No. _____

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

In re James D. Dondero et al.,
Petitioners.

On Petition For Writ Of Mandamus To The
United States District Court For The Northern District Of Texas

(Bankruptcy Case No. 19-34054-sgj11)

PETITION FOR WRIT OF MANDAMUS

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RELIEF SOUGHT

An Order directing the presiding bankruptcy judge, Stacey G. Jernigan (the "Bankruptcy Judge") to recuse herself from presiding over the Highland Capital Management, L.P. bankruptcy proceeding and any adversary proceeding related to any bankruptcy proceeding that involves Petitioners.

ISSUE PRESENTED

Whether 28 U.S.C. § 455(a) requires recusal of the Bankruptcy Judge because: (1) a "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;" *or* (2) her "impartiality might ***reasonably be questioned***."

INTRODUCTION

Petitioners James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC (collectively, "Petitioners") seek a writ of mandamus because mandamus is the only avenue through which Petitioners can obtain legal relief from the incessant, animus and partiality displayed by the presiding bankruptcy judge against Petitioners in the proceedings stemming from the chapter 11 bankruptcy of debtor Highland Capital Management, L.P. ("HCMLP"). Petitioners have sought the recusal of Judge Stacey G. Jernigan ("Judge Jernigan") for a significant period of time, while continuing to suffer harm because of the Court's partiality. As set forth in greater detail herein, recusal is necessary because the Bankruptcy Court has repeatedly:

- singled out Petitioners and their attorneys for unfair treatment;
- admonished Petitioners and their attorneys for invoking proper legal process to protect their interests;
- refused to credit evidence (even undisputed evidence) presented by Petitioners; and
- departed from normal procedure, in ways that uniquely harmed the legal position or rights of the Petitioners and, more particularly, HCMLP's former Chief Executive Officer, James D. Dondero ("Mr. Dondero").

The disenfranchising effect of these actions cannot be overstated. Perhaps the most revealing evidence of bias is the judge's recent publication of two novels, both of which roundly criticize the very industry in which HCMLP was engaged prior to bankruptcy and which also pit the protagonist, a Dallas bankruptcy judge, against a Dallas hedge fund manager closely resembling Mr. Dondero, who is caricatured as an evildoer. Judge Jernigan authored these novels while presiding over the bankruptcies of HCMLP and two other firms affiliated with Mr. Dondero, Acis Capital Management, L.P. and Acis Capital Management GP, LLC (together, "Acis"), and then promoted her novels through her professional network. This is not how neutral arbiters of

facts conduct themselves, and it does not engender public confidence in the impartiality of the Bankruptcy Court. Petitioners easily meet the statutory, mandatory standards governing recusal. This Court should grant the Petition.

FACTUAL BACKGROUND

A. Procedural History

After a series of interactions with Judge Jernigan began to evidence a pattern of animus and bias, Petitioners sought to recuse the Judge on March 18, 2021.[1] The Court denied that motion less than a week later.[2] Petitioners appealed the order denying recusal to the District Court, but on February 9, 2022, the District Court denied the appeal for lack of jurisdiction, concluding the Bankruptcy Court's order was interlocutory and therefore non-appealable.[3]

Thereafter, Judge Jernigan's actions further highlighted her continuing bias. As a result, Petitioners filed an Amended Motion for Final Appealable Order and Supplement to Motion to Recuse ("Motion to Supplement") seeking to: (1) remove the "reservation language" in the Bankruptcy Court's original order denying recusal, and (2) supplement the record on the original recusal motion with additional evidence of bias.[4] At an August 31, 2022 hearing, Petitioners informed the Court that HCMLP was *unopposed* to the relief requested in the Motion to Supplement. Nonetheless, Judge Jernigan accused Mr. Dondero and his counsel of "carpet-bombing us with paper and causing us to expend resources" and chastised his counsel.[5]

The Court denied Petitioners' Motion to Supplement as procedurally improper,[6] but invited Petitioners to either (1) file a "simple motion" (without attaching additional evidence) seeking

[1] Bankr. Dkt. 2061 [App. 39].
[2] Bankr. Dkt. 2083.
[3] *See Dondero v. Hon. Stacey G. Jernigan*, Civ. Action No. 3-21-CV-0879-K, Dkt. 39 at 1-2 (pointing out that, in denying recusal, the Bankruptcy Court "reserve[d] the right to amend or supplement" its ruling).
[4] Bankr. Dkt. 3470.
[5] Aug. 31, 2022 Hr'g Tr. at 20:13-25 [App. 206].
[6] Bankr. Dkt. 3479 at 3.

removal of the "reservation of rights" language, or (2) file a new motion to recuse based on new evidence or grounds for recusal.[7] Only the second option guaranteed Petitioners a complete record on appeal. Therefore, on September 27, 2022, Petitioners filed a Renewed Motion to Recuse, attaching the entire record supporting recusal.[8] After HCMLP claimed that certain allegations were protected by attorney-client privilege, Petitioners filed an Amended Renewed Motion to Recuse removing those allegations on October 17, 2022.[9] Thereafter, Petitioners learned that Judge Jernigan had published two novels effecting the Amended Renewed Motion and, on Friday, March 3, 2023, Petitioners filed a supplemental memorandum of law explaining why those novels also necessitated recusal.[10] On Monday, March 6, 2023, the Bankruptcy Court issued a Memorandum Opinion and Order Denying "Amended Renewed Motion to Recuse" Pursuant to 29 U.S.C. § 455 ("Recusal Order").[11] It is that Recusal Order that prompted this Petition for Writ of Mandamus.

B. Judge Jernigan Acknowledges She Formed Negative Opinions About Mr. Dondero During the Acis Bankruptcy

Mr. Dondero's first encounter with Judge Jernigan came in the context of the chapter 11 bankruptcy of Acis ("Acis Bankruptcy").[12] In a Bench Ruling confirming the Acis joint plan, the Bankruptcy Court concluded that: various entities were marching to the orders of Mr. Dondero; testimony given by individuals affiliated with Mr. Dondero was not credible; "the Highlands" (*i.e.*, Dondero-affiliated entities) were merely acting in "lockstep"; and the Highlands' party-in-interest status was "questionable."

[7] *Id.*
[8] Bankr. Dkts. 3541, 3542.
[9] Bankr. Dkts. 3570, 3571.
[10] Bankr. Dkt. 3673.
[11] Bankr. Dkt. 3676 [App. 2].
[12] Amended Renewed Motion at 4-6 [App. 2807-2809].

In her Recusal Order, Judge Jernigan states that she "cannot recall" any "specific rulings regarding Mr. Dondero" from the Acis Bankruptcy.[13] Yet Judge Jernigan's decisions and comments in the HCMLP bankruptcy frequently referenced Mr. Dondero's role in the Acis , including as a justification for imposing conditions on Mr. Dondero at the outset of the bankruptcy proceedings.[14]

For example, in January of 2021, just following the Highland Bankruptcy's transfer from Delaware the Bankruptcy Court, ***before Mr. Dondero had ever testified in the Highland Bankruptcy***, Judge Jernigan acknowledged that her opinions of Mr. Dondero from the Acis Bankruptcy were inextricably planted in her mind:

(1) stated "***[she] can't extract what [she] learned during the Acis case, it's in my brain***";

(2) expressed negative opinions about Mr. Dondero (although he had not yet filed any motion or objection in her court);

(3) opined that Mr. Dondero had a *propensity* to engage in bad acts (based on Judge Jernigan's perceptions formed during the Acis Bankruptcy); and

(4) relied on opinion she formed from the Acis Bankruptcy to *sua sponte* insist that language be included in her order approving a settlement between the Debtor and the UCC allowing the Court to hold Mr. Dondero in contempt for violating the terms of that settlement.[15]

The Acis Bankruptcy continued to feature prominently enough in Judge Jernigan's mind that it served as an important backdrop to her Order Confirming the Fifth Amended Plan of Highland Capital Management, L.P. (As Modified) ("Confirmation Order").[16]

[13] Recusal Order at 15 [App. 16].
[14] Amended Renewed Motion at 6 [App. 2809].
[15] *Id.*; *See* HCMLP Bankr. Dkt. 2062, Ex. 2, Jan. 9, 2020 Hr'g Tr. at 52:10-25 [App. 2846]; 78:23-79:16 [App. 2849-50]; *see also* HCMLP Bankr. Dkt. 2062, Ex. 3, Feb. 19, 2020 Hr'g Tr. at 174:22-175:1 [App. 480:22-485].
[16] *Id.* at 11-12 [App. 2814-15]; Confirmation Order, Bankr. Dkt. 1943, ¶¶ 8, 13-15; 17-18.

C. Judge Jernigan Publishes Her First Novel Reflecting Her Bias

Judge Jernigan's first novel, *He Watches All My Paths*, was published on January 16, 2019, just weeks before confirmation of the Acis plan of reorganization. The novel is remarkable in two respects: (1) it begins a two-novel saga involving a Dallas bankruptcy judge that mirrors Judge Jernigan's experience on the bench, and (2) it contains harsh commentary about financial services industry stakeholders (despite their presence in cases before her). In particular, the novel describes the "[h]igh flying hedge fund managers" as individuals that "suck up money like an i-robot vacuum," seem to "make money no matter what," and show "outrageous amounts of hubris" as part of their "bro culture."[17] It strongly suggests a judge harboring bias against those operating in the hedge fund industry——an industry in which HCMLP has actively operated.

D. Judge Jernigan's Animus Continues Throughout The Highland Bankruptcy

The Amended Renewed Motion detailed the many ways in which Judge Jernigan has targeted Petitioners and their lawyers throughout the HCMLP Bankruptcy. The following are examples of some of the Judge's actions and comments that mandate recusal.

1. The Judge Repeatedly Threatened Petitioners With Sanctions And Accused Them Of Acting in "Bad Faith."

Judge Jernigan has repeatedly threatened Petitioners and their lawyers, questioned their motives, and accused them of acting in bad faith by raising legitimate legal arguments or defending their rights. For example:

- In June 2020, Judge Jernigan questioned whether lawyers for CLO Holdco—a wholly owned subsidiary of a charitable Donor Advised Fund (the "DAF"), established by Mr. Dondero—were acting in good faith by seeking the release of funds that belonged to CLO Holdco from the Bankruptcy Court's registry.[18]

- On December 16, 2020, the Judge chastised Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NexPoint")—two

[17] Judge Stacey G. Jernigan, *He Watches All My Paths* (Jan. 16, 2019), at 131.
[18] *See* Amended Renewed Motion at 8 [App. 2811] & Ex. D [App. 2867].

entities affiliated with Mr. Dondero—for filing a legitimate motion, with a statutory basis, to preserve the status quo pending confirmation of HCMLP's Fifth Amended Plan of Reorganization ("Plan").[19] Judge Jernigan surmised that Mr. Dondero was behind the motion, that it was filed for an improper purpose, and that it was "almost Rule 11 frivolous."[20]

- In January 2021, the Debtor accused HCMFA and NexPoint of interfering with its management of certain collateralized loan obligation ("CLO") portfolios.[21] While the Debtor ultimately admitted that no interference actually occurred,[22] rather than address the Debtor's baseless accusations, the Bankruptcy Court ***focused on Mr. Dondero*** and inexplicitly threatened to hold him in contempt.[23] At this time, the Bankruptcy Court knew that Mr. Dondero had no continuing role with HCMLP and no ability to interfere with management of the CLO portfolios. Nevertheless, without evidence, the Bankruptcy Court concluded that Mr. Dondero had caused independent outside counsel for the movants to undertake the actions on his behalf.[24]

- In February 2021, the ***Debtor*** filed another baseless motion. After a seven-hour evidentiary hearing, Judge Jernigan deemed that the issue Debtor raised was moot (as opposed to baseless), yet accused ***Mr. Dondero*** of driving up legal fees,[25] and then went beyond the pleadings and the relief requested by the Debtor ***to issue findings adverse to Mr. Dondero***.[26]

- In the Confirmation Order, after two trusts affiliated with Mr. Dondero—The Dugaboy Investment Trust and Get Good Trust—objected to HCMLP's Plan, Judge Jernigan again questioned the good faith of Mr. Dondero. While the Judge stated no basis for her "belief," she labeled Mr. Dondero and the trusts

[19] *See id.* at 9-10 [App. 2812-13] & Ex. J [App. 2931]; *see also* Brief in Support of Motion to Recuse Pursuant to 28 U.S.C. § 455 ("Original Recusal Motion"), Bankr. Dkt. 2061, at 8-16 [App. 50-58].
[20] *See* Amended Renewed Motion at 9-10 [App. 2812-13].
[21] *See id.* & Ex. K [App. 2937] and Ex. L [App. 2946].
[22] *See* HCMLP Bankr. Dkt. 2062, Ex. 7, Jan. 26, 2021 Hr'g Tr. at 103:21-23 [App. 709], 173:16-19 [App. 779], 174:1-3 [App. 780], 174:8-175:5 [App. 780-81], 178:14-24 [App. 784], & 180:12-17 [App. 786] [App. 0630, 0700-02, 0705, 0707]. HCMLP's failures in this regard are detailed in Movants' Original Recusal Motion, Bankr. Dkt. No. 2016, at 13-16 [App. 55-58]. Notably, Debtor itself had numerous authorized traders, whose job was to settle Debtor's trades.
[23] *See id.* at at 24-App. 858 at 5 [App. 857-58].
[24] *See id.* at 251:19-253:4 [App. 0778-80]; *see also Highland Capital Mgmt. L.P. v. Highland Capital Mgmt. Fund Advisors, et al.*, Adv. Proc. 21-3000-sgj, Dkt. 1 (listing defendants). At the hearing, Davor Rukavina, as counsel to these entities, explained that the entities have independent boards who were his clients. *See* HCMLP Bankr. Dkt. 2062, Ex. 7, Jan. 26, 2021 Hr'g Tr. at 251:19-253:4 [App. 857-858]; *see also id.* at 5:8-10 611] (announcing the entities represented at the hearing). Conversely, Mr. Dondero had independent counsel at the hearing. *Id.* at 5:14-16 [App. 611].
[25] *See* HCMLP Bankr. Dkt. 2062, Ex. 21, Feb. 23, 2021 Hr'g Tr. at 232:3-234:19 [App. 2128-29].
[26] *See id.*, Ex. 20, Feb. 24, 2021 Order on Mandatory Injunction at 3-5 [App. 1894-1896]; *See also, e.g.*, HCMLP Bankr. Dkt. 2660 at 30; HCMLP Bankr. Dkt. 2062, Ex. 21, Feb. 23, 2021 Hr'g Tr. at 232:7-234:19 [App. 2128-30] ("But it just feels like sickening games. And again, if this keeps on, if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order."); *id.*, Ex. 7, Jan. 26, 2021 Hr'g Tr. at 251:24-252:5 [App. 857-58] (threatening to sanction Mr. Dondero for actions undertaken by independent entities advised by their own outside counsel).

