. Glenn Hegar, Comptroller of Public Accounts*, in the 261st Judicial District Court, Travis County, Texas.

Compensation

I am being compensated for my work in this matter at the following rates: \$150 per hour for travel time; \$250 per hour for research, consulting with counsel, or providing any work related to this report; and \$350 per hour for testimony by deposition or at trial.

Assumed Facts

You have asked me to assume the following facts:

1. Mr. Dondero signed the three promissory notes mentioned earlier (the Notes), which are payable to Highland Capital upon the demand of Highland Capital.
2. Subsequent to Mr. Dondero's execution of the Notes, but before Highland Capital made demand for payment of the Notes, Highland Capital and Mr. Dondero entered into an oral agreement (the Subsequent Agreement).
3. In the Subsequent Agreement between Highland Capital and Mr. Dondero, Highland Capital agreed that it would not collect on the Notes unless certain conditions (the Conditions) could not be satisfied. In other words, Highland Capital agreed that the loans will be forgiven only if the Conditions are satisfied.
4. Whether the Conditions are satisfied was not and is not within Mr. Dondero's control because they included the condition that certain portfolio company assets be sold above cost or in a manner outside Mr. Dondero's control.
5. The Conditions have not yet been satisfied.

Michael Aigen, Esq.

Stinson, LLP

May 28, 2021

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Analysis

When a person receives funds and has an obligation to repay them, as in the case of a typical loan, the obligation to repay prevents the person from having income for federal income tax purposes as a result of receiving the funds. *See, e.g., Commissioner v. Tufts*, 461 U.S. 300, 307 (1983) (“When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer.”)

If a borrower’s obligation to repay is subsequently reduced or eliminated, then the borrower has income from the discharge of indebtedness. The loan proceeds are not retroactively included in the borrower’s income in the year the borrower received the loan proceeds; instead, the borrower has income from the discharge of indebtedness in the year in which (and to the extent to which) the borrower’s obligation to repay is reduced or eliminated. This is reflected in Internal Revenue Code (IRC) § 61(a)(11), which provides that a taxpayer’s gross income includes “income from the discharge of indebtedness.”

In this case, the proceeds of the loans represented by the Notes were not includible in the income of Mr. Dondero for federal income tax purposes. This is because, as reflected in the Notes, Mr. Dondero had an obligation to repay these loan proceeds.

When Mr. Dondero and Highland Capital entered into the Subsequent Agreement, Mr. Dondero again did not have income from the discharge of indebtedness. This is because Mr. Dondero’s obligation to repay remained in effect. Pursuant to the Subsequent Agreement, Highland Capital agreed to cancel the loans represented by the Notes only if and when the Conditions are satisfied. Whether the Conditions are satisfied is not within Mr. Dondero’s control.

The issue presented by the Subsequent Agreement is analogous to the issue considered by the U.S. Supreme Court in *Commissioner v. Indianapolis Power & Light Co.*, 493 U.S. 203 (1990). In that case, the Court considered whether a utility company had to include in gross income deposits it required from customers with bad credit to assure prompt payment of future bills. The Court concluded that the amounts in question were not included in the income of the utility. In reaching this conclusion, the Court stated:

[T]hese deposits were acquired subject to an express “obligation to repay,” either at the time service was terminated or at the time a customer established good credit. So long as the customer fulfills his legal obligation to make timely payments, his deposit ultimately is to be refunded, and both the timing and method of that refund are largely within the control of the customer.

...

... The key is whether the taxpayer has some guarantee that he will be allowed to keep the money. IPL’s receipt of these deposits was accompanied by no such guarantee.

Id. at 209-10. In the same way, Mr. Dondero had an obligation to repay the loan proceeds represented by the Notes, and his obligation to repay remained in effect after the Subsequent Agreement. In the Subsequent Agreement, Highland Capital agreed to cancel the debts

represented by the Notes in the future only if and when the Conditions are satisfied. In other words, Highland Capital's agreement to cancel the debts represented by the Notes is conditional, and Mr. Dondero has no guarantee that he will be allowed to keep the loan proceeds in question.

In summary: (1) the proceeds of the loans represented by the Notes were not includible in the income of Mr. Dondero for federal income tax purposes because Mr. Dondero had an obligation to repay them, and (2) the Subsequent Agreement in which Highland Capital agreed to cancel the debts represented by the Notes if and when the Conditions are satisfied did not cause Mr. Dondero to have income from the discharge of indebtedness because Highland Capital's agreement to cancel the debts was conditional and did not eliminate Mr. Dondero's obligation to repay the loan proceeds.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. McGovern". The signature is written in a cursive style with some stylized flourishes.

Bruce A. McGovern
Professor of Law and Director, Tax Clinic

APPENDIX

BRUCE A. MCGOVERN

EDUCATION

- University of Florida Levin College of Law** Gainesville, FL
- LL.M. (Taxation), 1996.
- Fordham University School of Law** New York, NY
- J.D. *cum laude*, 1989.
 - Managing Editor, *Fordham Law Review*.
- Columbia University, Columbia College** New York, NY
- B.A. (Religion), 1984.
- New School for Social Research** New York, NY
- Freshman Year Program, 1980-1981

EXPERIENCE

- South Texas College of Law Houston** Houston, TX
- Professor of Law*, August 2003–present
Director, Low-Income Taxpayer Clinic, August 2016–present
Vice President and Associate Dean of Academic Administration, 2007-2017
Associate Professor of Law, April 2000–August 2003
Assistant Professor of Law, August 1997–April 2000
- Teach and write in the areas of federal taxation and business organizations.
 - Courses: Agency & Partnership, Corporations, Corporate Taxation, Federal Income Taxation, Federal Tax Procedure, Partnership & Subchapter S Taxation, U.S. Taxation of International Transactions.
 - As Associate Dean of Academic Administration:
 - Served as a member of the College’s senior administration. Duties included general oversight, establishing policies, and strategic planning.
 - Oversaw areas of Admissions, Career Resources and Financial Aid. Responsible for administering annually more than \$2.5 million in scholarships and grants and more than \$30 million in student loans.
- McGovern Tax Services, LLC** Katy, TX
- Co-Managing Member*, September 2017–present
- Prepare individual federal and state income tax returns and provide tax consulting services.
- Loyola University Chicago School of Law** Chicago, IL
- Visiting Professor*, January 2006–May 2006
- Courses: International Taxation and Corporate & Partnership Taxation.
- University of Florida Levin College of Law** Gainesville, FL
- Visiting Assistant Professor of Law*, August 1996–August 1997
- Taught courses in both the Graduate Tax Program and the J.D. curriculum.
 - Courses: Federal Income Taxation and Legal Accounting (both in the J.D. curriculum) and Federal Tax Research and Advanced Corporate Taxation (both in the Graduate Tax Program).

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EXPERIENCE (CONTINUED)

Professor Daniel J. Lathrope

Gainesville, FL

Graduate Assistant, August 1995–July 1996

- Prepared draft chapter on tax treatment of affiliated corporations (e.g., section 482 and consolidated tax returns) for new edition of widely used casebook on corporate taxation. Provided comments and revisions for other chapters.

Covington & Burling

Washington, DC

Associate (Tax), October 1990–August 1995

- Provided advice to clients on a wide range of federal tax issues, including advice related to litigation settlements and environmental cleanups, corporate reorganizations, compliance with tax accounting rules, and the taxation of life insurance companies and products.
- Duties included providing transactional advice, commenting on proposed Treasury regulations, seeking IRS private letter rulings and technical advice, and negotiating settlements in IRS administrative appeals.

The Hon. Thomas J. Meskill, U.S. Court of Appeals, Second Circuit

Judicial Clerk, August 1989–August 1990

PUBLICATIONS

Books:

Federal Income Taxation of Individuals (3d ed. Thomson Reuters 2003 and Supp. 2021) (with Boris I. Bittker, Martin J. McMahon, Jr., and Lawrence A. Zelenak)

Agency, Partnerships and Limited Liability Companies (2d ed. Carolina Academic Press 2013) (with Gary S. Rosin and Michael L. Closen)

Book Chapters:

Chapters in Consolidated Groups, CCH Tax Research Consultant (electronic treatise) (Chicago, IL: Commerce Clearing House, Tax Research Network, 2006):

- Overview of Consolidated Returns
- Factors to Consider in Determining Whether Eligible Corporations Should File a Consolidated Return
- Eligibility to File a Consolidated Return
- Election to File a Consolidated Return
- Electing to Discontinue Filing a Consolidated Return
- Tax Years, Methods of Accounting, and Related Issues
- Estimated Tax Payments
- Tentative Carryback Adjustments

Articles:

Recent Developments in Federal Income Taxation: The Year 2020, 74 *The Tax Lawyer* ____ (2021) (with Cassidy V. Brewer and James M. Delaney) (forthcoming).

Recent Developments in Federal Income Taxation: The Year 2019, 73 *The Tax Lawyer* 501 (2020) (with Cassidy V. Brewer and James M. Delaney).

Recent Developments in Federal Income Taxation: The Year 2018, 72 *The Tax Lawyer* 695 (2019) (with Cassidy V. Brewer).

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Articles (cont'd):

Recent Developments in Federal Income Taxation: The Year 2017, 71 *The Tax Lawyer* 725 (2018) (with Cassady V. Brewer).

Recent Developments in Federal Income Taxation: The Year 2016, 20 *Florida Tax Rev.* 131 (2017) (with Martin J. McMahon, Jr.).

Recent Developments in Federal Income Taxation: The Year 2015, 18 *Florida Tax Rev.* 275 (2016) (with Martin J. McMahon, Jr.).

Recent Developments in Federal Income Taxation: The Year 2014, 17 *Florida Tax Rev.* 97 (2015) (with Martin J. McMahon, Jr. and Ira B. Shepard).

Liabilities of the Firm, Member Guaranties, and the At Risk Rules: Some Practical and Policy Considerations, 7 *J. Small & Emerging Bus. L.* 63 (2003) (now *Lewis & Clark L. Rev.*).

Fiduciary Duties, Consolidated Returns, and Fairness, 81 *Neb. L. Rev.* 170 (2002).

An Obituary of the Federal Estate Tax, 43 *Ariz. L. Rev.* 625 (2001) (with M.C. Mirow).

The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform, 65 *Mo. L. Rev.* 797 (2000).

Tax Aspects of Environmental Liabilities and Insurance Recoveries, 7 *Mealey's Litigation Reports (Insurance)* No. 23, at 21 (Apr. 20, 1993) (with William M. Paul).

PRESENTATIONS

Recent Developments in Federal Income Taxation (selected presentations)

- Oregon Tax Institute, Jun. 2021 (virtual presentation with Cassady V. Brewer and James M. Delaney).
- Virginia Conference on Federal Taxation, Jun. 2021 (virtual presentation with Cassady V. Brewer and James M. Delaney).
- Houston IRS-CPA Society, May 2021 (virtual presentation).
- Univ. of North Carolina Tax Institute, Apr. 2021 (virtual presentation with Cassady V. Brewer).
- Florida Tax Institute, Feb. 2021 (virtual presentation with Cassady V. Brewer).
- State Bar of Texas, Tax Law in a Day, Feb. 2021 (virtual presentation).
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas, Dec. 2020 (webcast panel presentation).
- Oklahoma Tax Institute, Dec. 2020 (virtual presentation).
- Tennessee Federal Tax Conference, Nov. 2020 (virtual presentation).
- Tulane Tax Institute, Nov. 2020 (virtual presentation).
- Montana Tax Institute, Oct. 2020 (virtual presentation with James M. Delaney).
- Oregon Tax Institute, Sept. 2020 (virtual presentation with Cassady V. Brewer and James M. Delaney).
- State Bar of New Mexico Tax Symposium, Sept. 2020 (virtual presentation).
- Houston Bar Association Section of Taxation, Sept. 2020 (virtual presentation).
- State Bar of Texas, Tax Law 2020, Aug. 2020 (virtual presentation).
- Texas Society of CPAs Tax Summit, Aug. 2020 (virtual presentation).
- Virginia Conference on Federal Taxation, Jun. 2020 (virtual presentation with Cassady V. Brewer and James M. Delaney).
- Houston IRS-CPA Society, Apr. 2020 (virtual presentation).
- Dallas Bar Association Section of Taxation, Dallas, Texas, Mar. 2020.
- Florida Tax Institute, Tampa, Florida, Feb. 2020.

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PRESENTATIONS (CONT'D)

Recent Developments in Federal Income Taxation (selected presentations)

- State Bar of Texas, Tax Law in a Day, Houston, Texas, Feb. 2020.
- ABA Section of Taxation Midyear Meeting, Boca Raton, Florida, Feb. 2020 (with Elaine Gagliardi and James M. Delaney).
- Houston Tax Roundtable, Houston, Texas, Jan. 2020.
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas, Dec. 2019 (webcast panel presentation).
- Tennessee Federal Tax Conference, Franklin, Tennessee, Nov. 2019.
- Tulane Tax Institute, New Orleans, Louisiana, Nov. 2019.
- Texas Society of CPAs Tax Institute, Dallas and San Antonio, Texas, Nov. 2019.
- Kansas Society of CPAs Tax Institute, Wichita, Kansas, Nov. 2019.
- Austin CPA Chapter Annual Tax Conference, Austin, Texas, Nov. 2019.
- Montana Tax Institute, Missoula, Montana, Oct. 2019.
- Southern Federal Tax Institute, Atlanta, Georgia, Oct. 2019 (with Cassady V. Brewer).
- State Bar of New Mexico Tax Symposium, Albuquerque, NM, Sept. 2019.
- State Bar of Texas, Annual Meeting, Austin, Texas, Jun. 2019 (with Cassady V. Brewer).
- Oregon Tax Institute, Portland, Oregon, Jun. 2019.
- Virginia Conference on Federal Taxation, Charlottesville, Virginia, Jun. 2019).
- Tax Alliance Conference, Plano, Texas, Jun. 2019.
- Univ. of North Carolina Tax Institute, Chapel Hill, North Carolina, Apr. 2019 (with Cassady V. Brewer).
- Houston IRS-CPA Society, Houston, Texas, Apr. 2019.
- Dallas Bar Association Section of Taxation, Dallas, Texas, Apr. 2019.
- Houston Bar Association Section of Taxation, Houston, Texas, Mar. 2019.
- Florida Tax Institute, Tampa, Florida, Feb. 2019 (with Cassady V. Brewer).
- State Bar of Texas, Tax Law in a Day, Dallas, Texas, Jan. 2019.
- ABA Section of Taxation Midyear Meeting, New Orleans, Louisiana, Jan. 2019 (with Elaine Gagliardi and Philip Hackney).
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas, Dec. 2018 (webcast panel presentation).
- Oklahoma Tax Institute, Oklahoma City, Oklahoma, Nov. 2018.
- Tennessee Federal Tax Conference, Franklin, Tennessee, Nov. 2018 (with Cassady V. Brewer).
- University of Texas Tax Conference, Austin, Texas, Nov. 2018.
- Austin CPA Chapter Annual Tax Conference, Austin, Texas, Nov. 2018.
- Capital of Texas Enrolled Agents Seminar, Austin, Texas, Nov. 2018.
- Tulane Tax Institute, New Orleans, Louisiana, Nov. 2018.
- Southern Federal Tax Institute, Atlanta, Georgia, Oct. 2018 (with Cassady V. Brewer).
- Montana Tax Institute, Missoula, Montana, Oct. 2018 (with Cassady V. Brewer).
- State Bar of New Mexico Tax Symposium, Albuquerque, NM, Sept. 2018.
- State Bar of Texas Advanced Tax Law Course, Dallas, Texas, Aug. 2018.
- Oregon Tax Institute, Portland, Oregon, Jun. 2018.

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PRESENTATIONS (CONTINUED)

Recent Developments in Federal Income Taxation (selected presentations)

- Virginia Conference on Federal Taxation, Charlottesville, Virginia, Jun. 2018 (with Cassady V. Brewer).
- Tax Alliance Conference, Plano, Texas, Jun. 2018.
- Dallas Bar Association Section of Taxation, Dallas, Texas, April 2018.
- Univ. of North Carolina Tax Institute, Chapel Hill, North Carolina, Apr. 2018 (with Cassady V. Brewer).
- Houston IRS-CPA Society, Houston, Texas, Apr. 2018.
- Florida Tax Institute, Tampa, Florida, Feb. 2018 (with Cassady V. Brewer).
- Houston Bar Association Section of Taxation, Houston, Texas, Feb. 2018.
- ABA Section of Taxation Midyear Meeting, San Diego, California, Feb. 2018 (with Cassady V. Brewer and Elaine Gagliardi).
- State Bar of Texas, Tax Law in a Day, Houston, Texas, Feb. 2017.
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas, Dec. 2017 (webcast panel presentation).
- Oklahoma Tax Institute, Tulsa, Oklahoma, Dec. 2017.
- University of Texas Tax Conference, Austin, Texas, Dec. 2017.
- Austin Tax Study Group, Austin, Texas, Dec. 2017
- ABA Section of Taxation Low Income Taxpayer Representation Workshop, Washington, DC, Dec. 2017 (with Eric Benson and The Hon. Peter J. Panuthos)
- Tennessee Federal Tax Conference, Franklin, Tennessee, Nov. 2017 (with Cassady V. Brewer).
- Texas Society of CPAs Tax Institute, Richardson, Texas, Nov. 2017.
- Tulane Tax Institute, New Orleans, Louisiana, Nov. 2017.
- Austin CPA Chapter Annual Tax Conference, Austin, Texas, Nov. 2017.
- Chattanooga Tax Seminar (Elliot Davis Decosimo), Chattanooga, TN, Nov. 2017.
- Capital of Texas Enrolled Agents Seminar, Austin, Texas, Nov. 2017.
- Montana Tax Institute, Missoula, Montana, Nov. 2017 (with Martin J. McMahon, Jr.)
- Southern Federal Tax Institute, Atlanta, Georgia, Sept. 2017 (with Cassady V. Brewer).
- State Bar of New Mexico Tax Symposium, Albuquerque, NM, Sept. 2017.
- ABA Section of Taxation Fall Meeting, Austin, TX, Sept. 2017 (with Eric Benson, Rochelle Hodes, The Hon. Peter J. Panuthos, and Christine Speidel)
- State Bar of Texas Advanced Tax Law Course, Houston, Texas, Aug. 2017.
- Houston Tax Roundtable, Houston, Texas, Sept. 2017.
- Virginia Conference on Federal Taxation, Charlottesville, Virginia, Jun. 2017.
- Tax Alliance Conference, Plano, Texas, Jun. 2017.
- Oregon Tax Institute, Portland, Oregon, Jun. 2017.
- ABA Section of Taxation May Meeting, Washington, DC, May 2017 (with Kelley Miller and Caleb Smith)
- Univ. of North Carolina Tax Institute, Chapel Hill, North Carolina, Apr. 2017.
- Houston IRS-CPA Society, Houston, Texas, Apr. 2017.
- Dallas Bar Association Section of Taxation, Dallas, Texas, April 2017.
- Florida Tax Institute, Tampa, Florida, Mar. 2017 (with Martin J. McMahon, Jr.).