"disruptors"[27] and concluded that the entities objecting to the Plan were "controlled by" Mr. Dondero.[28]

- In August 2021, the Bankruptcy Court sanctioned ***Mr. Dondero*** in connection with a motion that the independent counsel ***of two entities—the DAF and CLO Holdco—***filed. After the Bankruptcy Court denied the DAF and CLO Holdco's request for *permission* to add James P. Seery (the Debtor's CEO and Chief Restructuring Officer) as a defendant in a state-court lawsuit,[29] the Debtor separately sought sanctions against DAF and CLO Holdco and their counsel, as well as on Mr. Dondero (who was not even a party to the state-court lawsuit).[30] Judge Jernigan deemed the lawsuit "wholly frivolous," concluded that Mr. Dondero was behind it,[31] and ordered Mr. Dondero to pay a $239,655 for his supposed contempt—nearly $70,000 *more* than the attorneys' fees invoices submitted by the movant.[32] The Bankruptcy Court added another $100,000 to be paid by Mr. Dondero (or any other individual or entity) if he appealed the sanctions award.[33]

Throughout the HCMLP Bankruptcy, Judge Jernigan has repeatedly: (1) ignored undisputed testimony and evidence; (2) held Mr. Dondero responsible for the actions of other persons and entities; (3) questioned the motives of Mr. Dondero and the other Petitioners; (4) accused Mr. Dondero and the other Petitioners "bad faith"; and (5) reached conclusions hostile to Mr. Dondero without evidence or contrary to uncontested evidence.

Conversely—notwithstanding the questionable legal arguments made by other parties to the case and dubious motions by the Debtor, the UCC, and its constituents—the Judge has never criticized or threatened any other party with sanctions. Instead, other parties have been given wide latitude to take positions that, if alleged by Mr. Dondero or Petitioners, would have resulted in threats of sanctions or be deemed vexatious. For example, Mr. Dondero sought to file a state court

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[27] HCMLP Bankr. Dkt. 1943, ¶ 17; *see also id.*, ¶ 19.
[28] HCMLP Bankr. Dkt. 2062, Ex. 9, Feb. 8, 2021 Hr'g Tr. at 20:13-15 [App. 1088]. Notably, not even HCMLP accused Mr. Dondero and his trusts of lodging bad faith objections to the Plan. Moreover, although the U.S. Trustee lodged some of the same objections, Judge Jernigan did not question her "good faith basis" for doing so. *See* Confirmation Order, Bankr. Dkt. 1943, ¶ 20; Bankr. Dkt. 1671.
[29] *Charitable DAF Fund, L.P. v. Highland Capital Mgmt., L.P.*, Case No. 21-cv-00842 (N.D. Tex.), Dkt. 6.
[30] HCMLP Bankr. Dkt. 2247.
[31] HCMLP Bankr. Dkt. 2660 at 21, 26.
[32] *Id.* at 28-30.
[33] *Id.* at 30. Not even the Debtor attempted to defend this portion of the Court's sanction award.

petition under TEX. R. CIV. P. 202 to investigate potential claims against certain non-debtor funds.[34] Ignoring clear case law that such actions are not removable, the funds (seeking to capitalize on the known predilection against Mr. Dondero) improperly removed the state court proceeding to Bankruptcy Court. Judge Jernigan reluctantly remanded the case while openly criticizing it on the merits and chastising Mr. Dondero for seeking information: "[W]hile remand appears to be the correct result under the law, it is done here ***with grave misgivings*** … Dondero's standing in filing the Rule 202 Proceeding would appear to be highly questionable and ***his motives highly suspect***."[35] However, the Judge did not sanction anyone for the frivolous removal.

2. Judge Jernigan Labeled Mr. Dondero As A "Vexatious" Litigant, Without Any Evidence To Support That Label.

Judge Jernigan has repeatedly referred to Mr. Dondero as a "vexatious" litigant, notwithstanding that no such allegation or legal finding has ever been made. For example:

- Speaking about a lawsuit that Judge Jernigan knew nothing about and had not even read: "If Mr. Dondero doesn't think that is so ***transparently vexatious litigation***, yeah, I'm going out there and saying that. ***I haven't seen it [the complaint she was condemning as vexatious], but, come on***."[36]

- Offering her *sua sponte* view: "[A]lthough ***I have not been asked*** to declare Mr. Dondero and his affiliated entities as vexatious litigants *per se*, it is certainly not beyond the pale to find that his long history with regard to major creditors in this case has strayed into that possible realm, and thus this court is justified in approving this provision."[37]

- Chastising CLO Holdco Ltd. and The Charitable DAF Fund, LP's counsel for filing a motion based on her view of Mr. Dondero: "I have commented before that we seem to have vexatious litigation behavior with regard to Mr. Dondero and his many controlled entities."[38]

[34] *See In re Dondero*, Case No. DC-21-09534 (95th Dist. Ct.).
[35] *See Dondero v. Alvarez & Marsal CFR Mgmt., LLC*, Case No. 21-03051, Dkt. 22 at 5-6, 20-21 (emphasis added).
[36] HCMLP Bankr. Dkt. 3571-1, Ex. G, Sept. 23, 2020 Hr'g Tr. at 51:13-16 [App. 2910] (emphasis added).
[37] *Id.*, Ex. M, Feb. 8, 2021 Hr'g Tr. at 46:20-25 [App. 2977] (emphasis added).
[38] *Id.*, Ex. S, June 25, 2021 Hr'g Tr. at 109:20-22 [App. 3019].

This "vexatious" refrain has been so ubiquitous that parties opposed to Mr. Dondero and the Petitioners regularly invoke this "finding" as a basis to reject Petitioners' arguments outright—even when there was no evidence from which the Bankruptcy Court could adjudge credibility.[39]

Importantly, no court has previously found that any of the Petitioners are vexatious litigants. Yet Judge Jernigan included the term in her Confirmation Order, to justify discrediting Mr. Dondero's testimony, dismissing the objections raised by him (and Petitioners) to the Plan confirmation, and requiring Petitioners to channel any future motions or litigation through her.[40]

3. The Judge Recommended Debtor File Certain Claims To Avoid The Reference From Being Withdrawn.

On June 10, 2021, certain Petitioners moved to withdraw the reference in an adversary proceeding. Judge Jernigan *sue sponte* recommended the Debtor file fraudulent transfer claims against Mr. Dondero (suggesting that those claims might affect the reference from being withdrawn).[41] HCMLP thereafter amended its complaint per the Judge's suggestion.[42] Plainly, a Court should not urge one party to assert claims against another. More troubling, Judge Jernigan's recommendation appeared geared toward allowing it to keep the lawsuit against Petitioners, denying them a jury trial, and requiring a trial to the bench.

[39] *See, e.g.*, HCMLP Bankr. Dkt. 3595 (HCMLP's Response to Movants' Renewed Motion to Recuse), ¶¶ 2, 67 [App. 3085 and 3110] (describing Mr. Dondero as "quintessentially vexatious" and invoking "the never-ending, meritless, vindictive, and vexatious litigation strategy that Mr. Dondero stubbornly clings to regardless of the burdens imposed on the judicial system…" as a reason to deny recusal); HCMLP Bankr. Dkt. 1828 (Debtor's Omnibus Reply to Objections to Confirmation of Plan), ¶ 22 (arguing that "[e]xculpation is particularly appropriate in this case to stem the tide of frivolous and vexatious litigation against the Exculpated Parties which Dondero and his Related Entities are seeking so desperately to continue to pursue").

[40] *See* HCMLP Bankr. Dkt. 1943, ¶ 80 (positing that "[t]he Gatekeeper Provision is also consistent with the notion of a prefiling injunction to deter vexatious litigants…").

[41] *See* HCMLP Bankr. Dkt. 2445, June 10, 2021 Hr'g Tr. at 81:5-83:12 [App. 3585-3587].

[42] *See Highland Capital Mgmt., L.P. v. Highland Capital Mgmt. Servs., Inc.*, Case No. 21-3006-sgj11, Dkt. 68.

4. The Judge's Actions Are Prejudicial.

Judge Jernigan's statements and actions against Mr. Dondero, his entities, and his perceived affiliates have substantially prejudiced Petitioners and others. This has manifested in two critical ways.

First, the Judge's bias has caused her to make decisions that are detrimental to creditors and stakeholders of the bankruptcy proceedings more generally. For example, HCMLP was not required to file Rule 2015.3 reports of financial information in bankruptcy. As a result, the true value of the bankruptcy estate has been obscured, undercutting Petitioners' ability to engage in meaningful settlement discussions that should have resolved the estate long ago. A recently filed adversary proceeding alleges that the bankruptcy estate has always been solvent. If true, then the bankruptcy estate could pay all creditors in full and dispense with the bankruptcy, rather than use estate assets to enrich a limited number of HCMLP's insiders and professionals.[43]

Second, Judge Jernigan's bias has had a chilling effect on Petitioners and their counsel. No litigant should be fearful of acting to protect their rights or believe that justice is impossible because of the predilections of a judge. But that is the situation here.[44] Such malice directed to a party's good faith efforts to protect their interests is just what recusal is designed to prevent.

E. Judge Jernigan Authors And Promotes Another Book Mirroring Her Perception Of Highland And Mr. Dondero.

Compounding matters, Petitioners recently learned that Judge Jernigan wrote a second novel, *Hedging Death*—while presiding over the HCMLP bankruptcy. That novel was released in

[43] *See* HCMLP Bankr. Dkt. 3662.

[44] Debtor sought to have Movant and NexPoint sanctioned and held in contempt for making a proffer of evidence to preserve the record for appeal in two adversary proceedings seeking to recover on certain notes. *See Highland Capital Mgmt., L.P. v. Highland Capital Mgmt. Fund Advisors, L.P.*, Case No. 21-03004-sgj, Dkt. 130 at 10-14. Although it was the Debtor's motions that were out of line (given that a making a proffer was the only means of preserving the record), and while Judge Jernigan denied the Debtor's motions, she still chastised Movant and NexPoint for preserving their rights, calling the Debtor's motion "a close call." *Id.*, Dkt. 161, Apr. 20, 2022 Hr'g Tr. at 51:14-21.

March 2022, less than a year after HCMLP's Plan became effective and while the HCMLP bankruptcy proceedings were ongoing. *Hedging Death* involves the same bankruptcy judge protagonist and, as shown below, draws unquestionable parallels to Mr. Dondero and his businesses.[45] Petitioners have also recently discovered that Judge Jernigan promoted her novels on social media, a personal website, at live book signing events, and solicited other members of the judiciary to write reviews.[46]

F. The Bankruptcy Court's Issues A Flawed Recusal Order

On March 6, 2023, Judge Jernigan denied the Petitioners' Amended Renewed Motion to Recuse because she: (1) subjectively believes she is not biased; (2) deemed the Motion untimely; and (3) believes that the few examples she addressed do not demonstrate bias (though the Court failed to address most of Petitioners' allegations).[47] Judge Jernigan also noted that criticism of counsel (which was not even a grounds that Petitioners asserted) did not justify recusal.[48]

STANDARD OF REVIEW

In the Fifth Circuit, mandamus relief is available to obtain appellate review of bankruptcy orders, including questions of recusal, that are otherwise non-appealable.[49] Courts entertain such petitions before a final judgment has been entered, because "[i]nterlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that

[45] *See* Judge Stacey G. Jernigan, *Hedging Death* (Mar. 22, 2019) ("*Hedging Death*"), back cover.
[46] *See, e.g.,* https:sjnovels.com/hedging-death; https://twitter.com/SJNovels (tagging "@IWIRC" and "#bankruptcyattorney" and attaching a book review from a former bankruptcy judge).
[47] *See* HMCLP Bankr. Dkt. 3676 [App. 2-37]; *see also* HCMLP Bankr. Dkt. 3570 & 3571 (Renewed Motion) [App. 2799-2828]. The Petitioners had previously filed a motion to recuse on March 18, 2021, *see* HCMLP Bankr. Dkt. 2060, 2061, & 2062 [App. 39], that was denied by the Bankruptcy Court for similar reasons on March 23, 2021, *see* HCMLP Bankr. Dkt. 2083 ("First Recusal Order").
[48] HMCLP Bankr. Dkt. 3676 at 17 [App. 18-19].
[49] *In re Lieb*, 915 F.2d 180, 186 (5th Cir. 1990) (citing *In re Barrier*, 776 F.2d 1298 (5th Cir. 1985) (per curiam)); *In re Cameron Int'l Corp*., 393 F. App'x 133, 134-35 (5th Cir. 2010).

judges do not adjudicate cases that they have no statutory power to hear."[50] The writ, however, requires exceptional circumstances, and the party seeking the writ has the burden of proving a clear and indisputable right to it.[51] While a writ of mandamus is only available where a litigant has no other adequate means of obtaining the desired relief, courts recognize that this standard is met—and a writ of mandamus disqualifying a judge is required—if petitioner demonstrates bias or even if the judge's "impartiality might reasonably be questioned."[52]

REASONS THE WRIT SHOULD ISSUE

A. The Bankruptcy Court Abused Its Discretion Denying Recusal Under Section 455

Under 28 U.S.C. § 455, recusal is *required* whenever: (1) a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;" ***or*** (2) the judge's "impartiality might ***reasonably be questioned***."[53] Notably, the judge's subjective belief of her impartiality is irrelevant and proof of actual bias is unnecessary.[54] As Congress explained when enacting section 455, litigants "ought not have to face a judge where there is a reasonable question of impartiality."[55]

This neutrality requirement helps guarantee that no person will be deprived of his interests without a proceeding in front of an impartial arbiter.[56] "[F]undamental to the judiciary is the public's confidence in the impartiality of [its] judges and the proceedings over which they

[50] *In re Sisneros*, 283 F. App'x 11, 12 (3d Cir. 2008) (citing *In re Sch. Asbestos Litig.*, 977 F.2d 764, 778 (3d Cir. 1992)).
[51] *In re Lieb*, 915 F.2d at 186.
[52] *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (holding that because petitioner demonstrated that a reasonable person could not help but harbor doubts about the impartiality of the judgment, petitioner had no adequate alternative means to obtain the relief he seeks).
[53] 28 U.S.C. § 455(a) (emphasis added); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988); *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).
[54] *See Burke v. Regolado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted); *Liljeberg*, 486 U.S. at 805.
[55] H. Rep. No. 1453, 93rd Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.
[56] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citations omitted).

preside"[57] because "justice must satisfy the ***appearance*** of justice."[58] The Fifth Circuit has held, therefore, that "***[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal***."[59]

Moreover, because the Due Process Clause entitles every litigant to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum—the source of the judge's bias is not outcome determinative.[60] The Supreme Court has recognized that predispositions developed during the course of current or 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***."[61]

Applying these standards, federal courts have held that recusal (or reassignment to a new judge) is appropriate under several circumstances applicable in this case, including where, among other things:

(1) the judge made antagonistic statements to plaintiffs and manifested an "apparent distrust" of plaintiffs "early in the litigation;"[62]

(2) the judge questioned one party's decision to pursue a course of action and made comments that were critical of the party's position;[63]

(3) the judge openly questioned the integrity of one party's counsel, suggested he was proceeding in "bad faith," and called certain decisions made by him "suspicious;"[64]

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[57] *Id.*
[58] *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).
[59] *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997).
[60] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 877 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam) ("Trial before 'an unbiased judge' is essential to due process."); *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021) (citations omitted).
[61] *Liteky v. United States*, 510 U.S. 540, 554-555 (1994).
[62] *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904-05 (8th Cir. 2009) (reassigning case to a new judge on remand).
[63] *In re U.S.*, 572 F.3d 301, 311-12 (7th Cir. 2009) (on mandamus, reversing district judge's order denying motion to recuse and ordering that "all orders entered by the Judge after the motion for recusal was filed . . . be vacated").
[64] *U.S. v. Kennedy*, 682 F.3d 244, 258-260 (3d Cir. 2012) (ordering reassignment of the case to a different judge on remand).