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PRESENTATIONS (CONTINUED)

Recent Developments in Federal Income Taxation (selected presentations)

- Houston Bar Association Section of Taxation, Houston, Texas, Mar. 2017.
- State Bar of Texas, Tax Law in a Day, Dallas, Texas, Feb. 2017.
- ABA Section of Taxation Midyear Meeting, Orlando, Florida, Jan. 2017 (with Martin J. McMahon, Jr. and Elaine Gagliardi).
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas, Dec. 2016 (webcast panel presentation).
- Oklahoma Tax Institute, Norman, Oklahoma, Dec. 2016.
- University of Texas Tax Conference, Austin, Texas, Dec. 2016.
- Tennessee Federal Tax Conference, Franklin, Tennessee, Nov. 2016 (with Martin J. McMahon, Jr.).
- Texas Society of CPAs Tax Institute, Addison & San Antonio, Texas, Nov. 2016.
- Tulane Tax Institute, New Orleans, Louisiana, Nov. 2016.
- Austin CPA Chapter Annual Tax Conference, Austin, Texas, Nov. 2016.
- Chattanooga Tax Seminar (Elliot Davis Decosimo), Chattanooga, TN, Nov. 2016.
- Capital of Texas Enrolled Agents Seminar, Austin, Texas, Nov. 2016.
- State Bar of Texas Advanced Tax Law Course, Austin, Texas, Oct. 2016.
- State Bar of New Mexico Tax Symposium, Albuquerque, NM, Sept. 2016.
- Southern Federal Tax Institute, Atlanta, Georgia, Sept. 2016 (with Martin J. McMahon, Jr.).
- Houston Tax Roundtable, Houston, Texas, Sept. 2016.
- Texas Association of Certified Public Accountants, Houston, Texas, Aug. 2016.
- Am. Institute on Federal Taxation Conference, Birmingham, Alabama, Jun. 2016.
- Oregon Tax Institute, Portland, Oregon, Jun. 2016.
- Univ. of North Carolina Tax Institute, Chapel Hill, North Carolina, Apr. 2016.
- Houston IRS-CPA Society, Houston, Texas, Apr. 2016.
- Florida Tax Institute, Tampa, Florida, Mar. 2016 (with Martin J. McMahon, Jr.).
- Dallas Bar Association Section of Taxation, Dallas, Texas, Mar. 2016. State Bar of Texas, Tax Law in a Day, Houston, Texas, Feb. 2016.
- ABA Section of Taxation Midyear Meeting, Los Angeles, California, Jan. 2016 (with Martin J. McMahon, Jr. and Elaine Gagliardi).
- Houston Bar Association Section of Taxation, Houston, Texas, Jan. 2016.
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas Dec. 2015 (webcast panel presentation).
- Oklahoma Tax Institute, Tulsa, Oklahoma, Dec. 2015.
- University of Texas Tax Conference, Austin, Texas, Dec. 2015.
- Tennessee Federal Tax Conference, Franklin, Tennessee, Nov. 2015 (with Martin J. McMahon, Jr.).
- Austin CPA Chapter Annual Tax Conference, Austin, Texas, Nov. 2015.
- State Bar of Texas Advanced Tax Law Course, Houston, Texas, Oct. 2015.
- Tulane Tax Institute, New Orleans, Louisiana, Oct. 2015.
- Southern Federal Tax Institute, Atlanta, Georgia, Oct. 2015 (with Martin J. McMahon, Jr. and Ira B. Shepard).

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PRESENTATIONS (CONTINUED)

Recent Developments in Federal Income Taxation (selected presentations)

- Houston Tax Roundtable, Sept. 2015.
- State Bar of New Mexico Tax Symposium, Albuquerque, New Mexico, Aug. 2015.
- Tax Alliance Conference, Plano, Texas, Jun. 2015.
- Oregon Tax Institute, Portland, Oregon, Jun. 2015.
- Dallas Bar Association Section of Taxation, Dallas, Texas, May 2015.
- University of North Carolina Tax Institute, Chapel Hill, North Carolina, Apr. 2015.
- Florida Tax Institute, Tampa, Florida, Apr. 2015 (with Martin J. McMahon, Jr.).
- Houston IRS-CPA Society, Houston, Texas Apr. 2015.
- Houston Bar Association Section of Taxation, Houston, Texas, Mar. 2015.
- State Bar of Texas, Tax Law in a Day, Dallas, Texas, Feb. 2015.
- ABA Section of Taxation Midyear Meeting, Houston, Texas, Jan. 2015 (with Martin J. McMahon, Jr. and Elaine Gagliardi).
- Texas Society of CPAs Tax Expo, Arlington, Houston, and San Antonio, Dec. 2014.
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas Dec. 2014 (webcast panel presentation).
- University of Texas Tax Conference, Austin, Texas, Dec. 2014 (with Martin J. McMahon, Jr.).
- Tennessee Federal Tax Conference, Franklin, Tennessee, Nov. 2014 (with Martin J. McMahon, Jr.).
- Tulane Tax Institute, New Orleans, Louisiana, Oct. 2014.
- Southern Federal Tax Institute, Atlanta, Georgia, Oct. 2014 (with Martin J. McMahon, Jr. and Ira B. Shepard).
- Houston Tax Roundtable, Sept. 2014 (with Ira B. Shepard).
- State Bar of Texas Advanced Tax Law Course, Dallas, Texas, Aug. 2014.
- Texas Association of Certified Public Accountants, Houston, Texas, Aug. 2014.
- Am. Institute on Federal Taxation Conference, Birmingham, Alabama, Jun. 2014.
- Tax Alliance Conference, Plano, Texas, Jun. 2014 (with Ira B. Shepard).
- Dallas Bar Association Section of Taxation, Dallas, Texas, May 2014.
- University of North Carolina Tax Institute, Chapel Hill, North Carolina, Apr. 2014 (with Martin J. McMahon, Jr.).
- Houston IRS-CPA Society, Houston, Texas Apr. 2014 (with Ira B. Shepard).
- Houston Bar Association Section of Taxation, Houston, Texas, Mar. 2014 (with Ira B. Shepard)
- University of Houston Law Center, Feb. 2014 (with Ira B. Shepard).
- ABA Section of Taxation Midyear Meeting, Phoenix, Arizona, Jan. 2014 (with Martin J. McMahon, Jr. and Elaine Gagliardi).
- Annual Tax Update, Accounting Professionals Continuing Education Network, Dallas, Texas Dec. 2013 (webcast panel presentation).
- Houston Tax Roundtable, Sept. 2013 (with Ira B. Shepard).

National Webcast, ABA Tax Section

Houston, TX

October 2018

- Topic: Disaster Resiliency: How Tax Attorneys Can Assist When a Disaster Strikes.

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PRESENTATIONS (CONTINUED)

Houston Bar Association, Section of Taxation

Houston, TX November 2011

- Topic: Recent Developments in Partnership Taxation.

National Webcast, Accounting Cont'ng Prof. Educ. Network

Dallas, TX September 2008

Topic: The Essential Partnership Tax Update.

National Webcast, Accounting Cont'ng Prof. Educ. Network

Dallas, TX May 2006

Topic: The Essential Partnership Tax Update.

Advanced Tax Law Course, State Bar of Texas

Dallas, TX September 2005

Topic: Disguised Sales of Partnership Interests: The Proposed Regulations.

Houston Bar Association, Section of Taxation

Houston, TX February 2005

Topic: Disguised Sales of Partnership Interests: The New Proposed Regulations.

Southeastern Conference of the Association of American Law Schools

Hilton Head, SC July 2001

Young Scholars' Workshop: Fiduciary Duties, Consolidated Returns, and Fairness.

PROFESSIONAL AFFILIATIONS AND ACTIVITIES

American College of Tax Counsel

- Fellow, 2016-present

State Bar of Texas Tax Section

- Council Member (Ex Officio) 2014-present
- General Tax Committee, Chair 2017-present, Vice Chair 2014-2017
- Conduct the First Wednesday Tax Update, a monthly webcast for Tax Section members

Houston Tax Roundtable

- President, 2015-2016
- Vice-President, 2014-2015
- Member, 2013-present

Wednesday Tax Forum

- Member, 2013-present
- Give monthly presentations on recent developments in federal income taxation.

Houston Tax Procedure Group

- Co-leader, 2015-present
- Member, 2013-present

Garland R. Walker Chapter, American Inns of Court.

- Treasurer, 2015-present
- Treasurer Pro Tem, 2004-2005, 2010-2011
- Member, 2002-present.

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PROFESSIONAL AFFILIATIONS AND ACTIVITIES (CONT'D)

Texas Journal of Business Law

- Faculty Advisor, 2005-2020

Florida Bar Tax Certification Committee

- Consultant, 1997-2005

ABA Sections of Taxation, Business Law, and Legal Education.

- Member

AWARDS

- Professor of the Year Award, STCL Black Law Students' Association, 1999.
- Outstanding Teaching Award, STCL Student Bar Association, 2000 and 2001.
- Outstanding Programming Award, State Bar of Texas Tax Section, 2018 (for monthly webcast entitled First Wednesday Tax Update)

BAR ADMISSIONS

Connecticut, District of Columbia, Maine, New York.

COMMUNITY INVOLVEMENT

- Member and Usher, St. Martin's Episcopal Church, Houston, Texas
- Assistant Scoutmaster, Boy Scout Troop 209, Katy, Texas, 2015-2018
- Den Leader, Cub Scout Pack 542, Katy, Texas, 2010-2015
- Youth sports coach (basketball and soccer), Katy, Texas, 2010-2016

Exhibit 13

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INTRODUCTION

I have been retained by Stinson LLP (“Stinson”), counsel to Mr. James Dondero, to provide expert opinions based on my knowledge and experience advising asset management and other financial service firms on compensation over the period 2013 to 2019. Specifically, I have been asked to independently analyze the competitiveness of compensation provided to Mr. Dondero compared to compensation received by executives and senior employees with similar experience and roles. In addition, I was asked to opine on and provide information on the use of loans in the marketplace as a form of compensation. Mr. Dondero is the Founder and, throughout the period, was the CEO, and head portfolio manager of Highland Capital Management LP (“HCM”) and in that role, performed the same services for related companies and companies managed by HCM, including Highland Capital Management Financial Advisors (“HCMFA”) and NexPoint Advisors (“NPA”). Market competitive compensation for Mr. Dondero during this period is relevant based on the apparent shortfall in annual compensation to Mr. Dondero. Throughout this period, he received loans in lieu of additional current compensation. Consistent with company practice, the loans were considered a form of deferred compensation that could be realized over time as the loans were forgiven and the income recognized by the individuals.

My opinions in this report are based on my experience consulting on executive compensation since 1980, my review of certain materials produced on Highland and its affiliates, and my perspectives on compensation programs for comparable senior executives and key employees in the industry.

BACKGROUND

Professional Experience

The issues I have been asked to provide opinions on are topics I have regularly encountered during many years of advising financial services firms, including asset management firms. I am an executive compensation consultant, and my firm, Johnson Associates, is a prominent boutique compensation consulting firm. My firm has specialized for many years in analyzing and advising the financial services industry, including major investment and asset management firms, hedge funds and other alternative investment firms, advisory firms, commercial banks, insurance companies, and brokerage firms.

I have extensive experience reviewing and assessing appropriate market levels of compensation for clients. I have worked as a compensation consultant since 1980. In 1992, I founded my own compensation consulting firm, Johnson Associates in New York City. Johnson Associates, where I am currently Managing Director, is a boutique firm specializing in compensation consulting for the financial services industry. We routinely consult on and have a strong understanding of market compensation levels for senior professionals and executives. Prior to founding my own firm, I was a consultant at several leading compensation advisory firms.

Our clients have included many of the world's most significant financial institutions, asset managers and alternative investment firms across a broad range of issues. A summary of my work history and education is attached as Exhibit A. I am regularly quoted on compensation issues in major publications, including *The Wall Street Journal*, *Business Week*, *The New York Times*, *Fortune*, *The Washington Post*, *Bloomberg* and many others.

Over the past 20 years, I have provided expert testimony in more than 40 cases and have been qualified as an expert in the field of executive compensation 30+ times since founding my firm in 1992 (both on the employee and employer side). A list of cases in which I have rendered expert testimony since 2016 is attached as Exhibit B.

Compensation

I am being compensated at my normal hourly rate of \$715 per hour for preparing this report. My compensation is not contingent on the content of my opinions. I have been assisted in this engagement by my associate, Michael Perniciaro. Michael's normal hourly rate is \$225 per hour. All opinions in this report are my own.

Facts and Data Considered

In preparing this report, I considered certain documents provided to me, interviews with Mr. Dondero and former Highland or affiliate employees. The documents include information about Highland and its related entities, Mr. Dondero's compensation history, and financial statements over the period. Importantly, given the state of document production in this case, I did not receive all the documents typical for an assessment of compensation. The result of which could lead to a conservative bias in my assessment of market competitive compensation. I have evaluated publicly disclosed proxy statements of a select group of Highland peer firms, as well as information from news sources. The information is consistent with the data and outcomes across our client studies.

SUMMARY OF OPINIONS

Based on my experience as an executive compensation consultant and my review of the compensation and other documents, it is my opinion that:

- Reasonable compensation for Mr. Dondero's role is positioned well above the market median, toward the market high end. Based on analysis and market research, it is apparent that Mr. Dondero was the key leader of the firm and deeply involved in all its operations, with contributions well beyond the traditional CEO / Chief Investment Officer role at comparators. Competitive market high-end for Mr. Dondero's role is about \$6.0M per year while his actual compensation over the period was an average of about \$3.0M per year. Therefore, the aggregate shortfall in compensation provided to Mr. Dondero against reasonable compensation levels in the market is at least \$21M over the period I examined. Market compensation figures strictly represent Mr. Dondero's managerial responsibilities and does not include any premium as a Founder. Founders are often paid significantly more in the market.
- I understand from Mr. Dondero that the 2018 loans that are the subject of this suit were modified by an agreement in late 2018 or early 2019 under which the loans would be forgiven upon the sale at over cost of substantially all of any of three portfolio company assets held in the Highland platform, MGM, Cornerstone and/or Trussway. Based on interviews from prior employees, the use of forgivable loans was a known business practice at Highland and there was a clear expectation similar loans would be forgiven. Loans are often used both in private firms and more broadly in the market, both as a perk without forgiveness and also with forgiveness as deferred compensation.

- While I do not have sufficient data to know the capital in the firm at year end 2018,¹ the substantial amount of capital remaining in the firm at the time of bankruptcy (i.e., \cong \$399.6M) includes undistributed earnings to its Founders and primary shareholders, Mr. Dondero and Mr. Okada. For asset management firms, it is market practice to distribute most earnings annually to the firm's equity holders. The retention of the earnings in the business, further illustrate the shortfall in payments made to Mr. Dondero over the period.

¹I have been told that the Debtor has not produced much of what was requested by Mr. Dondero and that Mr. Dondero no longer has access to the Highland server. Therefore, I understand, what information he provided was from his own accountants, recollections, and/or from companies over which he still has control.

STATEMENT OF OPINIONS

Factual Background

From my review and analysis of available materials and research, I understand the consolidated Highland business (“Highland”) is a multi-strategy asset management firm focused on CLOs, hedge funds, and several private investments. Prior to the financial crisis, in 2008, Highland was very successful, reaching its peak revenue and assets under management levels. Looking at the post financial crisis period from 2013 to 2019, Highland continued to operate under the leadership of Mr. Dondero. During this period, several loans were made to Mr. Dondero. Part of my mandate was to assess market compensation levels during this period relative to firms with similar size and earnings. To do so, an assessment of Highland’s financial information is necessary. I did not receive all of the financial information for HCM that I would have liked to have had because, I was told, HCM refused to produce most of the documentation requested from it. However, I was able to review the actual financials of HCMFA and NPA, and to obtain information Mr. Dondero possessed and/or recollected. The revenues for HCMFA and NPA ranged from \$30.5M to \$65.9M over the period with assets under management of \$4.7B to \$7.5B. To complete my analysis, Mr. Dondero provided his best recollection of the size and structure of the consolidated three entities stating assets under management from 2013 to 2019 ranging from \$10.0B to \$20.0B, with a primary focus on CLOs and an average of about \$1.0B being in hedge funds. Based on the incomplete nature of my data review, there is a possibility that the market figures provided in this report could be understated based on my conservative approach, relying primarily on the documented data for HCMFA and NPA but only the recollection of Mr. Dondero for HCM, not the actual documentation, such as audited financial statements.