(4) there was "immediate, continuing, and ever-increasing tension" between the judge and one party's counsel, the judge questioned in open court "the conduct of the lawyers" for one party, and the judge questioned one party's "good faith;"[65] and

(5) the judge's comments "evidenced his distrust of [one party's] lawyers and his generally poor view of [one party's] practices."[66]

Further, in the context of these standards, it is well-accepted that "[a] judge may not write about or discuss a pending or impending case, or disclose nonpublic information, *even in a work of fiction.*"[67] Indeed, the Code of Conduct for United States Judges requires judges to abide by various canons in the execution of their judicial duties.[68] Of particular relevance here, Canon 2 requires a judge to avoid impropriety and the *appearance of impropriety* in all activities.[69] Canon 4 prescribes that a judge may engage in extrajudicial activities only if those activities are consistent with the obligations of judicial office.[70] In this regard, a judge should (1) avoid using information regarding the judicial office in advertising materials, (2) avoid conducting a book signing or discussion directed to attorneys or other members of the legal community, and (3) refrain from engaging in promotional activities relating to any private publication.[71]

The Bankruptcy Court has engaged in *all* of these prohibited practices in this case, each of which should mandate recusal.[72] Judge Jernigan's personal bias and animus toward Mr. Dondero

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[65] *Johnson v. Sawyer*, 120 F.3d 1307, 1334-1337 (5th Cir. 1997) (ordering reassignment of the case to a different judge on remand and explaining that "the loss of efficiency and economy pales in comparison" to "the necessity to preserve the appearance of impartiality, fairness, and justice").

[66] *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1465 (D.C. Cir. 1995) (where a reasonable observer could question whether the presiding judge "would have difficulty putting his previous views and findings aside" on remand, case should be assigned to a different judge).

[67] *See* American Bar Ass'n Model Code of Judicial Conduct, Rules 2.10, 3.5 (emphasis added).

[68] Code of Conduct for United States Judges, *available at* https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

[69] *Id.* The commentary to Canon 2A explains that the canon "applies to both professional and personal conduct."

[70] *Id.*

[71] *See, e.g.*, Guide to Judiciary Policy, Vol. 2, Part B, § 220, Nos. 55, 112. 114, *available at* https://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf.

[72] *Johnson v. Sawyer*, 120 F.3d at 1334.

and his perceived affiliates (including Petitioners) far exceeds what is permissible in any court proceeding. The evidence is more than sufficient to establish that Judge Jernigan harbors an actual and enduring bias and animus that is "personal rather than judicial in nature."[73]

Alternatively, even if Judge Jernigan does not harbor actual bias—and all signs demonstrate that she does—the evidence establishes that any reasonable observer would "harbor doubts concerning [her] impartiality"[74] and question whether she "'would have difficulty putting [her] previous views and findings aside.'"[75] Allowing Judge Jernigan to continue to preside over any proceeding involving Petitioners would undermine public confidence in the judiciary. Under these circumstances, recusal is mandatory.

B. The Recusal Order Fails To Negate Bias Or The Appearance Of Bias

The Recusal Order fails to refute the grounds mandating recusal. Moreover, the lengths the Judge goes to retain control over proceedings involving Mr. Dondero and Petitioners further evidences why recusal is necessary.

1. Judge Jernigan Abused Her Discretion In Denying Petitioners' Renewed Motion Pursuant To 28 U.S.C. § 455 As Untimely.

The timeliness of a recusal motion is determined from the point in time that 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).[76] 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 then claim it is too late to recuse and force a party to be judged by a partial jurist.

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[73] *Parrish v. Board of Comm'rs*, 524 F.2d 98, 100 (5th Cir. 1975).
[74] *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483-84 (5th Cir. 2003) (quoting *In re Chevron U.S.A., Inc.*, 121 F.3d at 165).
[75] *Microsoft Corp.*, 56 F.3d at 1465 (quoting *U.S. v. Torkington,* 874 F.2d 1441, 1447 (11th Cir.1989)).
[76] *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)).

Notably, the Fifth Circuit has expressly declined to adopte a "*per se* untimeliness" rule.[77] The Fifth Circuit has explained that "the ***closest thing*** to per se untimeliness" occurs "when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal."[78]

While courts—including *Delesdernier v. Porterie*, which the Bankruptcy Court cites—have denied recusal motions as untimely, those cases generally involve situations in which the complaining party obtained definitive knowledge that the judge had a disqualifying circumstance **and** either: (1) delayed raising the issue until a strategically advantageous time; or (2) raised the issue for the first time after a final judgment.[79]

Here, Petitioners sought to recuse Judge Jernigan based on an evolving *pattern of conduct* taken by Judge Jernigan that, when viewed as a whole, reveals both the appearance of bias and actual animus towards Petitioners.[80] That bias and animus represents a ***continuing and ongoing harm*** that can only be remedied if a non-biased factfinder presides over the myriad proceedings still before the Bankruptcy Court, including adversary proceedings.

Importantly, that bias and animus did not actually manifest itself until late 2020 and early 2021. It is the manifestation (or appearance) of bias that is the relevant demarcation line as it relates to timeliness of a recusal motion, and Petitioners indisputably filed their Original Recusal Motion

[77] *United States v. Sanford*, 157 F.3d 987, 988 (5th Cir. 1998).
[78] *Hill v. Schilling*, 495 F. App'x 480, 483 (5th Cir. 2012) (emphasis added).
[79] *See, e.g., Sanford*, 157 F.3d at 989 (Denying motion to recuse as untimely because basis for recusal was known and defendant did not move to recuse the district court and raised issue for first time on appeal); *Hill*, 495 F. App'x at 483 (Denying motion to recuse as untimely because the movant knew that the trial judge's spouse held an economic interest in one of the parties, but did not move to recuse the judge until after adverse judgment at trial); *Davies*, 68 F.3d at 1130-31 (holding motion to recuse was untimely because the movants knew the judge represented the IRS and did not object after a judgment was entered against them); *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982) (holding that "the motion raised for the first time on appeal, and after two full trials on the merits," is untimely).
[80] *See Davis v. Board of School Comm'rs of Mobile Cnty.*, 517 F.2d 1044, 1051 (5th Cir. 1975) (grounds for recusal exist "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party").

a reasonable time thereafter (*i.e.*, March 18, 2021). As a result, there is no timing issue. Neither the 15 months that passed after the HCMLP Bankruptcy was transferred nor the timing of the various recusal motions (or the Bankruptcy Court's suspicions regarding the Petitioners' motivation for the filings) are relevant.[81] Moreover, Petitioners just recently learned of Judge Jernigan's two novels and the overt bias revealed in the publication, contents, and marketing of those books.[82] Any motion based on the novels is untimely.

2. Judge Jernigan Abused Her Discretion In Relying On Its Subjective Denials Of Actual Bias.

While referencing the proper objective standard, Judge Jernigan denied the renewed recusal motion by applying a subjective standard: "[t]he Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Petitioners. She does not believe she has displayed deep-seated favoritism or antagonism."[83] As explained, a judge's subjective belief of her bias is irrelevant[84] and it is not necessary that the judge actually has a bias (or actually knows of grounds requiring recusal).[85] The Bankruptcy Court abused its discretion to the extent it denied Petitioners' renewed recusal motion based upon her own subjective beliefs regarding her bias.[86]

3. Judge Jernigan Abused Her Discretion In Failing And Refusing To Address Each Basis For Recusal.

Judge Jernigan abused her discretion in denying the renewed recusal motion without

[81] Petitioners moved to recuse the Bankruptcy Court from adversary proceedings and future issues involving Petitioners; not from hearing any contempt issue. Petitioners never sought to have any order or hearing abated until after the motions were ruled upon and appealed.
[82] *See Kirschner v. Dondero*, Adv. Proc. No. 21-03076-sgj, Dkt. 310-1, ¶ 5.
[83] HCMLP Bankr. Dkt. 3676 at 17 [App. 18-19].
[84] *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).
[85] *Liljeberg*, 486 U.S. at 805.
[86] While Judge Jernigan claims to have merely addressed motions as they were presented," shown proper respect for Petitioner's and counsel, and to subjectively believed that Petitioners' goals is to preserve their economic proprietary rights, there is no support or citation for these comments or subjective thoughts. The record shows the opposite.

addressing each factual basis alleged. The review of a Section 455 recusal request is "'extremely fact intensive and fact bound,' thus a close recitation of the factual basis for the [party's] recusal motion is necessary."[87]

Here, Judge Jernigan selectively addressed only a few of the identified bases for recusal. That is improper. The Judge avoided addressing most of the allegations in the Amended recusal motion purportedly because the filings contain thousands of pages. However, the "thousands" of pages are largely appendices, including full transcripts. The recusal motions are not "thousands" of pages and contain specific arguments with specific pin citations to relevant portions of the appendices. The length of an appendix does not permit Judge Jernigan to cherry-pick the grounds for recusal that she wants to try to explain away, while avoiding grounds that she cannot. Avoiding most of the grounds for recusal further demonstrates the Judge's predisposition to rule against Petitioner without objective analysis.

4. The Attempted Explanations To The Selected Bases Reinforce The Need To Recuse.

a. The Judge Attempts To Distance Herself From Opinions She Admittedly Formed During The Acis Bankruptcy.

Judge Jernigan contends that she: (1) does not recall any specific ruling from the Acis Bankruptcy relating to Mr. Dondero; (2) only recalls Mr. Dondero testifying once in court during the Acis Bankruptcy; and (3) has vague recollection that deposition testimony may have been presented another time.[88]

As explained, however, the record refutes this denial. ***Before Mr. Dondero had ever testified in the HCMLP Bankruptcy***, Judge Jernigan conceded that her opinions of Mr. Dondero

[87] *Republic of Panama v. Am. Tobacco Co.*, 217 F.3d 343, 346 (5th Cir. 2000).
[88] HCMLP Bankr. Dkt. 3676 at 14-17 [APP. 15-18].

from the Acis Bankruptcy were inextricably planted in her mind[89] and openly questioned Mr. Dondero's credibility prefacing a statement she made in a hearing by stating, ***"[i]f you can trust Mr. Dondero…."***[90] The Recusal Order does not even attempt to explain away the numerous prior statements. Instead, the Judge acted as if no such statements were ever made. This further demonstrates why recusal is necessary.

b. Judge Jernigan's Questioning About Possible PPP Loans At The July 2020 Exclusivity Hearing Further Demonstrates Her Bias.

The Recusal Order characterizes inquiries made during a July 2020 hearing regarding Paycheck Protection Program ("PPP") loans that "Mr. Dondero or affiliates" received as simple curiosity and insists that her questions do not matter because no action was taken against Mr. Dondero or his affiliated entities.[91] These justifications are both inaccurate and irrelevant.

First, this was not curiosity. After seeing an article that referenced "Mr. Dondero or Highland affiliates" received PPP loans, Judge Jernigan (1) insinuated that Mr. Dondero had engaged in improper activity; (2) stated that "you can probably imagine the different things going through my brain;" and (3) *sua sponte* directed HCMLP's counsel to investigate and report who was behind the alleged loans, even if such loans were made to a non-debtor entity affiliated with Mr. Dondero.[92]

Second, the *point* is not whether action was taken but that the Judge read an article in her personal time, assumed from that article (rather than evidence presented in her court) that Mr.

[89] *See* HCMLP Bankr. Dkt. 3571-1, Ex. B, Jan. 9, 2020 Hr'g Tr. at 52:10-25, 78:23-79:16, & 80:3-6 [App. 2846, 2849-2850, 2851]; *see also* HCMLP Bankr. Dkt. 2062, Ex. 3, Feb. 19, 2020 Hr'g Tr. at 174:22-175:1 [App. 0481-0482].
[90] HCMLP Bankr. Dkt. 2062, Ex. 3, Feb. 19, 2020 Hr'g Tr. at 174:22-175:1 [App. 0481-0482].
[91] Bankr. Dkt. 3676 at 28 [App. 29].
[92] Amended Renewed Motion at 8-9 [App. 2811-2812]; HCMLP Bankr. Dkt. 3571-1, Ex. E, July 8, 2020 Hr'g Tr. at 43:13-44:1 [App. 2890-2891].

Dondero had engaged in nefarious conduct, demanded information regarding that conduct, and, broadcast her distrust of Mr. Dondero. That appearance of partiality requires recusal.

c. The Bankruptcy Court's Use Of Terms "Litigious" or "Vexatious."

The Bankruptcy Court denies ever "find[ing] or conclud[ing] that Petitioners are 'vexatious litigants'" and claims it merely "determined that Mr. Dondero's litigation history supported the inclusion of a gatekeeper provision in the Plan."[93] However, the Fifth Circuit concluded that the Bankruptcy Court found Petitioners to be vexatious and struck a part of the gatekeeper provision in the Plan because it improperly attempted to enjoin and impose sanctions on Petitioners without following the procedures to designate them vexatious litigations.[94]

Notably, there was no litigation history cited to support any such ruling. While the Recusal Order now lists numerous bases for its finding, the only basis the Bankruptcy Court gave to support its finding at the time consisted solely of pre-petition lawsuits against the Debtor.[95] Petitioners were not parties to these lawsuits and HCMLP maintained that there were meritorious defenses to the claims.[96] The Recusal Order tellingly omits any discussion of this important distinction.

d. The Bankruptcy Court's Orders Requiring Mr. Dondero's (And His Sister's) Attendance At Bankruptcy Court Hearings.

First, to try and discredit Petitioners (and their counsel), Judge Jernigan claims that Petitioner's recusal motions make "disturbing" allegations that she ordered Nancy Dondero to "appear at all hearings 'regardless of whether [her] presence [was] needed.'" However, her order requires Nancy Dondero to "appear in [1] ***all*** future hearings in this Bankruptcy Case, as well as [2] all Adversary proceedings where either the Trusts are ***a party or take a position***, unless

[93] *Id.* at 32 (citing HCMLP Bankr. Dkt. 1943, ¶¶ 80-81).
[94] *In re Highland Capital Mgmt., L.P.*, 48 F.4th 419, 438 n. 19 (5th Cir. 2022).
[95] HCMLP Bankr. Dkt. 2062, Ex. 9, Feb. 9, 2021 Hr'g Tr. at 46:20-25 [App. 1114]; *See also* HCMLP Bankr. Dkt. 3676 at 28, n.24 [App. 20]; HCMLP Bankr. Dkts. 891; 895; 928 and 1384 at 31.
[96] *See* App. 2779-2791, HCMLP Bankr. Dkt. 2062, at Ex. 28; *see also id.*, App. 2792-2793, Ex. 29.

otherwise ordered by the court."[97] The Judge's willingness to criticize Petitioners' counsel and skew her own order to maintain control of this case only further evidence supports recusal.