When examining Mr. Dondero's role at Highland relative to others in the market, it is apparent that his contributions and responsibilities exceeded the traditional duties of executive officers and lead investors who are paid significant amounts elsewhere. Mr. Dondero was the key man running daily business and operations, attracting clients, and overall investments. Given his outsized role, it would be reasonable to expect his compensation to be well above the market median. The sources utilized to ascertain specifics of his role and arrive at this conclusion include interviews with former Highland or Highland affiliate employees, as well as articles in the public domain and discussions with Mr. Dondero.

The total annual compensation for Mr. Dondero from 2013 - 2019 was \$3.0M on average and the aggregate compensation over the period was \$21.0M (source: W-2 filings). To assess the compensation in the market and determine the final market range, I utilized three methodologies including: (1) proxy analysis of CEOs at similarly sized, publicly traded asset management firms, (2) market research on Portfolio Manager compensation, (3) top-down analysis of typical percent of revenue allocated to CEO and/or top portfolio managers. Market compensation figures provided in this report strictly represent Mr. Dondero's managerial responsibilities and does not include any premium as a Founder.

To opine on the use of the loans as a form of compensation, I relied on market research, industry expertise, and interviews. My findings from this assessment are the use of forgivable loans was a normal business practice for Highland and there was a clear expectation they would be forgiven over time, based on varying performance criteria, depending on the employee.

An important additional consideration is the Founders, Mr. Dondero and Mr. Okada, did not receive the typical amount of distribution payments from their equity ownership. Based on the financials filed in connection with the bankruptcy, there was a significant amount of capital

in the business amounting to \$399.6M. This amount includes undistributed earnings to the original equity shareholders, primarily Mr. Dondero.

Market Assessment of Executive and Investor Compensation

During my career as a compensation expert, I have had significant experience assessing and designing annual compensation awards across the financial services industry, including comparable asset management firms. Accordingly, I am familiar with typical annual compensation levels for senior executives and senior portfolio managers at comparable asset management firms. I would expect pay levels for a key individual such as Mr. Dondero to be substantial, given his contributions, responsibilities, and the competitive market for investment management pay.

To assess reasonable compensation across the competitive market range, it is important to determine Mr. Dondero's responsibilities and contributions relative to others in the industry. It is my understanding that Mr. Dondero worked tremendously long hours, was involved in all aspects of the business including investment decisions, fundraising, business management / administration and the operation of portfolio companies. An article published in the *Dallas Morning News* states, "Mr. Dondero works 70 hours weeks... his days are filled with board and investor meetings, company strategy sessions and constant monitoring and adjusting of the firm's portfolios."² In my opinion, Mr. Dondero's role as CEO and head portfolio manager clearly exceeds the traditional duties of executive officers who are paid significant amounts elsewhere. Based on his significant responsibilities and key man status for the firm, it would be reasonable to expect annual compensation significantly above the market median.

² "High Intensity Pays Off For Highland," The Dallas Morning News, September 3, 2003, <https://www.pressreader.com/usa/the-dallas-morning-news/20060903/283218733648003>.

The appropriate positioning for Mr. Dondero is further accentuated by the assessment of “replacement cost”. If Mr. Dondero departed Highland in the period of 2013 to 2019, the cost of replacing him as CEO / head investor with a similar level of contribution across all functions would be multiples of his annual compensation. In assessing and providing market compensation for Mr. Dondero’s role, I considered how his skillsets and contributions are valued in the market. My assessment of market compensation considers the cost of replacing Mr. Dondero with an outside hire.

The final market range provided in Exhibit C reflects my industry experience and expertise as well as three methodologies for determining competitive compensation magnitudes. These methodologies include: (1) proxy analysis of CEOs at similarly sized, publicly traded asset management firms over the period, (2) market research on Portfolio Manager compensation, (3) top-down analysis of typical percent of revenue allocated to CEO and/or top Portfolio Managers. Several methodologies utilized to capture Mr. Dondero’s specific role as CEO and head portfolio manager. The market figures do not include any premium for being a Founder. In the market, Founders can be, and generally are, paid substantially more.

As shown below and in Exhibit E, the average annual compensation of public company asset management CEOs from 2013 to 2019 ranges from \$2.1M - \$4.1M. Importantly, in the market it is common for some senior investment professionals to earn more than the CEO or other corporate officers. Incorporating firm leadership functions into the investment role is a savings of sorts, as someone must still do this job.

Proxy Analysis CEO Total Compensation (Asset Management)								
	2013	2014	2015	2016	2017	2018	2019	Average
25th Percentile	\$1,515	\$1,680	\$2,405	\$1,845	\$2,370	\$2,310	\$2,220	\$2,049
Median	\$2,600	\$2,490	\$2,600	\$2,080	\$3,380	\$3,080	\$2,670	\$2,700
75th Percentile	\$3,210	\$2,805	\$3,130	\$3,815	\$3,945	\$3,285	\$3,435	\$3,375
90th Percentile	\$4,510	\$3,760	\$3,840	\$4,690	\$4,125	\$3,720	\$3,990	\$4,091

While we examined the disclosed compensation of a select group of public peers (Exhibit D), few of Highland's direct competitors are public and disclose the pay of their top investment professionals (see Exhibit F for some discussions about investment management compensation in the public domain). Instead, firms are either 1) private, or 2) if public, disclosed officers most often are not highly paid portfolio management professionals.

Specifics of individual portfolio management pay are closely guarded for competitive reasons. That said, there are some articles quoting portfolio manager pay in the public domain showing compensation for portfolio managers can be well above the competitive range for public asset management CEOs (see Exhibit F). For example, according to an article published by "efinancialcareers" top performing portfolio managers at the average Hedge Funds with greater than \$4.0B assets under management earned \$6.8M in total compensation.³ While Highland's structure differs from a pure hedge fund, the skills and role responsibilities are comparable to Mr. Dondero. Another example is the CEO of the Harvard Endowment, Mr. Narvekar, earned \$6.25M in 2019.⁴ The McLagan "Highland Capital CEO Compensation Analysis" (April 2020) produced by HCM, shows 2018 total compensation for the Head of Alternative Credit Strategy / CIO of \$4.1M at the 75th percentile and 2018 total compensation for CEO With/Without CIO Responsibilities making \$5.4M at the market median and \$9.6M at the market 75th percentile.

The final method for assessing compensation in the market is a top-down analysis of competitive percentages of revenue attributed to portfolio managers or their teams in the market. Based on competitive market research and industry knowledge, 10% to 12% of revenue would

³ Dan Butcher, "Here Are the Salaries and Bonuses at Hedge Funds in the U.S.," eFinancialCareers, May 5, 2018, <https://www.efinancialcareers.com/news/finance/the-salaries-and-bonuses-of-investment-professionals-at-large-hedge-fund-compensation>.

⁴ Janet Lorin, "Harvard Endowment Chief Narvekar \$6.25 Million for 2019," Bloomberg.com (Bloomberg, May 14, 2021), <https://www.bloomberg.com/news/articles/2021-05-14/harvard-paid-endowment-chief-narvekar-6-25-million-for-2019>.

be within the competitive market range for someone in Mr. Dondero’s role. One public example of a dual CEO and CIO sharing directly in profitability is Mario Gabelli; he earns a fixed 10% of aggregate pre-tax profit every year per his employment agreement.⁵

The final competitive range below (Exhibit C) reflects the market competitive annual total compensation range. This competitive range was determined based on my interactions with asset management firms and over 30 years of industry experience and the insights gained from the three methodologies for determining competitive market compensation outlined above. Market compensation figures strictly represent Mr. Dondero’s managerial responsibilities and does not include any premium as a Founder.

<i>Figures in 000s</i>	2013 - 2019 Total Annual Market Range		
Market Match	Market Median	Market 75th Percentile	Market 90th Percentile / High-End
CEO / Portfolio Manager	\$3,000	\$4,250	\$6,000

Based on the market research and the insights gained through my extensive experience advising on compensation in the industry, reasonable annual compensation for Mr. Dondero’s extensive role as CEO and portfolio manager is positioned at the market high-end at **\$6.0M per year**. This figure takes into account firm size, profitability, asset class, and both the investment functions, as well as responsibilities for running the firm. In summary, given his outsized role, his compensation should be positioned toward the market high-end. If the comparison was directly to hedge fund portfolio managers, the figures would be far higher (i.e., often \$10M+

⁵ “Schedule 14A GAMCO INVESTORS, INC.,” SEC.gov, April 29, 2020, <https://www.sec.gov/Archives/edgar/data/0001060349/000106034920000009/gblproxyfinal2020.htm>

annually). Additionally, market figures do not include any premium for being a Founder. In the market, Founders are often paid substantially more than the market figures shown.

Mr. Dondero's aggregate compensation during the period of 2013 to 2019 is well below the reasonable market compensation level. Mr. Dondero's aggregate actual compensation from 2013 - 2019 was \$21.0M (source: W-2 filings). Reasonable competitive compensation for Mr. Dondero based on our analysis of his role is \$6.0M per year or \$42.0M in aggregate over the period. The shortfall in actual compensation to Mr. Dondero versus reasonably expected competitive compensation levels over the period is about **\$21.0M** (Exhibit C). Market figures provided do not include any premium as a Founder, which further broadens the shortfall to market. An important additional consideration is the relative lack of typical equity distributions to Mr. Dondero for his historic ownership of the firm.

Use of Loans as Compensation

In my expert opinion, the use of loans from a company to its senior professionals continues to be a common practice for private businesses. At Highland, the use of loans was a common practice with the clear expectation among senior professionals that the loans would be forgiven over time based on performance, particularly of success in specified projects. I heard from former Highland or Highland affiliate employees that similar loans were used at Highland as deferred incentive compensation and intended to be forgiven over time or on the occurrence of particular achievements.

While, for public companies, Sarbanes Oxley Section 402 explicitly prohibits publicly traded companies from making loans to executive officers it is still a common practice at private

companies.⁶ The use of these loans at private companies is beneficial for retention by allowing the firm to provide annual or periodic or other forgiveness for a portion the loan and eventually forgiving the full amount. The amount of loan forgiveness is considered income to the professionals and is taxable when forgiven. This was the case at Highland as well. In a publicly available article for the *Dow Jones Private Equity Analyst – Global Compensation Study*, two Proskauer partners outline the tax regulations for similar loans to professionals.⁷

Market Practices on Equity Distributions

It is the standard practice in the market to distribute the majority of earnings to equity owners each year for asset management businesses. Based on the financials filed in connection with the bankruptcy, there was a significant amount of capital in the business equaling \$399.6M. This amount included undistributed earnings to the primary equity holders, Mr. Dondero and Mr. Okada. Highland did not distribute these earnings based on their philosophy of “delayed gratification”. This policy has been in place since the inception of the firm, including the peak years prior to the financial crisis. Very recently, the “delayed gratification” approach paid off in connection with Highland’s private direct investment in MGM which was announced to be acquired by Amazon with significant economics attached.⁸

⁶ Sarbanes-Oxley Act (2002).

⁷ Michael J Album and James E Gregory, “Human Capital Considerations For Maturing Private Equity Firms,” *Dow Jones Private Equity Analyst-Global Compensation Study*, 2012, pp. 84-96, <https://www.proskauer.com/insights/download-pdf/1930>.

⁸ Annie Palmer, “Amazon to Buy MGM Studios for \$8.45 Billion,” *CNBC* (CNBC, May 26, 2021), <https://www.cnbc.com/2021/05/26/amazon-to-buy-mgm-studios-for-8point45-billion.html>.

CONCLUSION

It is my opinion that Mr. Dondero's aggregate compensation from 2013 to 2019 is significantly below the reasonable competitive compensation level for his role relative to similarly situated firms. In aggregate, the total shortfall in Mr. Dondero's actual compensation versus reasonable competitive compensation is at least \$21.0M. This shortfall does not include any premium as a Founder, which could be considerable. Additionally, it is my opinion that the loans provided to Mr. Dondero should be considered potential deferred compensation as they were similar to loans given to other professionals at the firm. Lastly, the significant amount of capital in the business at the time of bankruptcy is at least partially attributable to Mr. Dondero as unrecognized payments as a prior equity holder, and indicates the rationale for having the potential for considerable deferred compensation.

* * *

I reserve the right to supplement this report and/or to supplement or modify my opinions in light of any additional facts or data that may come to my attention.

Dated: May 28, 2021

Respectfully submitted,



Alan Johnson
Johnson Associates, Inc.
19 West 44th Street, Suite 511
New York, NY 10036
Phone: (212) 221-740

Exhibit A: Work History and Education

Alan M. Johnson
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19 West 44th Street, Suite 511
New York, NY 10036
(212) 221-7400

Professional Experience

- Entire career as executive compensation consultant

Years	Firm	Title or Equivalent	Duties
1980 – 1983	Hewitt Associates	Consultant	Executive Compensation Consultant
1983 – 1986	Sibson & Company	Principal	Executive Compensation Consultant
1986 – 1989	Frederic W. Cook & Co.	Partner/Shareholder	Executive Compensation Consultant
1989 – 1990	Handy Associates	Managing Director	Executive Compensation Consultant
1990 – 1992	GKR	Managing Director	Executive Compensation Consultant
1992 – Present	Johnson Associates, Inc.	Managing Director	Executive Compensation Consultant

Education

1973 – 1975	U.S. Naval Academy
1975 – 1977	University of Florida, B.A. (History/Economics)
1977 – 1978	University of Virginia, Graduate Economics
1978 – 1980	University of Chicago, M.B.A. (Finance)

Consulting focus:

- Since about 1990 the bulk of my consulting efforts have involved advising major financial and professional service firms. I consult on the design and magnitudes of compensation programs for senior executives on a regular basis. I am quoted extensively in the press on compensation issues related to major financial service firms.

Exhibit B: Alan M. Johnson Prior Expert Testimony for Previous Five Years

LAW FIRM:	CASE:	COURT:	
Schulte Roth & Zabel LLP	Mark Rohman and Sean Cunningham v. Capstone Advisory Group, LLC.	Arbitration	(April 2016)
Gibson Dunn & Crutcher LLP	United States v. Greebel	Eastern District of NY	(December 2017)
Cohen Tauber Spievack & Wagner P.C.	Jeffry Brown v. Neuberger Berman Group LLC, and NB Alternatives Advisers LLC	Arbitration	(January 2018)
Gibson Dunn & Crutcher LLP	Robert Emerson Mulholland v. UBS Financial Services Inc.	FINRA Dispute Resolution Arbitration	(December 2018)
Proskauer Rose LLP	Damian Dalla-Longa v. Magnetar Capital LLC	Arbitration	(September 2019)
Skadden, Arps, Slate, Meagher & Flom LLP	Isaly v. OrbiMed	Arbitration	(January 2020)
Pachulski Stang Ziehl & Jones LLP	RTI Holding Company vs. Debtors	Delaware Bankruptcy Court	(December 2020)

Exhibit C: Actual Compensation vs. Estimated Market Compensation Range

Mr. Dondero Actual Compensation (2013 - 2019)

Notes: Mr. Dondero’s compensation reflects amounts disclosed in W-2 filings for 2013 to 2019

- Does not include equity distributions over the period; typically, not included in competitive assessments of compensation.

James Dondero Compensation									
Income	2013	2014	2015	2016	2017	2018	2019	Total	Average
Highland Capital Management W-2 Income	\$1,911,538	\$3,282,693	\$2,875,058	\$772,904	\$566,370	\$566,370	\$568,542	\$10,543,475	\$1,506,211
Nexpoint Residential Trust W-2 Income	--	--	--	--	--	\$893,262	--	\$893,262	--
NextPoint Advisors W-2 Income	--	--	--	\$1,628,736	\$3,118,250	\$2,870,278	\$1,953,455	\$9,570,718	\$2,392,679
Total W-2 Income (Source: W-2)	\$1,911,538	\$3,282,693	\$2,875,058	\$2,401,639	\$3,684,620	\$4,329,910	\$2,521,996	\$21,007,455	\$3,001,065

Estimated Market Compensation Range

Notes: Market annual total compensation range reflecting my direct interactions with asset management firms and over 30 years of industry experience

- We have factored in Mr. Dondero’s out-sized role / contributions on both the investment management and firm-stewardship responsibilities where applicable.
- Greater than findings from public proxy analysis reflecting higher compensation to portfolio managers in the market / alternatives space.
- Represents finding from the 3 methodologies outlined for determining market compensation.
- Market compensation figures strictly represent Mr. Dondero’s managerial responsibilities and does not include any premium as a Founder

Figures in 000s	2013 - 2019 Total Annual Market Range		
	Market Median	Market 75th Percentile	Market 90th Percentile / High-End
CEO / Portfolio Manager	\$3,000	\$4,250	\$6,000

Compensation Shortfall

Notes: In my opinion, reasonable competitive annual compensation for Mr. Dondero over the period is \$6.0M, positioning him toward the market high-end to reflect his out-sized role and contribution to the firm

Aggregate Reasonable Competitive Compensation	\$42,000,000
Less: Actual Total Compensation	\$21,007,455
Shortfall in Compensation	\$20,992,545

Exhibit D: Select Public Peer Comparators

Notes:

- Industry consolidation continues to shrink pool of publicly available compensation data for the asset management industry, even at much larger firms than Highland
- Group intended to represent a range of firms that are relevant but not perfectly similar
- Disclosure of Portfolio Manager positions limited as typically not included in publicly filed data (no compulsion to disclose as with executive officers)
- Highland data includes good faith estimate of consolidated entities assets under management during the period. Actual financials not assessed due to the non-disclosure of Highland Capital Management (“HCM”) information. Data for “HCMFA” and “NPA” reviewed.