Second, the order relating to Mr. Dondero—which requires his attendance regardless of whether he is taking a position—departed from the Bankruptcy Court's usual approach.[98]

e. Hearing On Debtor's Application To Employ Foley Gardere As Special Counsel On February 19, 2020.

HCMLP filed an Application to Employ Foley Gardere as Special Counsel (the "Application to Employ") to pursue appeals relating to the Acis Bankruptcy on behalf of Neutra Ltd., a company owned by Mr. Dondero that succeeded to the ownership of Acis. Retired Bankruptcy Judge Russell Nelms, one of the three independent directors appointed to HCMLP's new board, testified that the board used its business judgment to approve the Application to Employ. The evidence demonstrated that a successful appeal would: (1) defeat a $75 million claim against HCMLP; and (2) result in Neutra owning Acis and HCMLP being reinstated as the advisor to Neutra, which would generate fees and economic benefit for HCMLP.[99] Nevertheless, the Bankruptcy Court concluded that HCMLP failed to prove the estate would benefit[100] and asserted that Mr. Dondero somehow used his "powers of persuasion" to unduly influence the ***Independent Board's*** business judgment.[101] Notably, at no other point during the HCMLP Bankruptcy did Judge Jernigan find any Debtor-related testimony unconvincing, except on one occasion when she

[97] See HCMLP Bankr. Dkt. 2458 at 3 ("**ORDERED** that the Dugaboy Investment Trust and the Get Good Trust must have a trustee appear in all future hearings in this Bankruptcy Case, as well as all adversary proceedings where either of the Trusts are a party or take a position, unless otherwise ordered by the court.").
[98] HCMLP Bankr. Dkt. 3571-1, May 20, 2021 Hr'g Tr. at 20:19-21:14 [App. 2991-2998].
[99] HCMLP Bankr. Dkt. 2062, Feb. 19, 2020 Hr'g Tr. at 39:6-12, 45:8-16, 69:23-73:11 [App. 0346, 0352, 0376-0380].
[100] HCMLP Bankr. Dkt. 3676 at 26 [App. 27].
[101] HCMLP Bankr. Dkt. 3571-1, Ex. C, Feb. 19, 2020 Hr'g Tr. at 177:7-178:3 [App. 2863-2864]. In the same hearing, the Court also suggested that Mr. Dondero could not be "trusted" to "keep his word." *Id.* at 174:11-175:13 [App. 2860-2861].

expressed hostility to the possibility that HCMLP's position might benefit a Mr. Dondero affiliate.[102]

f. The Presiding Judge's Novels.

The novels reveal (or, at lease, create a reasonable perception) that she holds negative views about hedge fund managers like Mr. Dondero and the industry in which he operates. In the Recusal Order, Judge Jernigan acknowledges she learned about the CLO industry and the CLO products that are featured in her novels during the Acis Bankruptcy.[103] One can reasonably presume that Judge Jernigan, like many authors, also conducted *outside research* on the industry and its players, of which Mr. Dondero and HCMLP were pioneers.

Judge Jernigan denies that any characters or entities in her novels were "inspired by or modeled after the [Petitioners]," disclaims any resemblance her novels have "to actual events, locales, or persons, living or dead, [a]s entirely coincidental," and focuses on aspects of her stories that differ from reality.[104] However, the Bankruptcy Court avoids discussing the important similarities between her novel, *Hedging Death*, and Petitioners. By way of example:

Hedging Death	**Mr. Dondero, HCMLP, and Acis**
The novel involves a Dallas-based hedge fund, *Ranger* Capital, which is described as a "multi-billion-dollar conglomerate, which manage[s] not just hedge funds, but private equity funds, CDOs, CLOs, REITS, life settlement, and all manner of compicated financial products."[105]	HCMLP: (1) was formerly named *Ranger* Asset Management; (2) is a Dallas-based hedge fund; (2) was, at one point, worth more than a billion dollars; and (3) manages exactly the same unusual mix of investments.[106] HCMLP launched one of the first ever CLOs

[102] When applying the reasonable business judgment standard to Mr. Seery and Debtor management, by contrast, the Bankruptcy Court has said it is a very low standard requiring judicial deference. *See* HCMLP, Ex. W, August 4, 2021 Hr'g. Tr. at 77:4-78:20 [App. 3075-3076].
[103] HCMLP Bankr. Dkt. 3676 at 15 [App. 16].
[104] HCMLP Bankr. Dkt. 3676 at 33-36 [App. 34-37].
[105] *See Hedging Death* at 10-11, 73, 99, 244.
[106] Notably, there are no other enterprises in Dallas that manage this mixture of product types. Moreover, this mixture includes products not normally found at the same firm because they (1) require divergent skill sets and teams to manage, (2) usually have significantly different time horizons for asset realization (which require a diverse base of investors with different timing needs), and (3) have limited overlap in which managed funds can take investments, such as CLOs and CDOs (which only can invest in debt), private equity (which is equity only), and REITs (which are real-estate only). Highland's unique history created this diversity of product types. The Highland mixture of products

	and was the world's largest CLO manager for years.
Ranger Capital's manager is described as a reckless investment manager and "nasty" litigant.[107]	Judge Jernigan has used the exact same language to describe Mr. Dondero in the Bankruptcy Proceedings.
Ranger Capital experiences economic distress largely due to extensive investor litigation stemming from bad investments.[108]	Judge Jernigan admits that her characterization of Mr. Dondero as litigious "was a view formed against the backdrop of having heard about more than a decade of litigation," and describes HCMLP as having a "historical inclination toward litigation."[109]
The novel describes "byzantine" international tax structures and off-shore transactions as pretexts for hiding illegal activity and money laundering.[110]	HCMLP and Mr. Dondero use international tax structures and off-shore transactions (customary in the finance industry), and Judge Jernigan has repeatedly expressed her suspicion of them (calling them "byzantine").[111]
The novel describes the life settlement industry as "creepy."[112]	The Bankruptcy Court knows that HCMLP and Mr. Dondero invested in the life settlement industry.

These are just a few parallels, but the only one that Judge Jernigan even attempts to address is the name of Ranger Capital. The Judge claims that: she has never "***heard***" that HCMLP ever did business under the name of "Ranger"; the name "Ranger" "was never mentioned in the bankruptcy case"; Ranger "is not in the Highland disclosure statement"; Ranger is absent from "the numerous organizational charts that were presented to her ***in the last three years***."[113] However, this information is publicly disclosed: (1) on NexPoint's (one of the Petitioners') website; [114] and (2) in a 2018 filing in the Acis Bankruptcy (but not presented in the last ***three***

likely exists only at a sprawling firm that invests in almost all asset types, or but not at any other founder-managed mid-size firm.

[107] *See Hedging Death* at 16, 74, 98-99, 114, 127.

[108] *Id.* at 16, 114, 127.

[109] HCMLP Bankr. Dkt. 3676 at 28-30 [App. 29-31].

[110] *See, e.g.*, *Hedging Death* at 75, 127-128, 179 ("Graham had kept all this information secret with his byzantine web of offshore companies.").

[111] *See, e.g.*, HCMLP Bankr. Dkt. 3571-1, Ex. D, June 30, 2020 Hr'g Tr. at 86:16-87:15 [App. 2882-2883].

[112] *Hedging Death* at 71.

[113] HCMLP Bankr. Dkt. 3676 at 34 [App. 35].

[114] www.nexpointassetmgmt.com/our-history/

years).[115] Notably, Judge Jernigan does not deny that Ranger Capital is based upon HCMLP, offers no alternative "inspiration" for the "Ranger" name, and fails to deny that the unscrupulous depiction of hedge fund managers expressed in the first novel, *He Watches All My Paths*, reflect her own views.

Any reasonable person reading Judge Jernigan's novel *Hedging Death* would logically conclude: (1) the novel appears patterned, at least in part, after HCMLP and Mr. Dondero; and (2) the Judge holds bias and prejudice, at the very least highly negative opinions, about hedge-fund managers and private equity industry, generally (if not about Mr. Dondero and his businesses specifically). Indeed, several recent press articles have drawn parallels between Judge Jernigan's story in *Hedging Death* and Mr. Dondero/HCMLP.[116] At the very least, these parallels would cause and have caused reasonable people—and should cause this Court—to reasonably question Judge Jernigan's impartiality, warranting an order of mandamus requiring the Judge's recusal.[117]

PRAYER

For these reasons, recusal is mandatory.[118] Petitioners respectfully request that the Court grant this Mandamus.

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[115] *See* Dkt. 85-2 in Case No. 18-03078 at Ex. P to the Trustees Motion for Partial Summary Judgment [App.3368] – a history of HCM in the 2018 ADV ("1990 James Dondero and Mark Okada (the "Founders") formed a joint venture with Protective Life Insurance Corporation ("Protective Life"), specializing in senior secured loans … 1997 The Founders purchased Protective Life's stake, and later that year established Ranger Asset Management, L.P., an independent investment adviser registered with the SEC. 1998 Ranger Asset Management, L.P. changed its name to Highland Capital Management, L.P."). Petitioners request the Court take judicial notice of this filing.

[116] *See Bankruptcy Litigant: Recuse Novelis Judge*; February 1, 2023 [App. 3170-3173]; *see also* App. Financial Times [3174-3177], "Highland court saga tests fact vs fiction," … (author voices his own suspicions about whether the novel is based on the real-life proceedings currently playing out in Judge Jernigan's courtroom).

[117] *In re Kansas Pub. Employees Retirement Sys.*, 85 F.3d at 1358.

[118] *Liljeberg*, 486 U.S. at 850; *Andrade*, 338 F.3d at 454.

Dated: April 5, 2023

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

No. _____

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

In re James D. Dondero et al.,
Petitioners.

On Petition For Writ Of Mandamus To The
United States District Court For The Northern District Of Texas

(Bankruptcy Case No. 19-34054-sgj11)

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

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ATTORNEYS FOR PETITIONERS

Petitioners James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("Petitioners") submit this Appendix to Petition for Writ of Mandamus:

Exhibit	Description	Appendix Page No.
1.	Memorandum Opinion and Order Denying Amended Renewed Motion to Recuse, Pursuant to 28 U.S.C. § 455, dated March 6, 2023, Dkt. 3676 in Case No. 19-34054-sgj-11	APP. 0001 – APP. 0037
2.	James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Food Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, A Delaware Limited Liability Company's Brief in Support of Their Motion to Recuse Pursuant to 28 U.S.C. § 455, dated March 18, 2021, Dkt. 2061 in Case No. 19-34054-sgj-11	APP. 0038 – APP. 0075
3.	Appendix in Support of James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Food Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, A Delaware Limited Liability Company's Brief in Support of Their Motion to Recuse Pursuant to 28 U.S.C. § 455, dated March 18, 2021, Dkt. 2062 in Case No. 19-34054-sgj-11	APP. 0076 – APP. 2798
4.	James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Food Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, A Delaware Limited Liability Company's Memorandum of Law in Support of Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455, dated October 17, 2022, Dkt. 3571 in Case No. 19-34054-sgj-11	APP. 2799 – APP. 2828
5.	Appendix Support of James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Food Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, A Delaware Limited Liability Company's Memorandum of Law in Support of Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455, dated October 17, 2022, Dkt. 3571-1 in Case No. 19-34054-sgj-11	APP. 2829 – APP. 3078

6.	Highland's Objection to Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455, dated October 31, 2022, Dkt. 3595 in Case No. 19-34054-sgj-11	APP. 3079 – APP. 3135
7.	Movants' Amended Reply in Support of Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455, dated December 15, 2022, Dkt. 3648 in Case No. 19-34054-sgj-11	APP. 3136 – APP. 3163
8.	James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Food Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, A Delaware Limited Liability Company's Supplemental Memorandum of Law in Support of Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455, dated March 3, 2023, Dkt. 3673 in Case No. 19-34054-sgj-11	APP. 3164 – APP. 3169
9.	*Bankruptcy Litigant: Recuse Novelist Judge*, Hedge Fund Alert, February 1, 2023	APP. 3170 – APP. 3173
10.	Mark Vandevelde, *Highland Court Saga Tests Fact vs. Fiction*, Financial Times, March 11, 2023	APP. 3174 – APP. 3177
11.	Appendix in Support of Trustee's Motion for Partial Summary Judgment, dated November 27, 2018, Dkt. 85-2 in Case No. 18-03078-sgj	APP. 3178 – APP. 3581
12.	Hearing Transcript, June 10, 2021; Case No. 19-34054-sgj-11	APP. 3582-3589

Dated: April 5, 2023

Respectfully submitted,

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EXHIBIT 1

Docket #3676 Date Filed: 3/6/2023

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

Signed March 5, 2023

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**CASE NO. 19-34054-SGJ-11**
	§	**(Chapter 11)**
Reorganized Debtor.	§	

MEMORANDUM OPINION AND ORDER DENYING "AMENDED RENEWED MOTION TO RECUSE, PURSUANT TO 28 U.S.C. § 455"

(ruling on the most recent motion to recuse filed in the main bankruptcy case, *see* DE ## 3570 & 3571)

There have been multiple motions to recuse the presiding bankruptcy judge ("Presiding Judge") in the main bankruptcy case of Highland Capital Management, L.P. ("Highland," "Reorganized Debtor," or sometimes "Debtor"). Each one has been filed by 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, f/k/a HCRE

Partners, LLC, a Delaware limited liability company (collectively, the "Movants").[1] This Memorandum and Order relates to the one entitled *Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455* (with supporting Brief), filed October 17, 2022 [DE ## 3570 & 3571]—which is either the second or third such motion filed in the main bankruptcy case, depending upon how one counts. For ease of reference, the court will refer to this motion and brief at DE ## 3570 & 3571 as the "Third Motion to Recuse." This Memorandum Opinion and Order denies the Third Motion to Recuse.

I. FOR CLARIFICATION, THE FOUR MOTIONS TO RECUSE FILED BY MOVANTS.

First Motion to Recuse. Movants filed the first *Motion to Recuse Pursuant to 28 U.S.C. § 455* on March 18, 2021, along with a supporting Brief and an Appendix [DE ## 2060, 2061, & 2062] (hereinafter, the "First Motion to Recuse"). This was collectively 2,763 pages in length. This was approximately one month after the bankruptcy court confirmed a Chapter 11 plan in this case—specifically, the court confirmed a plan (the "Plan") on February 22, 2021. This was also approximately 17 months after the bankruptcy case was filed in October 2019. The First Motion to Recuse was also filed just two business days before the bankruptcy court was scheduled to hear a motion of Highland to hold Mr. Dondero in contempt of a TRO. The court denied the First Motion to Recuse in an order dated March 23, 2021 ("First Order Denying Recusal") [DE # 2083]. The Movants appealed the First Order Denying Recusal, and that appeal was dismissed for lack of jurisdiction on February 9, 2022 ("District Judge Kinkeade's Order") (reported at 2022 WL

[1] An entirely separate, fourth Motion to Recuse the Presiding Bankruptcy Judge was filed February 27, 2023, by one of the Movants—Highland Capital Management Fund Advisors, L.P.—in related Adversary Proceeding # 21-3076 styled *Kirschner v. Dondero, et al*. [DE # 309]. This Memorandum Opinion and Order is not intended to address that motion.

394760). District Judge Kinkeade's Order held that: (a) an order denying a motion to recuse is an interlocutory order; (b) it is not subject to the collateral order doctrine; (c) it is not an appealable interlocutory order under 28 U.S.C. § 1292(a); (d) Movants were not entitled to leave to appeal under 28 U.S.C. § 1292(b); (e) Movants were not entitled to withdrawal of the reference on the First Motion to Recuse; and (f) Movants were not entitled to have their appeal construed as a petition for writ of mandamus.

Second Motion to Recuse. A new motion was filed on August 25, 2022, five months after District Judge Kinkeade's Order. It was entitled "Amended Motion for Final Appealable Order and Supplement to Motion to Recuse Pursuant to 28 U.S.C. § 455 and Brief in Support" [DE ## 3470 & 3471] ("Second Motion to Recuse"). This was six days after the Fifth Circuit ruled on the appeal of the Highland Plan confirmation order, affirming it in substantial part. The Second Motion to Recuse, which, with Appendix, was 162 pages in length, expressed Movants' interpretation of District Judge Kinkeade's Order: that the only reason the First Order Denying Recusal was not final and appealable was because of one sentence at the end of the order, wherein the bankruptcy court ***reserved the right to supplement or amend the order***. The bankruptcy court promptly set a status conference (six days later—on August 31, 2022) regarding the Second Motion to Recuse to clarify Movants' basis for its new motion. For one thing, the bankruptcy court questioned Movants' interpretation that this one sentence in the First Order Denying Recusal was the actual basis for District Judge Kinkeade's Order,[2] since he cited a litany of authority for the proposition that a recusal order does not become final until a final judgment has been entered

[2] The bankruptcy court put that sentence in the First Order Denying Recusal because it expected the Movants might file a Rule 59 motion requesting a hearing or seeking more findings.

in the overall proceeding. District Judge Kinkeade's Order, penultimate paragraph ("Appellants must await final judgment, or other final resolution, of their bankruptcy proceeding in order to appeal the Recusal Order."). In other words, could the bankruptcy court truly "fix" the lack of finality problem by simply deleting that one sentence in the First Order Denying Recusal? Moreover, the court questioned the procedural propriety of Movants' request to "supplement" the record on the First Motion to Recuse with approximately 154 pages of extra evidence. This request appeared to the court to be either a very untimely Rule 59 motion or, in essence, a new motion to recuse—urging consideration of new grounds/evidence that arose subsequent to the First Motion to Recuse. After a status conference, on September 1, 2022, the court issued an order denying the Second Motion to Recuse [DE # 3479] ("Second Order Denying Recusal") for ***procedural defects***, but ruled that the order was:

> without prejudice to the Movants' right to file (1) a simple motion (without an appendix or attached proposed supplements to the record) under the appropriate procedural rule(s), seeking only a revised and amended Recusal Order that removes the following language contained at the end of the Recusal Order, but otherwise leaves the Recusal Order unchanged: "The court reserves the right to supplement or amend this ruling;" and/or (2) a new motion to recuse this bankruptcy judge based on any alleged new evidence or grounds for recusal that were not considered by this bankruptcy judge at the time of its consideration of the original Recusal Order.

Third Motion to Recuse. The Movants chose the latter option. Specifically, approximately six weeks later, on October 17, 2022, the Movants filed the current motion before the court entitled *Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455* and supporting brief [DE ## 3570 & 3571] (the "Third Motion to Recuse"). This was 10 days after the Fifth Circuit had issued, on October 7, 2022, a denial of a request for a stay in connection with its ruling on the Plan and confirmation order. The court is aware that there is a petition for *writ of certiorari* pending at the

U.S. Supreme Court regarding the Plan and confirmation order. In any event, the Third Motion to Recuse is 280 pages in length (the motion, brief and appendix combined)—with the additional appendix intended to supplement the 2,763 pages of materials filed with the First Motion to Recuse. The Reorganized Debtor filed a Response and Brief objecting to the Third Motion to Recuse (56 pages in length) and filed an appendix in support (4,035 pages in length), both on October 31, 2022. DE # 3595 & 3596. Movants then filed a motion to file a reply brief in excess of the page limit and a Reply [DE ## 3618 & 3623] on November 10, and November 14, 2022, respectively. These documents were collectively 58 pages. ***Because more than 7,000 pages of material were submitted***, and also because this court has other court business (including typically at least three Highland contested matters or adversary rulings under advisement at any given point in time), this court has had the Third Motion to Recuse under advisement (that is the subject of this Order).

Fourth Motion to Recuse. Meanwhile a fourth motion to recuse the Presiding Judge was filed on February 27, 2023 in the separate Adversary Proceeding #21-3076 by one of the same Movants that is a defendant therein.[3] It appears that some of the same arguments are made in the Fourth Motion to Recuse with one significant new argument: Movant believes that a character in one of the fiction legal thriller novels written by the Presiding Judge is based on Mr. James

[3] *See HCMFA's Motion to Recuse pursuant to [2]8 U.S.C. §§ 144 and 455* and brief in support [Adv. Pro. No. 21-3076 DE ## 309, 310]. The court notes anecdotally that this Fourth Motion to Recuse was filed several hours after the bankruptcy court issued an opinion and order conforming the Highland Plan to the ruling of the Fifth Circuit. It may very well be coincidental, but the various motions to recuse have each followed on the heels of a significant case development that Movants may perceive to be adverse to their interests —*i.e.*, the Plan confirmation order; affirmance by the Fifth Circuit of the Plan confirmation order; denial of a stay by the Fifth Circuit of its ruling on the confirmation order; a ruling of the bankruptcy court conforming the Plan to the Fifth Circuit's ruling. Again, this may be purely coincidental.

Dondero and, thus, shows the Presiding Judge has a bias towards him or the hedge fund industry generally. This court will separately rule on the Fourth Motion to Recuse in due course, after the parties have had the chance to respond.

II. THE SPECIFIC GROUNDS URGED IN THE CURRENT MOTION.

Movants are requesting that the Presiding Judge recuse herself from presiding over the Chapter 11 case of Highland (all of it). With regard to the specific grounds urged by Movants, they state that they perceive the Presiding Judge has animus towards Mr. Dondero and parties connected with him or deemed under his control (the "Affected Entities"). Mr. Dondero and the Affected Entities argue that the Presiding Judge's impartiality can be reasonably questioned. Specifically, they express concerns that the Presiding Judge formed negative opinions of Mr. Dondero in a prior bankruptcy case over which the Presiding Judge presided (*In re Acis Capital Management, L.P.,* Case No. 18-30264);[4] that those opinions have supposedly carried over to the Highland case; that the Presiding Judge has been unable to extricate those opinions from her mind; and that this has resulted in an actual bias against Mr. Dondero that has prejudiced or is prejudicing him and the Affected Entities.

Accordingly, the Movants ask that the Presiding Judge recuse herself from any future contested matters and adversary proceedings arising in the Highland case.

III. RELEVANT CASE BACKGROUND.

By way of further background, the Highland case has been pending since October 16, 2019. It was filed in the Bankruptcy Court for the District of Delaware. Venue was transferred to the Bankruptcy Court for

[4] Acis Capital Management, L.P. ("Acis") was formerly a company in the Highland corporate organizational structure.

the Northern District of Texas, Dallas Division, on motion of the Official Unsecured Creditors Committee ("UCC") on December 4, 2019. The UCC in this case consisted of non-insider creditors asserting more than $1 billion worth of claims against the Debtor.

On January 9, 2020, a significant corporate governance settlement between Highland and the UCC was reached and presented to this court. It was approximately one month after the Highland case was transferred to the Presiding Judge. The settlement involved the removal of Mr. Dondero as CEO and from all decision making at Highland, ***at the insistence of the UCC***, and an entirely new corporate governance structure was imposed on the Debtor, with extensive oversight by the UCC. This new corporate governance structure was negotiated by the Debtor under pressure from both the UCC and the United States Trustee—both of whom expressed positions that a Chapter 11 Trustee should be appointed in this case due to Mr. Dondero's alleged conflicts of interest, inability to act as a fiduciary, and purported mismanagement. Mr. Dondero signed off on the corporate governance settlement and this court approved it. A new three-member independent board controlled the Debtor for the remainder of the bankruptcy case until the Plan went effective in August 2021. That board consisted of a retired bankruptcy judge (Russell Nelms); a second individual with extensive experience serving as an independent board member of companies undergoing bankruptcy or restructuring (John Dubel); and a third individual (later appointed CEO) with broad experience managing distressed debt investments and other products similar to what Highland managed (James P. Seery). Mr. Dondero stayed on with Highland during the entire first year of the bankruptcy case (through October 2020), as an unpaid portfolio manager, but with no governance role, at the request of the Debtor. The UCC acquiesced to that arrangement (although they had not negotiated this and expressed reservations about Mr. Dondero's role—albeit limited). The United States Trustee was opposed to the new corporate government structure and preferred a Chapter 11 Trustee instead. This court overruled the United States Trustee's objection and determined that the corporate

governance structure negotiated by the UCC was more likely to preserve value and foster reorganization efforts than the more drastic step of appointing a Chapter 11 Trustee.

After more than a year, under direction of the new board, Highland obtained confirmation of a Chapter 11 Plan on February 22, 2021. The Plan was proposed after many months of contentiousness with several large creditors and the UCC. In fact, in August 2020, the bankruptcy court required the key parties to stand down and engage in mediation before two respected co-mediators (Retired Bankruptcy Judge Allan Gropper, S.D.N.Y. and Attorney/Mediator Sylvia Mayer, Houston). Highland (either during or after mediation) reached key settlements with the largest creditors in this case (including Acis, which asserted more than a $70 million disputed claim; the Redeemer Committee for the Crusader Fund, which asserted more than a $250 million claim and had been in litigation in multiple fora with Highland and affiliates for approximately a decade; and UBS Securities, which asserted more than a $1 billion claim and had also been in litigation with Highland and certain affiliates for more than a decade). Mr. Dondero participated in the mediation, but settlements were not reached with him. The independent board members asked for Mr. Dondero's resignation from Highland in October 2020 (i.e., from his role as a portfolio manager). At this point, things became very contentious among the Movants and the Debtor; dozens of contested motions and objections were filed among the Movants and Debtor. Accusations were made by the Debtor that Mr. Dondero was interfering with Highland business, employees, and had even destroyed a company phone to hide evidence. TROs were sought and obtained. Finally, the court confirmed the Plan in February 2021. The Plan was supported by the UCC and overwhelmingly (99%+) by non-insider creditors. Other large, non-insider creditors that supported the Plan, besides those mentioned above, were Patrick Daugherty (a former executive of Highland who has been in litigation with Highland and Mr. Dondero for more than a decade) and HarbourVest—each of whom asserted multi-million dollar claims in this case. In any event, the Movants appealed the confirmation order, and it was

affirmed in substantial part by the Fifth Circuit. The plan has been in effect since August 2021.

IV. LEGAL STANDARD APPLICABLE TO THE MOTION TO RECUSE.

Before addressing the substance of the Third Motion to Recuse, the court will address the governing legal authority: 28 U.S.C. § 455, Fed. R. Bankr. P. 5004(a), and certain case law interpreting same. The relevant portions of 28 U.S.C. § 455 provide that:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . .

28 U.S.C. § 455(a) & (b)(1).

Bankruptcy Rule 5004(a) further provides that, "A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, shall be disqualified from presiding over the case."

A. Timeliness?

The court first notes that the applicable statute and rule do not address the concept of timeliness of a motion to recuse. However, several courts have taken timeliness into account.

The Fifth Circuit has noted, in *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982), that, while there were arguments in favor of not reading a timeliness requirement into the statute,

"the lack of a timeliness rule has its own problems."[5] The Fifth Circuit, in concluding that it was "convinced that timeliness may not be disregarded in all cases regarding disqualification under § 455(a)," stated,[6]

> Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem. Congress did not enact § 455 to allow counsel to make a game of the federal judiciary's ethical obligations; we should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage.

Regarding the specific motion for disqualification of a district court judge in that case, the Fifth Circuit notes "that the motion raised for the first time on appeal, and after two full trials on the merits, is too tardily made for us to consider it now."[7]

B. Hearing Needed? If So, Who Presides?

The court next notes that the applicable statute and rule do not expressly state whether the presiding judge or some other judge should decide a motion to recuse/disqualify or whether a hearing—evidentiary or otherwise—is required.

Case authority has interpreted the provisions set forth above to give the targeted judge authority (at least initially) to decide a motion to disqualify. *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999) (a motion to recuse is committed to the discretion of the targeted judge, and the denial of such motion will only be reversed upon the showing of an abuse of discretion); *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 401 B.R. 848, 851 (Bankr. S.D.Tex. 2009) (citing *United States v. Mizell*, 88 F.3d 288, 299 (5th Cir. 1996) (the targeted judge has broad

[5] *Delesdernier*, 666 F.2d at 121.
[6] *Id.*
[7] *Id.* at 122-23. The Ninth Circuit and Tenth Circuit have also taken timeliness into account when considering a § 455 motion for recusal. *See Davies v. C.I.R*, 68 F.3d 1129, 1130-31 (9th Cir. 1995)(a motion for recusal filed "one year after a ruling was considered untimely."); *Willner v. Univ. of Kansas*, 848 F.2d 1023 (10th Cir. 1988).

discretion in determining whether disqualification is appropriate)).[8]

Additionally, the court notes that the applicable statute and rule do not expressly state what type of hearing is required, if any. Case authority has interpreted that a motion for disqualification does not necessarily confer upon a movant a right to make a record in open court, nor does it confer upon them a right to an evidentiary hearing. *Lieb v. Tillman (In re Lieb)*, 112 B.R. 830, 835-36 (Bankr. W.D. Tex. 1990). *See generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3550, at 629 (a section 455 motion can be supported by an affidavit, a verified memorandum, or a statement of facts in some form). The procedure for a targeted judge to follow, as set forth in *Levitt v. University of Texas*, 847 F.2d 221, 226 (5th Cir. 1988), and as more specifically articulated in *Lieb v. Tillman*, 112 B.R. at 836, is: (a) first, the targeted judge should decide whether the "claim asserted" by the movants "rises to the threshold standard of raising a doubt in the mind of a reasonable observer" as to the judge's impartiality; (b) if not, then the judge should not recuse himself; and (c) if so, another judge should "decide what the facts are," *i.e.,* hold an evidentiary hearing, and presumably then this other judge would decide whether disqualification is appropriate. If a movant appeals a decision not to disqualify or recuse and the district court finds the record and documents submitted to be inadequate for a determination, it may remand and direct another judge to conduct an evidentiary hearing to enlarge the record. Such procedure is consistent with *Levitt. See Lieb v.Tillman*, 112 B.R. at 836.