Peers	Assets Under Management (\$B)							Revenue (\$M)						
	2019	2018	2017	2016	2015	2014	2013	2019	2018	2017	2016	2015	2014	2013
Asset Management														
Cohen & Steers	\$72	\$55	\$62	\$60	\$53	\$53	--	\$411	\$381	\$378	\$350	\$329	\$314	\$298
Pzena Investment	\$41	\$33	\$39	\$30	\$26	\$28	\$25	\$151	\$154	\$141	\$108	\$117	\$113	\$96
Silvercrest	\$25	\$19	\$21	\$19	\$18	\$18	\$16	\$102	\$99	\$91	\$80	\$75	\$69	\$60
Diamond Hill	\$23	\$19	\$22	\$19	\$17	\$16	\$12	\$137	\$146	\$145	\$136	\$124	\$105	\$81
Manning & Napier	\$19	\$20	\$25	\$32	\$35	\$48	\$51	\$136	\$161	\$202	\$249	\$328	\$405	\$376
Westwood Holdings	\$15	\$17	\$24	\$21	\$21	\$20	\$19	\$84	\$122	\$134	\$123	\$131	\$113	\$92
Hennessy Advisors	\$5	\$6	\$7	\$7	\$6	\$6	\$4	\$43	\$55	\$53	\$51	\$45	\$35	\$24
Main Street Capital	\$4	\$3	\$3	--	--	--	--	\$173	\$214	\$235	--	--	--	--
Consolidated Highland*	--	\$10.0	\$14.0	\$15.0	\$18.0	\$20.0	\$19.0	--	--	--	--	--	--	--
Highland Hedge Fund*		\$1.9	\$1.0	\$0.9	\$1.3	\$1.0	\$0.7	--	--	--	--	--	--	--
HCMFA & NP (only)	\$7.5	\$6.1	\$5.1	\$4.8	\$5.2	\$5.7	\$4.7	\$66	\$52	\$42	\$41	\$50	\$31	\$31

*Represents estimated for the consolidated three entities. Financial for Highland Capital Management ("HCM") not provided by the debtor

Exhibit E: Proxy Analysis Disclosed Public Peer CEO Compensation (2013 - 2019)

Notes:

- Reflects disclosed senior executive officer compensation in \$ thousands
- CEO not necessarily the highest paid employee at any given firm
- Senior investment professionals' pay often not disclosed and can be greater than CEO
- GAMCO not included; Mr. Gabelli receives 10% of aggregate pre-tax profit annually
- Indicates awards granted for performance each, not outstanding or fully vested compensation
- Where applicable, partial year salaries annualized. One-time awards annualized over appropriate vesting periods. Performance share values reflects target award values; does not reflect payouts from past cycles

Summary of Proxy Analysis

Proxy Analysis CEO Total Compensation (Asset Management)								
	2013	2014	2015	2016	2017	2018	2019	Average
25th Percentile	\$1,515	\$1,680	\$2,405	\$1,845	\$2,370	\$2,310	\$2,220	\$2,049
Median	\$2,600	\$2,490	\$2,600	\$2,080	\$3,380	\$3,080	\$2,670	\$2,700
75th Percentile	\$3,210	\$2,805	\$3,130	\$3,815	\$3,945	\$3,285	\$3,435	\$3,375
90th Percentile	\$4,510	\$3,760	\$3,840	\$4,690	\$4,125	\$3,720	\$3,990	\$4,091

Proxy Analysis by Year and Individual

Chief Executive Officer - 2019											
Company	Executive	Position	Base Salary	Cash Bonus	Total Cash	Stock Options	Restricted Shares	Perf Shares	Total Long Term	One-Time (Annualized)	Total Comp
Cohen & Steers	Steers, R.	CEO	\$750	\$835	\$1,585	\$0	\$2,915	\$0	\$2,915	\$0	\$4,500
Manning & Napier	Mayer, M.	CEO	\$500	\$2,250	\$2,750	\$145	\$755	\$0	\$900	\$0	\$3,650
Silvercrest	Hough, R.	Pres & CEO	\$700	\$1,000	\$1,700	\$800	\$475	\$0	\$1,275	\$240	\$3,215
Main Street Capital	Hyzak, D.	CEO	\$625	\$650	\$1,275	\$0	\$1,395	\$0	\$1,395	\$0	\$2,670
Pzena Investment	Pzena, R.	Chairman, CEO, & Co-CIO	\$365	\$685	\$1,055	\$0	\$1,425	\$0	\$1,425	\$0	\$2,480
Hennessy Advisors	Hennessy, N.	Chairman & CEO	\$350	\$1,455	\$1,805	\$0	\$155	\$0	\$155	\$0	\$1,960
Westwood Holdings	Casey, B.	President & CEO	\$650	\$0	\$650	\$0	\$0	\$0	\$0	\$0	\$650
25th Percentile			\$435	\$670	\$1,165	\$0	\$315	\$0	\$530	\$0	\$2,220
50th Percentile			\$625	\$835	\$1,585	\$0	\$755	\$0	\$1,275	\$0	\$2,670
75th Percentile			\$675	\$1,230	\$1,755	\$75	\$1,410	\$0	\$1,410	\$0	\$3,435
90th Percentile			\$720	\$1,775	\$2,185	\$405	\$2,020	\$0	\$2,020	\$95	\$3,990

Exhibit E: Proxy Analysis Disclosed Public Peer CEO Compensation (2013 - 2019)

Chief Executive Officer - 2018											
Company	Executive	Position	Base Salary	Cash Bonus	Total Cash	Stock Options	Restricted Shares	Perf Shares	Total Long Term	One-Time (Annualized)	Total Comp
Cohen & Steers	Steers, R.	CEO	\$750	\$650	\$1,400	\$0	\$2,355	\$0	\$2,355	\$0	\$3,755
Westwood Holdings	Casey, B.	President & CEO	\$650	\$1,065	\$1,715	\$0	\$0	\$1,995	\$1,995	\$0	\$3,710
Pzena Investment	Pzena, R.	Chairman, CEO, & CIO	\$365	\$995	\$1,360	\$0	\$1,925	\$0	\$1,925	\$0	\$3,285
Main Street Capital	Hyzak, D.	CEO	\$555	\$1,400	\$1,955	\$0	\$1,275	\$0	\$1,275	\$0	\$3,230
Silvercrest	Hough, R.	CEO	\$700	\$1,600	\$2,300	\$500	\$40	\$0	\$540	\$240	\$3,080
Hennessy Advisors	Hennessy, N.	CEO	\$350	\$2,420	\$2,770	\$0	\$220	\$0	\$220	\$0	\$2,990
Diamond Hill	Bingaman, C.	President & CEO	\$300	\$500	\$800	\$0	\$1,000	\$0	\$1,000	\$510	\$2,310
Manning & Napier	Coons, J.	Co-CEO & President	\$400	\$520	\$920	\$0	\$0	\$0	\$0	\$0	\$920
Manning & Napier	Goldberg, R.	Co-CEO & Director	\$750	\$0	\$750	\$0	\$155	\$0	\$155	\$0	\$905
25th Percentile			\$365	\$520	\$920	\$0	\$40	\$0	\$220	\$0	\$2,310
50th Percentile			\$555	\$995	\$1,400	\$0	\$220	\$0	\$1,000	\$0	\$3,080
75th Percentile			\$700	\$1,400	\$1,955	\$0	\$1,275	\$0	\$1,925	\$0	\$3,285
90th Percentile			\$750	\$1,765	\$2,395	\$100	\$2,010	\$400	\$2,065	\$295	\$3,720
Chief Executive Officer - 2017											
Company	Executive	Position	Base Salary	Cash Bonus	Total Cash	Stock Options	Restricted Shares	Perf Shares	Total Long Term	One-Time (Annualized)	Total Comp
Westwood Holdings	Casey, B.	CEO	\$650	\$1,540	\$2,190	\$0	\$0	\$1,995	\$1,995	\$0	\$4,185
Cohen & Steers	Steers, R.	CEO	\$750	\$735	\$1,485	\$0	\$2,615	\$0	\$2,615	\$0	\$4,100
Main Street Capital	Foster, V.	Chairman, CEO	\$610	\$1,500	\$2,110	\$0	\$1,780	\$0	\$1,780	\$0	\$3,890
Hennessy Advisors	Hennessy, N.	President & CEO	\$350	\$3,240	\$3,590	\$0	\$245	\$0	\$245	\$0	\$3,835
Pzena Investment	Pzena, R.	CEO, Co-CIO	\$365	\$2,560	\$2,925	\$0	\$0	\$0	\$0	\$0	\$2,925
Silvercrest	Hough, R.	CEO	\$700	\$1,500	\$2,200	\$0	\$40	\$0	\$40	\$240	\$2,480
Diamond Hill	Bingaman, C.	President & CEO	\$300	\$550	\$850	\$0	\$0	\$0	\$0	\$1,180	\$2,030
Manning & Napier	Stamey, C.	Co-CEO, Sales / Distribution	\$300	\$1,140	\$1,440	\$0	\$135	\$0	\$135	\$0	\$1,575
25th Percentile			\$340	\$1,040	\$1,475	\$0	\$0	\$0	\$30	\$0	\$2,370
50th Percentile			\$490	\$1,500	\$2,150	\$0	\$90	\$0	\$190	\$0	\$3,380
75th Percentile			\$665	\$1,795	\$2,380	\$0	\$630	\$0	\$1,835	\$60	\$3,945
90th Percentile			\$715	\$2,765	\$3,125	\$0	\$2,030	\$600	\$2,180	\$520	\$4,125
Chief Executive Officer - 2016											
Company	Executive	Position	Base Salary	Cash Bonus	Total Cash	Stock Options	Restricted Shares	Perf Shares	Total Long Term	One-Time (Annualized)	Total Comp
Westwood Holdings	Casey, B.	CEO	\$650	\$1,350	\$2,000	\$0	\$0	\$3,955	\$3,955	\$0	\$5,955
Cohen & Steers	Steers, R.	CEO	\$750	\$675	\$1,425	\$0	\$2,425	\$0	\$2,425	\$0	\$3,850
Hennessy Advisors	Hennessy, N.	President & CEO	\$350	\$3,075	\$3,425	\$0	\$350	\$0	\$350	\$0	\$3,775
Diamond Hill	Bingaman, C.	President & CEO	\$300	\$600	\$900	\$0	\$0	\$0	\$0	\$1,180	\$2,080
Pzena Investment	Pzena, R.	CEO, Co-CIO	\$365	\$1,600	\$1,965	\$0	\$0	\$0	\$0	\$0	\$1,965
Silvercrest	Hough, R.	CEO	\$700	\$725	\$1,425	\$0	\$55	\$0	\$55	\$240	\$1,720
Manning & Napier	Manning, W.	CEO	\$1,400	\$0	\$1,400	\$0	\$0	\$0	\$0	\$0	\$1,400
25th Percentile			\$360	\$640	\$1,415	\$0	\$0	\$0	\$0	\$0	\$1,845
50th Percentile			\$650	\$725	\$1,425	\$0	\$0	\$0	\$55	\$0	\$2,080
75th Percentile			\$725	\$1,475	\$1,985	\$0	\$205	\$0	\$1,390	\$120	\$3,815
90th Percentile			\$1,010	\$2,190	\$2,570	\$0	\$1,180	\$1,580	\$3,035	\$615	\$4,690

Exhibit E: Proxy Analysis Disclosed Public Peer CEO Compensation (2013 - 2019)

Chief Executive Officer - 2015											
Company	Executive	Position	Base Salary	Cash Bonus	Total Cash	Stock Options	Restricted Shares	Perf Shares	Total Long Term	One-Time (Annualized)	Total Comp
Westwood Holdings	Casey, B.	President, CEO	\$600	\$2,065	\$2,665	\$0	\$0	\$2,090	\$2,090	\$0	\$4,755
Hennessy Advisors	Hennessy, N.	President & CEO	\$350	\$2,515	\$2,865	\$0	\$370	\$0	\$370	\$0	\$3,230
Cohen & Steers	Steers, R.	CEO	\$750	\$485	\$1,235	\$0	\$1,790	\$0	\$1,790	\$0	\$3,025
Diamond Hill	Dillon, R.	CEO	\$360	\$640	\$1,000	\$0	\$0	\$1,600	\$1,600	\$0	\$2,600
Manning & Napier	Cunningham, P.	CEO	\$500	\$0	\$500	\$0	\$0	\$2,000	\$2,000	\$0	\$2,500
Pzena Investment	Pzena, R.	CEO, Co-CIO	\$380	\$605	\$980	\$0	\$0	\$1,330	\$1,330	\$0	\$2,310
Silvercrest	Hough, R.	CEO	\$700	\$725	\$1,425	\$0	\$240	\$0	\$240	\$0	\$1,665
25th Percentile			\$370	\$545	\$990	\$0	\$0	\$0	\$850	\$0	\$2,405
50th Percentile			\$500	\$640	\$1,235	\$0	\$0	\$1,330	\$1,600	\$0	\$2,600
75th Percentile			\$650	\$1,395	\$2,045	\$0	\$305	\$1,800	\$1,895	\$0	\$3,130
90th Percentile			\$720	\$2,245	\$2,745	\$0	\$940	\$2,035	\$2,035	\$0	\$3,840

Chief Executive Officer - 2014											
Company	Executive	Position	Base Salary	Cash Bonus	Total Cash	Stock Options	Restricted Shares	Perf Shares	Total Long Term	One-Time (Annualized)	Total Comp
Westwood Holdings	Casey, B.	President, CEO	\$600	\$1,995	\$2,595	\$0	\$0	\$2,060	\$2,060	\$0	\$4,650
Cohen & Steers	Steers, R.	CEO	\$750	\$460	\$1,210	\$0	\$1,660	\$0	\$1,660	\$0	\$2,870
Diamond Hill	Dillon, R.	CEO	\$360	\$640	\$1,000	\$0	\$0	\$1,600	\$1,600	\$0	\$2,600
Hennessy Advisors	Hennessy, N.	President & CEO	\$350	\$1,750	\$2,100	\$0	\$280	\$0	\$280	\$0	\$2,380
Silvercrest	Hough, R.	CEO	\$650	\$725	\$1,375	\$0	\$70	\$0	\$70	\$0	\$1,445
Manning & Napier	Cunningham, P.	CEO	\$500	\$495	\$995	\$0	\$0	\$0	\$0	\$0	\$995
25th Percentile			\$395	\$530	\$1,055	\$0	\$0	\$0	\$125	\$0	\$1,680
50th Percentile			\$550	\$685	\$1,295	\$0	\$35	\$0	\$940	\$0	\$2,490
75th Percentile			\$640	\$1,495	\$1,920	\$0	\$230	\$1,200	\$1,645	\$0	\$2,805
90th Percentile			\$700	\$1,875	\$2,350	\$0	\$970	\$1,830	\$1,860	\$0	\$3,760

Chief Executive Officer - 2013											
Company	Executive	Position	Base Salary	Cash Bonus	Total Cash	Stock Options	Restricted Shares	Perf Shares	Total Long Term	One-Time (Annualized)	Total Comp
Manning & Napier	Cunningham, P.	CEO	\$500	\$1,500	\$2,000	\$0	\$4,020	\$0	\$4,020	\$0	\$6,020
Westwood Holdings	Casey, B.	President, CEO	\$600	\$1,505	\$2,105	\$0	\$0	\$1,395	\$1,395	\$0	\$3,500
Cohen & Steers	Steers, R.	CEO	\$750	\$365	\$1,115	\$0	\$1,800	\$0	\$1,800	\$0	\$2,915
Diamond Hill	Dillon, R.	CEO	\$360	\$640	\$1,000	\$0	\$0	\$1,600	\$1,600	\$0	\$2,600
Hennessy Advisors	Hennessy, N.	President & CEO	\$350	\$1,170	\$1,520	\$0	\$90	\$0	\$90	\$0	\$1,610
Pzena Investment	Pzena, R.	CEO, Co-CIO	\$280	\$1,145	\$1,420	\$0	\$0	\$0	\$0	\$0	\$1,420
Silvercrest	Hough, R.	CEO	\$500	\$600	\$1,100	\$0	\$70	\$0	\$70	\$0	\$1,170
25th Percentile			\$355	\$620	\$1,110	\$0	\$0	\$0	\$80	\$0	\$1,515
50th Percentile			\$500	\$1,145	\$1,420	\$0	\$70	\$0	\$1,395	\$0	\$2,600
75th Percentile			\$550	\$1,335	\$1,760	\$0	\$945	\$700	\$1,700	\$0	\$3,210
90th Percentile			\$660	\$1,500	\$2,040	\$0	\$2,690	\$1,475	\$2,690	\$0	\$4,510

Exhibit F: Discussions of Investment Management Compensation in the Public Domain

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Documents Reviewed

Data Items Reviewed from Debtor

- Bates Label Range: D-JDNL-017439 to D-JDNL-017441

Data Items Reviewed:

- Bates Label Range: EXPERT 0000001 to EXPERT 0002316

Individual Documents - Starting Bates Label

- Expert 1 – EXPERT 0000001
- Expert 1 – EXPERT 0000003
- Expert 1 – EXPERT 0000004
- Expert 1 – EXPERT 0000024
- Expert 1 – EXPERT 0000026
- Expert 1 – EXPERT 0000028
- Expert 1 – EXPERT 0000030
- Expert 1 – EXPERT 0000365
- Expert 1 – EXPERT 0000367
- Expert 1 – EXPERT 0000372
- Expert 1 – EXPERT 0000383
- Expert 1 – EXPERT 0000384
- Expert 1 – EXPERT 0000385
- Expert 1 – EXPERT 0000387
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- Expert 1 – EXPERT 0001975
- Expert 1 – EXPERT 0001998
- Expert 1 – EXPERT 0002233
- Expert 1 – EXPERT 0002234
- Expert 1 – EXPERT 0002253
- Expert 1 – EXPERT 0002260
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