[8] The Fifth Circuit discourages transfer of a disqualification motion because "[t]he challenged judge is most familiar with the alleged bias or conflict of interest" and "is in the best position to protect the nonmoving parties from dilatory tactics." *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982).

C. Motions to Recuse are Very Fact-Specific.

Next, with regard to evaluating a motion to recuse, the Fifth Circuit has recognized thatsection 455(a) claims are fact-driven, and as a result, the analysis of a particular section 455(a) claim must be guided, not by a comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue. *United States v. Jordan,* 49 F.3d 152, 157 (5th Cir. 1995). Disqualification is appropriate if a reasonable person, knowing all of the relevant circumstances, would harbor doubts about the impartiality of the judge. *Chitimacha Tribe*, 690 F.2d at 1165.

D. On the Topic of Bias or Animus.

As a matter of law, the existence of clashes between the court and counsel for a party is an insufficient basis for disqualification, and "Circuit Courts have refused to base disqualification under section 455 upon apparent animosity towards counsel." *In re Lieb*, 112 B.R. at 835 (citing *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1050-52 (5th Cir. 1975)(holding that disqualification should be determined "on the basis of conduct which shows a bias or prejudice or lack of impartiality by focusing on a party rather than counsel."))(other citations omitted); *see also, Focus Media, Inc. v. NBC (In re Focus Media),* 378 F.3d 916, 929-31 (9th Cir. 2004) (adverse rulings and negative remarks ordinarily do not support a bias challenge). More significant, the U.S. Supreme Court has stated that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not establish bias or partiality" and that[9]

> judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias

[9] *Liteky v. United States*, 510 U.S. 540, 555-556 (1994).

> or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

What might amount to a "high degree of favoritism or antagonism"? The example given by the *Liteky* Court was a 1921, WWI-espionage case where the District Court Judge allegedly said of the German American defendants: "'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.'" A very recent Fifth Circuit case echoes these principles as well. In *Brocato*, the court noted that "a judge is not generally required to recuse for bias, even if the judge is 'exceedingly ill disposed towards the defendant,' when the judge's 'knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings[.]'"[10]

V. THE UNIQUE FACTS AND CIRCUMSTANCES APPLICABLE HERE.

First, the court determines that the Third Motion to Recuse and the previous motions to recuse have not been timely. Again, the original one was filed more than 15 months after the Presiding Judge was transferred the Highland case from Delaware. It was the 2060th pleading on the docket maintained in the bankruptcy case (this does not count the docket entries in the nine, separate adversary proceedings related to the Highland case), and it was filed after many dozens of orders had been issued by the court, including the confirmation order that was subsequently affirmed on appeal. The current Third Motion to Recuse was the 3570th pleading on the docket of the bankruptcy case and was filed exactly three years after the bankruptcy case was filed. The timing does not seem to pass muster—if, indeed, timeliness is a factor, as Circuit-level authority has suggested.

[10] *United States v. Brocato*, 4 F.4th 296, 302-03 (5th Cir. 2021).

But, since the Third Motion to Recuse—and all of them for that matter—raise serious issues, the court will nevertheless analyze the pending motion as though it is timely. The court will address whether the overall circumstances might cause a reasonable observer to question or harbor doubts about the bankruptcy court's impartiality. Would the claims asserted in the Third Motion to Recuse rise to the threshold standard of raising a doubt in the mind of a reasonable observer as to the court's impartiality?

A. The Acis Case.

The Third Motion to Recuse revisits the Acis bankruptcy case and suggests that the Presiding Judge gained extrajudicial knowledge and developed opinions of Mr. Dondero and the Affected Entities during that case and that this has created animus or bias towards them in the Highland bankruptcy case and related adversary proceedings. Evaluating this contention requires some examination of just what the bankruptcy court heard and adjudicated in the Acis case.

Acis Capital Management, L.P. ("Acis LP"), a Delaware limited partnership, and Acis Capital Management GP, L.L.C. ("Acis GP/LLC"), a Delaware limited liability company—were two entities within the approximately 2,000-entity organizational structure of Highland that were forced into an involuntary bankruptcy case in January 2018 (for convenience, the court will collectively refer to them as "Acis"). The Presiding Judge presided over the Acis case. Mr. Dondero was the president of the two Acis debtors, as well as the CEO of Highland at the time. The Presiding Judge's recollection is that Mr. Dondero testified ***only once*** during the lengthy Acis proceedings (during the trial on the involuntary petitions in the Spring of 2018) and, at all other times, various inhouse counsel at Highland (Scott Ellington, Isaac Leventon, and J.P. Sevilla) served as the witnesses for Acis and Highland.

As far as "extrajudicial knowledge," what the Presiding Judge learned from the Acis case was largely regarding the "CLO Industry." The court learned that Highland was a pioneer, among registered investment advisors, in the securitization investment product known as a "CLO" (collateralized loan obligations) and Acis, for many years, was the vehicle through which Highland's CLO business was managed. The court learned about the typical structure of these CLOs (the various tranches of debt and the rights they enjoyed), the typical governing documents for and life cycle of a CLO, the typical portfolio management agreements, the shared services agreements, and the sub-advisory agreements that undergirded the whole operation. The court learned about Highland's role in these and the role of Acis, historically, and the role of an entity known as Highland CLO Funding "("HCLOF"). If the Presiding Judge made any specific rulings with regard to Mr. Dondero or the Affected Entities during the Acis case, she cannot recall. The court certainly does recall accusations made by Acis against ***Highland*** and ***HCLOF*** with regard to alleged fraudulent transfers and alleged denuding of Acis assets to thwart a judgment creditor, Josh Terry. The court has never ruled on the actual fraudulent transfer claims and, the claims (at least among Acis and Highland) have been settled.

In summary, the extrajudicial knowledge—if it should be considered that—the Presiding Judge gained from the Acis case, that is now suggested to have created bias or animus, was knowledge about the highly complex CLO products industry, knowledge about the forms of agreements that typically set forth parties' rights and obligations, and some knowledge about the Highland business structure and the shared services and sub-advisory services model it typically used. The Presiding Judge, at all times, has been aware that Mr. Dondero was a founder of Highland and was the President of Acis and CEO of Highland at relevant times. To be clear, a

Chapter 11 Trustee was appointed in the Acis case soon after an order for relief was entered, and the Presiding Judge only recalls Mr. Dondero testifying once in court during the Acis case. The Presiding Judge has a vague recollection that deposition testimony may have been presented at another time. The court cannot recall any of the other Affected Entities ever being parties appearing in the Acis case or providing testimony.

Assuming, *arguendo*, that the Presiding Judge gained some knowledge about Highland and at least one of the Movants (i.e., Mr. Dondero) from the Acis case, the governing case law suggests that this sort of awareness would not qualify as extrajudicial knowledge.[11] In *Tejero*, for example, the Fifth Circuit made it clear that a judge's knowledge of a party gained from previous cases involving that party does not qualify as extrajudicial knowledge.[12] There, the judge relied on knowledge gained from presiding over three previous cases involving the party that moved for the judge's recusal.[13]

The court notes, anecdotally, that 28 U.S.C. § 1408(2) contemplates that venue is proper over a case "in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership." Thus, it is not *per se* improper (in fact, it is generally proper) for a presiding judge to preside over cases of affiliated business entities of a party. It happens all the time.

Without showing that the Presiding Judge relied on extrajudicial knowledge to form her opinion, the Movants bear the burden of showing that the Presiding Judge 'display[ed] a deep-

[11] *See, e.g.*, *Liteky*, 510 U.S. at 555-556; *Tejero v. Portfolio Recovery Assocs., L.L.C.*, 955 F.3d 453, 463-64 (5th Cir. 2020).
[12] *See Tejero*, 955 F.3d at 463 (citing *United States v. Reagan* 725 F.3d 471, 491 (5th Cir. 2013)).
[13] *See id.*

seated favoritism or antagonism that would make fair judgment impossible.[14]

B. Bias or Animus, More Generally?

More generally, the court does not believe that the provisions of 28 U.S.C. § 455 are implicated here. The Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Movants. She does not believe she has displayed deep-seated favoritism or antagonism.

As earlier mentioned, case law has held that clashes between a court and counsel for a party is an insufficient basis for disqualification, and courts "have refused to base disqualification under section 455 upon apparent animosity towards counsel." *In re Lieb*, 112 B.R. at 835 (citing *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1050-52 (5th Cir. 1975)(holding that disqualification should be determined "on the basis of conduct which shows a bias or prejudice or lack of impartiality by focusing on a party rather than counsel.")))(other citations omitted). Not only has this court shown proper respect for Mr. Dondero's and each of the Affected Entities' counsel, but the court has no disrespect or animus toward Mr. Dondero on a personal level or any of the Movants. This court desperately wants to believe (and has, and always will, keep its mind open to the belief) that the foremost goal of the Movants is to preserve their economic and proprietary rights—even though, over time, things have gotten more and more contentious and even seemingly personal among certain parties (the court is reminded of when the former general counsel of Highland sued another prior general counsel of Highland for "stalking" him, and the suit was removed from the state court to the bankruptcy court; the bankruptcy court swiftly remanded it

[14] *Liteky*, 510 U.S. at 555.

back to state court—believing it had no place in a business reorganization). In any event, the Presiding Judge has commented several times that she believes Mr. Dondero, more than anything else, just wanted to get the company he built back. The Presiding Judge has said this, in spite of hearing sworn testimony that Mr. Dondero has threatened out of court to "burn the place down" if he cannot get what he believes he should get from the bankruptcy process.

This court has merely addressed motions, objections, and other pleadings as they have been presented. It has issued and enforced orders when requested and warranted. This court has provided Movants with a full and fair opportunity to present and pursue their objections and motions. In many situations, the court has issued very lengthy findings of fact and conclusions of law, opinions, or reports and recommendations to the District Court. Sometimes Movants have appealed (in fact, more than two dozen times) and many times they did not. This court's rulings have mostly been affirmed or otherwise undisturbed in the appeals that have been resolved so far.

C. Misstatements, Partial Descriptions, or Misunderstandings of Various Case Events.

Regrettably, the brief in support of the Third Motion to Recuse (filed by counsel who never appeared during the bankruptcy case until filing the First Motion to Recuse) contains several misstatements or partial descriptions of events during the case, in several places, that create misimpressions. Some of the more problematic examples of this are set forth below (in no particular order).

The Bankruptcy Court's Orders Requiring Mr. Dondero's (and Allegedly His Sister's?) Attendance at Bankruptcy Court Hearings. In the brief in support of the Third Motion to Recuse, Movants assert as one example of the Presiding Judge's alleged bias, certain of her orders—entered in January 2021, May 2021, and June 2021—"target[ing] Mr. Dondero (as well as his sister Nancy

Dondero) by requiring their presence at all hearings, regardless of whether their presence is needed." Third Motion to Recuse (brief in support), at p. 16 [DE # 3542]. This entirely misstates what happened.

First, almost 100% of the dozens of Highland hearings over the last 3+ years have been conducted virtually through WebEx (due to COVID and the large number of out-of-town participants). The court does not believe Nancy Dondero has ever physically been in the bankruptcy court, and Mr. Dondero rarely has. Certainly, they have never been penalized for that.

More importantly, what Movants omit was that, during a January 8, 2021 hearing to determine whether the court should grant a requested preliminary injunction against Mr. Dondero (regarding his alleged interference with the Debtor's business and certain employees of the Debtor), Mr. Dondero testified that he had not attended an earlier TRO hearing regarding this alleged conduct, nor read the transcript from the hearing, nor read the TRO itself to know what conduct it addressed.[15] The bankruptcy court was concerned that Mr. Dondero's failure to attend or participate in bankruptcy court hearings that impacted him or might result in obligations imposed upon him would create an opportunity for "plausible deniability." Thus, this court ordered Mr. Dondero to appear at all hearings to ensure both awareness of and compliance with this court's orders. Again, these were almost always video hearings. Mr. Dondero subsequently failed to appear at a hearing, thereby validating the court's concerns. Consequently, this court entered an order on May 24, 2021, clarifying that Mr. Dondero was required to appear at all hearings in the bankruptcy case [DE # 2362]. Notably, Mr. Dondero did not appeal the preliminary injunction or

[15] See DE # 3596, Ex. 31, Appx. 3755 ("Q … At least as of today, you never bothered to read the TRO that was entered against you, correct? A Correct.").

the May 24, 2021 order.

More generally, it is not atypical for this bankruptcy court to order principals of a party to appear at hearings when there are concerns regarding: (a) the contentiousness of a case, or (b) whether clients and lawyers are completely in sync and in communication with each other.

As for Nancy Dondero, the bankruptcy court has never ordered Nancy Dondero to appear at any hearings. Instead, on June 17, 2021, the court ordered the trustee of the Dugaboy and Get Good Trusts (i.e., Mr. Dondero's family trusts) to appear at all hearings and proceedings but only "where either of the Trusts are a party or take a position" [DE # 2458]. The trusts (Dugaboy, in particular) have been very active during the bankruptcy case and the court believed their standing was very tenuous. The court provided a detailed rationale for its order and it was never appealed. Nevertheless, Movants now disturbingly assert that Nancy Dondero was required to appear at all hearings "regardless of whether [her] presence [was] needed."

August 4, 2021 Order Finding Mr. Dondero in Contempt of Court. In the brief in support of the Third Motion to Recuse, Movants cite an order entered by the bankruptcy court on August 4, 2021, holding Mr. Dondero in civil contempt of court [DE # 2660] (the "Contempt Order"), as "[p]erhaps one of the most telling" examples of the Presiding Judge's bias. Third Motion to Recuse (brief in support), at p. 14-15 [DE # 3571]. Movants do not accurately or fully describe the facts leading up to entry of this Contempt Order (which was appealed and affirmed in all material respects).[16]

First, the Contempt Order stemmed from an April 12, 2021 complaint (the "HarbourVest

[16] *Charitable DAF Fund L.P. v. Highland Cap. Mgmt.*, L.P., 2022 U.S. Dist. LEXIS 175778 (N.D. Tex. Sept. 28, 2022). The only finding not affirmed was the payment of $100,000 if an unsuccessful appeal was filed.

Complaint") filed against Highland in the District Court, by an entity known as CLO Holdco and its parent company that is referred to as the "DAF"—both believed to be under the control of Mr. Dondero (more on that below). The HarbourVest Complaint was filed less than two months after Highland's Plan was confirmed and before it went effective. Movants allege that the HarbourVest Complaint addressed Highland's "brokering [during the bankruptcy case] the sale of CLO interests held by HarbourVest … without prior notice to other CLO investors and without respecting those investors' right of first refusal" in violation of some alleged duty. Third Motion to Recuse (brief in support), at 14. This is an inaccurate description of the events in the bankruptcy case that are the subject of the HarbourVest Complaint, and it also does not make clear why the bankruptcy court was motivated to enter the Contempt Order regarding the filing of the HarbourVest Complaint.

The facts were that, prior to Highland's bankruptcy case, a third-party unrelated to Highland called HarbourVest purchased a 49.98% equity interest in a non-Debtor entity called HCLOF for approximately $80 million. Highland and the entity CLO Holdco also owned equity interests in HCLOF. After Highland's bankruptcy, HarbourVest filed claims against Highland in excess of $300 million and sought rescission of its investment in HCLOF, alleging it was fraudulently induced by factual misrepresentations and omissions made by Mr. Dondero and certain of Highland's employees prior to the bankruptcy case. Highland and HarbourVest settled HarbourVest's claims, and Highland filed a Rule 9019 motion seeking court approval of the settlement. DE # 1625. The motion for approval of the settlement went out on normal notice to creditors and parties-in-interest in the bankruptcy case. Under the settlement, HarbourVest received allowed claims in the bankruptcy case totaling $80 million in the aggregate and

transferred its interests in HCLOF to a Highland subsidiary, effectively rescinding HarbourVest's investment in HCLOF. All aspects of the settlement were publicly disclosed in Highland's motion. DE # 1625. Mr. Dondero, his family trusts, and CLO Holdco (the same entity that later filed the HarbourVest Complaint) all objected to the settlement with HarbourVest. CLO Holdco argued it had a right of first refusal to HarbourVest's 49.98% interest in HCLOF. However, after reviewing Highland's pleadings, HCLOF's governing documents, and applicable law, CLO Holdco announced through counsel at a bankruptcy court hearing on the settlement that it had determined it had no such right and withdrew its objection. The bankruptcy court approved the settlement, including the transfer of HarbourVest's 49.98% interest in HCLOF to Highland and/or its designee.

Then, three months later, CLO Holdco and its parent company DAF filed the HarbourVest Complaint seeking, among other things, to enforce CLO Holdco's alleged right of first refusal—a right CLO Holdco had conceded did not exist in open bankruptcy court. The HarbourVest Complaint raises claims against Highland for breaches of fiduciary duty under the Investment Advisers Act[17] and/or state law, breach of contract, negligence, violations of the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. ("RICO")), and tortious interference—all relating to the settlement that the bankruptcy court had approved on notice to creditors and after an evidentiary hearing. With regard to the RICO count, CLO Holdco and DAF

[17] While specific statutory references to the federal Investment Advisers Act are sparse in the HarbourVest Complaint, subsequent pleadings of the Plaintiffs made clear they are referring to at least 15 U.S.C. § 80b-6 and 80b-15(a) (which they cite as imposing both a duty of care and a duty of loyalty, each unwaivable, on investment advisors, in favor of funds and its investors, citing *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008)); 15 U.S.C. § 206(2) (which they cite as requiring investment advisers to seek "best execution" for all their clients' transactions, citing *SEC v. Ambassador Advisors, LLC,* 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021)); and 15 U.S.C. § 215 (which they cite as recognizing "a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act").

alleged that Highland and certain co-Defendants it named were an "association-in-fact" engaged in a pattern of racketeering activity for failing to disclose the valuation of the 49.98% equity interest and ultimately effectuating the HarbourVest Settlement. Shortly thereafter, CLO Holdco sought to add Mr. James Seery (Highland's CEO) as a defendant in clear violation of various bankruptcy court orders [e.g., DE # 854]. Accordingly, the bankruptcy court, after an evidentiary hearing, issued the Contempt Order finding Mr. Dondero and others in contempt. To be clear, not only were the Plaintiffs seeking to sue Mr. Seery in violation of bankruptcy court orders, but this had the appearance of an end-run around the bankruptcy court—i.e., suing a Debtor (Highland was still a Debtor, with a confirmed plan that had not reached its effective date) for post-petition conduct that had been approved by the bankruptcy court after notice to creditors, and, all the while, one of the plaintiffs had objected to the post-petition conduct, by objecting to the HarbourVest Settlement, and then withdrew such objection. Moreover, even if there was a legal theory to pursue claims against Highland regarding the whole HarbourVest Settlement, there was a process for pursuing administrative claims in the confirmation order and Plan, and this process had not been followed.

Movants state in their brief in support of their Third Motion to Recuse, at p. 15, that Mr. Dondero credibly testified "he was not involved at all in authorizing or preparing the motion to add Mr. Seery" to the HarbourVest Complaint and that there was no evidence to the contrary. This is directly contradicted by the actual record. As the District Court explained when affirming the bankruptcy court's Contempt Order:

> Ample evidence supports the bankruptcy court's factual findings. Dondero has had a significant role in DAF for over a decade. DAF's assets come in part from Dondero and his "family trusts." Dondero "was DAF's managing member

until 2012," and he remains "DAF's informal investment advisor." After Dondero stepped down as managing member, that role went to Grant Scott, "Dondero's long-time friend, college housemate, and best man at his wedding." Scott ultimately resigned due to "disagreements with … Dondero."

[Mark] Patrick replaced Scott as "DAF's general manager on March 24, 2021"—19 days before the Seery Motion. Patrick initially had "no reason to believe that Mr. Seery had done anything wrong with respect to the HarbourVest transaction." Only once "Dondero told [him] that an investment opportunity was essentially usurped" did Patrick "engage[] the Sbaiti firm to launch an investigation" and ask "Mr. Dondero to work with the Sbaiti firm with respect to their investigation of the underlying facts." After that, Dondero "communicated directly with the Sbaiti firm"—Patrick did not. Dondero "saw versions of the complaint before it was filed" and had "conversations with attorneys" about the complaint pre-filing. That complaint focused on "Seery's allegedly deceitful conduct" and "mention[ed] Mr. Seery 50 times." Further, when listing the parties, the complaint listed each party named in the caption along with "[p]otential party James P. Seery, Jr.," providing his citizenship and domicile.

Further, although Dondero averred that he did not direct the Sbaiti firm to add Seery to the complaint, Dondero also contradicted himself, first claiming that he did not know that "the Sbaiti firm intended to file a motion for leave to amend their complaint to add Mr. Seery," but then agreeing during the hearing that he "[p]robably" was "aware that that motion was going to be filed prior to the time that it actually was filed." He also testified to conversations about the Seery Motion, noting that it involved a "very complicated legal preservation" issue.

Based on all that evidence, the Court is not left with a definite and firm conviction that the bankruptcy court erred. After being stymied in the bankruptcy court, Dondero manufactured the exigency for the lawsuit that challenged Seery's conduct. Dondero's claim that he "did not suggest that Mr. Seery should be added as a defendant" is not credible. Dondero gave Patrick the idea of challenging Seery's conduct, and he worked with the Sbaiti firm to bring that idea to fruition in the complaint—a complaint that clearly contemplated adding Seery to the lawsuit. Likewise, his plea that he "had no involvement with the Seery Motion" is not credible. Dondero himself testified to the contents of attorney communications concerning the Seery Motion, eventually admitting that he "probably" had knowledge of the Motion before it was filed. In short, the bankruptcy court did not err, after considering the "totality of the evidence," in finding that Dondero had "the idea of" suing to "challenge Mr. Seery's … conduct," that he "encouraged Mr. Patrick to do something wrong," and that Patrick "abdicated responsibility to Mr. Dondero with regard to . . . executing the litigation strategy."[18]

[18] *Charitable DAF Fund, L.P.*, 2022 U.S. Dist. LEXIS 175778, at **18-21.

The District Court, like the bankruptcy court, included ample citations to the record, including the direct testimony of both Mr. Dondero and Mr. Mark Patrick, to support its factual findings concerning Mr. Dondero's direct involvement in violating the bankruptcy court's orders and processes.

Finally, Movants allegations about the lack of support for the amount of bankruptcy court's sanctions is incorrect. Movants alleged that Highland submitted invoices showing it had incurred just $38,796.50 defending against Mr. Dondero's contempt in connection with the HarbourVest Complaint. But, in fact, Highland submitted invoices for $187,795. [DE # 2421-1, 2421-2; Ex. 34, Appx. 4048-4102]. The bankruptcy court added to that amount to compensate for additional costs, and the bankruptcy court's sanction of $239,655 was affirmed by the District Court.[19]

Hearing on Debtor's Application to Employ Foley Gardere as Special Counsel on February 19, 2020. The bankruptcy court held a hearing early in the bankruptcy case on Debtor's application to retain the law firm Foley Gardere to pursue appeals of the Acis involuntary petition and the Acis confirmation order (the "Application to Employ") on behalf of ***Neutra Ltd. (which is or was a company owned by Mr. Dondero***). During this hearing, retired Bankruptcy Judge Russell Nelms, one of the three independent directors appointed to Debtor's new board, testified that, as to the board's business judgment, the Application to Employ was considered by the independent directors, and they concluded that it was in the ***Debtor's*** best interest for Foley Gardere to perform this legal work. Movants assert that, despite this testimony, the bankruptcy court displayed a predisposition to contest positions that could possibly benefit Mr. Dondero on the pre-determined

[19] *Id.* at **13-17.

basis that any person sharing an opinion with Mr. Dondero (including, apparently, a member of the independent board) was somehow being unduly influenced by him).

Movants are less-than-clear regarding the bankruptcy court's comments and concerns regarding the Foley Gardere Application. To be clear, through the Foley Gardere Application, Highland sought to retain Foley Gardere on behalf of ***both*** Highland and the non-Debtor entity, Neutra Ltd., in the appeal of the Acis confirmation order and related matters (the "Acis Appeal"). In support of the Foley Gardere Application, Highland disclosed that: (a) Neutra Ltd. was owned by Mr. Dondero and his partner, Mark Okada, and (b) ***Highland*** intended to pay for Foley Gardere's representation of Neutra Ltd. in the Acis Appeal. The UCC and Acis objected to the Foley Gardere Application on the ground that ***Highland*** should not be permitted to use estate assets to support Neutra, a Dondero-controlled entity. [DE # 120]

Mr. Nelms testified in support of the Foley Gardere Application and was subject to a lengthy cross-examination.[20] The bankruptcy court approved Highland's retention of Foley Gardere but determined that the evidence was insufficient to justify expending estate assets to pay ***Neutra, Ltd.'s*** legal fees, a non-Debtor entity in which Highland held no interest.[21] The bankruptcy court's ruling on the Foley Gardere Application was based on its determination that Highland failed to prove that the estate would benefit by paying a non-Debtor's (Neutra Ltd.'s) legal fees. The bankruptcy court stated: "I cannot believe there is a chance in the world there is economic benefit to Highland if these things get reversed. Economic benefit to Neutra: Yeah, maybe. . . . But benefit to Highland? I just don't think the evidence has been there to convince me

[20] DE # 3596, Ex. 24, Appx. 3086-3142.
[21] *Id*. Appx. 3204-3209.

it's reasonable business judgment for Highland to pay the legal fees associated with the appeal."[22]

The bankruptcy court is at a loss to understand how its comments on the Foley Gardere Application constitute a manifestation of bias towards Mr. Dondero or Movants.

The January 2021 Examiner Motion. On January 14, 2021, Mr. Dondero's family trusts, requested the bankruptcy court exercise its discretion to direct the appointment of a neutral third-party examiner pursuant to 11 U.S.C. § 1104(c) as an allegedly less costly means to resolve various issues that had arisen in the Highland bankruptcy (the "Examiner Motion"). The Examiner Motion was made 15 months after the case was filed, after months of global mediation had occurred, where most of the significant claims against the estate had been settled, and less than three weeks before the scheduled confirmation hearing, which the court had been told was likely to have support of the major creditor constituencies. Despite the family trusts' request, the bankruptcy court declined to set that motion for an emergency hearing, meaning it was set for hearing in the ordinary course, after the date of the confirmation hearing. It became moot after confirmation of the Plan—although it would not have been moot if confirmation had been denied. Movants assert that the court's failure to set the Examiner Motion on an emergency basis shows bias. No creditor supported the Examiner Motion. When the court ultimately denied the Examiner Motion, nobody appealed.

Questioning of Highland About Possibility of PPP Loans at the July 2020 Exclusivity Hearing. Movants contend that certain questions of the bankruptcy court regarding COVID-related "PPP loans" at a July 8, 2020 exclusivity hearing were evidence of bias against Mr.

[22] *Id.* Appx. 3205-3206.

Dondero. As fully disclosed by this court, the inquiries were prompted by an extrajudicial source (a newspaper article) that the Presiding Judge happened to read one day, which noted that "Mr. Dondero or affiliates" received PPP loans. Because of the vagueness of the article, the bankruptcy court sought information from Highland—not Movants—and ordered Highland to disclose any PPP loans it had received post-petition. Highland responded to the court at a subsequent hearing that Highland had not obtained any PPP loans. Neither Mr. Dondero nor any of his affiliated entities were directed to provide any information, no action was taken against them, and the issue was never raised again by the bankruptcy court. Movants' suggestion that this somehow showed biased towards them is hard to understand. The court was merely inquiring about the possibility of Highland having obtained a post-petition COVID loan. Mr. Dondero was not even in control of Highland at this time.[23]

Court's Usage of Terms Such as "Litigious" or "Vexatious." This court and all courts sometimes use strong words as part of managing complex and contentious cases. Did the Presiding Judge ever refer to Mr. Dondero or Movants as "litigious"? Yes. This was based on evidence. This was a view formed against the backdrop of having heard about more than a decade of litigation with UCC members and certain other creditors in courts in Texas, Delaware, New York, the Cayman Islands, Bermuda, and Guernsey.[24] For example, one of the new, independent directors of the Debtor, John Dubel—a man with decades of experience working on some of the

[23] In mid-2020, it was very unclear whether Chapter 11 debtors were eligible for PPP loans. The Presiding Judge was hearing different things in different court hearings and in the press. The Presiding Judge was partly simply curious as to whether Highland had been able to get one—in addition to being concerned it should be disclosed to creditors if it did.

[24] An overview of prepetition litigation involving Highland and other Dondero-related parties is set forth in the Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., DE # 1473 at 20-24.

largest, most complex Chapter 11s around the country—credibly testified as follows:

> Q Did you form a view as to the causes of the bankruptcy filing?
>
> A Litigation. That was my clear view. This company had been in litigation with multiple parties, various different parties, since around 2008. Generally, you would see litigation like the types that were, you know, that were here, you know, you'd litigate for a while, then you'd try and settle it. It did not appear to me that there was any intention on the—the Debtor to settle these litigations, but would rather just continue the process and proceed forward on the litigation until the very last minute. And so it was obvious that this was going to—that the Debtor was a, as I said, a highly-litigious shop, and that was one of the causes, obviously, the cause of the filing, along with the fact that judgments were about to be entered against the Debtor.[25]

Continuing on, Mr. Dubel elaborated:

> Q And can you elaborate a little bit on I think you said you had done some diligence and you had formed a view as to the causes of the bankruptcy filing, but did this case present any specific concerns or issues that you and the board members had to address perhaps above and beyond what you experienced in some of the other cases you described?
>
> A Well, as I said earlier, the fact that the litigation -- the various litigations with the creditors have been going on for what I viewed as an inordinate amount of years, and that it was clear from my diligence that I had done that this had been directed by Mr. Dondero, to keep this moving forward in the litigation, and to, in essence, just, you know, never give up on the litigation.
>
> It was important that the types of protections that we were afforded in the January 9th order were put in place, because we—none of us—none of the three of us, and myself in particular, did not want to be in a position where we would be sued and harassed through lawsuits for the next, you know, ten years or so. That's not something anybody would want to sign up for.[26]

Did the Presiding Judge ever use the term "vexatious"? Yes. This was as a result of learning of the decade of unresolved litigation in the multiple fora set forth above. But it was also

[25] DE # 1894, pp. 271-272 (Transcript of Confirmation Hearing, 2/2/21, Testimony of Independent Director John Dubel).
[26] *Id.* at 274.

a perception formed after witnessing Movants and other Dondero-affiliates file over 50 proofs of claim (most of which were later withdrawn). It was also a view that any reasonable person might develop after reading the many dozens of motions; the many dozens of objections; and the many dozens of appeals that were pursued by Movants in the bankruptcy case. It was also borne out when multiple witnesses testified that there was a phenomenon in the insurance industry colloquially referred to as ***the "Dondero Exclusion"***—meaning that cost-effective liability insurance could not be obtained for the officers of Highland because of the company's historical inclination toward litigation.

For example, the new Highland CEO, Mr. James Seery, credibly testified on direct examination by Debtor's counsel as follows:

> Q Did you have any involvement in the Debtor's efforts to obtain D&O insurance for the independent board?
>
> A I did.
>
> Q Can you just describe for the Court what role you played and what issues came up as the Debtor sought to obtain that insurance?
>
> A Sure. The Debtors had been looking to get an insurance policy in place. They were not able to do that. I happen to have worked with an insurance broker on D&O situations in some very difficult situations over the years and brought them into the mix. They were able to go out to the market and find a policy that would cover us, the—kind of the key components of that policy, though, were, number one, the guaranty that HCMLP would give--I'm sorry, the guaranty that HCMLP would give to Strand's obligations, and also the--I'll call it the gatekeeper provision was very important because these parties did not want to have—they wanted to have what was referred to, commonly referred to as the Dondero Exclusion.
>
> So while we were—we purchased a policy that covered us, it did have an exclusion, unless there were no assets left, and then the what I'll call—we refer to as kind of a Side A policy would kick in.
>
> Q OK. What do you mean by the Dondero Exclusion?

> A The insurers did not want to cover the—any litigation that Mr. Dondero would bring against directors. It was pretty commonly known in the marketplace that Mr. Dondero was very litigious, and insurers were not willing to write the insurance without the protections that this order afforded because they did not want to be hit with frivolous—hit with claims on the policy for frivolous litigation that might be brought.[27]
>
> Q And do you recall at confirmation what impediments were described to the Court in terms of obtaining D&O insurance at that time?
>
> A Yes. I think the main impediment which was discussed by Mr. Tauber is what they colloquially refer to in insurance markets as the Dondero Exclusion. Basically, getting coverage to cover Mr. Dondero's actions is very difficult because of his litigious nature. And so one of the keys was to build in and continue the gatekeeper function.[28]

And then, again, more testimony about the "Dondero Exclusion" came on direct examination of Debtor's counsel from an executive in the insurance industry, Marc Tauber, of Aon Financial:

> Q Okay. And, finally, you mentioned Mr. Dondero. What role did he play in your ability to obtain insurance for the Strand board?
>
> A Well, that's a very significant role. As, you know, as mentioned, the underwriters are very risk-averse, so the litigiousness of Mr. Dondero is a very strong red flag prohibiting a number of people from writing the insurance at all. And the ones that were writing, that were willing to provide options, were looking for protections from Mr. Dondero.
>
> Q And what kind of protections were they looking for?
>
> A Well, the gatekeeper function was a key factor. That was really the only way we could even start a conversation with any of the people that we were able to engage. And in addition, they wanted a, you know, sort of a belts and suspenders additional protection of having an exclusion preventing any litigation brought by or on behalf of Mr. Dondero.
>
> Q Were you able to identify any carrier who was prepared to underwrite D&O insurance for Strand without the gatekeeper provision or without a Dondero

[27] *Id.* at 276-277.
[28] DE # 2598, Transcript from 7/21/21 hearing (direct examination of James P. Seery).

exclusion?

A We were not.[29]

In any event, Movants' statement that this court found the Movants to be "vexatious litigants" is not consistent with the record. This court did not specifically find or conclude that Movants are "vexatious litigants." Rather, this court determined that Mr. Dondero's litigation history supported the inclusion of a gatekeeper provision in the Plan. *See* Confirmation Order, at ¶¶ 80-81 [DE # 1943]. All of the above-quoted testimony was in connection with the bankruptcy court considering whether gatekeeper provisions proposed in the Plan were necessary and appropriate. Significantly, the Fifth Circuit affirmed this court's findings and concluded that the gatekeeper provision was justified and "sound."[30]

The fact that the Presiding Judge commented on litigiousness (often—by the way—in the context of yearning for settlement) should not be interpreted as "bias" or "prejudice" toward Movants or any other party, for that matter. Not only was there significant credible evidence of this, but it is simply about rule enforcement and managing a docket consistent with this court's duty to the public.

The Presiding Judge's Fiction Novels. As noted early on, there is now a Fourth Motion to Recuse filed February 27, 2023, in Adversary Proceeding No. # 21-3076 which is styled *Kirschner v. Dondero. et al*. The Presiding Judge intends to rule on that Fourth Motion to Recuse after all parties in that adversary proceeding have had the opportunity to respond.

[29] DE # 1905, at pp. 31-32 (Transcript from 2/3/21 Confirmation Hearing, Testimony of Marc Tauber of Aon Financial).
[30] *NexPoint v. Highland Capital Management*, 48 F.4th 419, 435 (5th Cir. 2022).

While the Presiding Judge had intended to remain silent on this subject until such time as the time had run for parties in the Adversary Proceeding to respond, the court observed that on March 3, 2023, Movants filed a new pleading entitled *Supplemental Memorandum of Law in Support of Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455*, in which Movants supplement their Third Motion to Recuse "with information regarding two books published by Judge Jernigan, which Movants recently learned about and read." DE # 3673. Movants state in this new pleading that the Presiding Judge's fiction novels "contain derisive commentary about financial industry executives, the financial industry generally, and the financial instruments specifically at issue in HCMLP's bankruptcy" and that the second novel in particular "appears based on Judge Jernigan's experiences with HCMLP and Mr. Dondero in the Bankruptcy Proceedings." The Movants conclude that "any reasonable person would agree appear [that the Presiding Judge's novels are] patterned after Mr. Dondero, are additional evidence that the Court harbors exceedingly negative views about hedge fund managers and the hedge fund industry, generally, as well as Mr. Dondero specifically." *Id.*, at 4.

The Presiding Judge's novels—again entirely fiction—are not about Mr. Dondero or the hedge fund industry in general. The first novel (*He Watches All My Paths*) is entirely about a federal judge who receives death threats and the impact of that on her family, as well as the U.S. Marshals who provide protection. The ultimate perpetrator of the threats in the novel is not a person in the hedge fund industry but, rather, a young, former tort victim who feels wronged by the American justice system. The second novel (*Hedging Death*) is partly a sequel to the first—in that it involves a manhunt for a criminal from the first book—and it also happens to involve a bio-medical research firm in a Chapter 11 case in the protagonist judge's court, whose president

is a Chechen immigrant to the U.S. and received funding from a hedge fund manager named Cade Graham. Cade Graham is the book character that Movants believe is "patterned" after Mr. Dondero. The character Cade Graham is an individual who fakes his own death in Mexico ("pseudocide") after linking up with Mexican drug cartels. He is described as a Dallas native, raised by an oil man, who graduated from Princeton. He has a Brazilian girlfriend with whom he has a son, Ethan, with whom he engages in business. The book mentions a "Ranger Capital" exactly seven times (on six pages in more than 300 pages) as a company of Cade Graham's. There is another hedge fund mentioned in the book called Toro Capital. Movants state now that Highland once did business under the name of "Ranger." This was never mentioned in the bankruptcy case. It is not in the Highland disclosure statement. The Presiding Judge cannot find the name in any of the numerous organizational charts that were presented to her in the last three years. The Presiding Judge has never once heard this.

The Presiding Judge regrets this sideshow. Many sitting judges write books—albeit it is more common for them to write legal nonfiction books than fiction books. Ironically, the former can be much more fraught with peril—creating the possibility that someone is going to infer a legal viewpoint that might signal how the judge might rule in a future case. The Presiding Judge made clear that everything in the two books should be viewed as fiction. For example, on the copyright information page of *Hedging Death*:

> Hedging Death is a work of fiction. Names, characters, places, and incidents are the products of the author's imagination or are used fictitiously. Any resemblance to actual events, locales, or persons, living or dead, is entirely coincidental.

Then, again on the Author's Page before the Prologue:

> Because I am a sitting United States judge, and I am also married to a police officer, I feel compelled, at the outset, to clarify certain points regarding this novel. First, with the exception of the Prologue herein (which describes real-life events that happened July 7, 2016, in Dallas, Texas) the following is a work of fiction. While some of the characters and events beyond the Prologue may be loosely based on actual persons and events, and some of the places (in my home state of Texas and in various other faraway spots) are certainly very real, the human characters in this novel are absolutely fictional. Judge Avery Lassiter, the main character in this novel, is not me. Second, one should not assume that any statement or opinion expressed or implied by any characters in this novel are necessarily mine or are somehow a reflection on how I might rule on any particular issue in any case in the future.

The author Oscar Wilde once wrote: "Life imitates art far more than art imitates life."[31] That being true, many fiction authors do, indeed, write about "what they know." Many fiction authors write stories where characters are loosely based on real life people or weave plots that are loosely based on real life events. The examples are countless. Agatha Christie wrote a story line about a kidnapping of a child from a wealthy American family (based on the Lindberg child kidnapping) in *Murder on the Orient Express*. Practically, everything Ernest Hemingway ever wrote was a highly fictionalized story from his past: *A Farewell to Arms* (story of an American expatriate working as an ambulance driver in the Italian Army who is wounded and falls in love with an Italian nurse—Hemingway was wounded as an ambulance driver working for the Italian Army in World War I); *The Sun Also Rises* (story of a group of young American and British expatriates who become friends living in Paris and go to the bull fights in Pamplona—once again, Hemingway spent years in Paris, hanging out with the likes of F Scott Fitzgerald, Pablo Picasso, and Gertrude Stein, occasionally going to see the bull fights in Spain); *The Old Man and the Sea*

[31] Oscar Wilde, The Decay of Lying—An Observation (essay in his collection of essays titled *Intentions* in THE NINETEENTH CENTURY periodical (Jan. 1889)).

(story about an old fisherman in Cuba—again, Hemingway spent several years of his life fishing, writing, and drinking in Cuba on a boat called the *Pillar*). The Presiding Judge is somewhat embarrassed to discuss these literary greats in the same paragraph in which she is mentioning her own fiction works—it is merely to make a point. While the Presiding Judge's protagonist characters in her books (Judge Avery Lassiter and Max Lassiter) may resemble herself and her spouse, and while certain judges, lawyers, and U.S. Marshal characters in her books may resemble real life persons (i.e., heroes) that she has been honored to see or know during her lifetime, there are no characters or entities in her books that have been inspired by or modeled after the Movants.

VI. CONCLUSION.

The Presiding Judge has not specifically addressed herein every single ground asserted by the Movants as a manifestation of her alleged bias or animus. The submissions on this issue are enormous (as mentioned, thousands of pages have been filed). Distilled to its essence, the Third Motion to Recuse has failed to present any objective manifestations of bias or prejudice.

The court does not believe any of the assertions of the Movants rise to "the threshold standard of raising a doubt in the mind of a reasonable observer" as to the judge's impartiality. This court does not believe that any objective person would find that the Movants are the victims of improper judicial conduct rising to the extraordinary remedy of recusal.

WHEREFORE, it is hereby

ORDERED that the Third Motion to Recuse is denied.

It is so ORDERED.

END OF MEMORANDUM OPINION AND ORDER

EXHIBIT 2

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

In re:	)	Case No. 19-34054-sgj-11
	)	
Highland Capital Management, L.P.,	)	Chapter 11
	)	
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, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S BRIEF IN SUPPORT OF THEIR MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

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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, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "Movants") file this Brief in Support of their Motion to Recuse (the "Motion") Pursuant to 28 U.S.C. § 455[1] and would, in support thereof, respectfully show the Court as follows:

I. INTRODUCTION

1. Brought with reluctance, this Motion is the necessary result of the undeniable animus that the Presiding Judge (hereinafter, the "Court") has developed against James Dondero ("Mr. Dondero") and the resulting prejudicial effect of that animus on Mr. Dondero, The Dugaboy Trust, The Get Good Trust (collectively, the "Trusts") and any entity the Court deems connected to him or under his control (collectively, the "Affected Entities").[2] While the Court has presided over many issues in this bankruptcy, numerous adversary proceedings and contested matters involving Mr. Dondero and the Affected Entities remain, in which, for the reasons described herein, the Court's impartiality can be reasonably questioned.

2. Importantly, the Court has essentially acknowledged the foundation of this Motion already—that: the Court formed negative opinions of Mr. Dondero in a prior bankruptcy; those opinions have carried into *this* bankruptcy; and, despite best efforts, the Court has been unable to extricate those opinions from its mind. Moreover, the record in this bankruptcy reflects that the Court's negative opinions of Mr. Dondero have resulted in, if not actual bias against Mr. Dondero

[1] 28 U.S.C. § 455 has been made applicable to bankruptcy judges under FED. R. BANKR. P. 5004.
[2] The definition of the Affected Entities includes the entities defined as "the Advisors" and "the Retail Funds" below.

and the Affected Entities, the undeniable perception of bias against Mr. Dondero and the Affected Entities that impair the ability of Mr. Dondero (and the Affected Entities) to preserve their legal rights. Specifically, among other things, the record reflects that the Court has:

(a) repeatedly made statements demonstrating the Court's unfavorable opinions about Mr. Dondero;

(b) declared that Mr. Dondero (and, by implication, the Affected Entities and each of their licensed attorneys) are vexatious litigants based on actions taken by Mr. Dondero and the Affected Entities to: (i) defend lawsuits and motions filed against them; (ii) assert valid legal positions; and/or (iii) preserve legal rights, including on appeal;

(c) concluded that any entity the Court deems connected to or controlled by Mr. Dondero (*i.e.*, the Affected Entities) is essentially no more than a tool of Mr. Dondero, without evidence being introduced that the corporate status of these entities should be disregarded or that they constitute a single business enterprise;[3]

(d) summarily and/or preemptively disregarded the testimony of any witness who would testify in favor of Mr. Dondero or any of the Affected Entities, without evidentiary support, as "under [Mr. Dondero's] control" and, if the witness has any connection to Mr. Dondero, *per se* not credible.

3. At the end of the day, even assuming, *arguendo*, that the Court's animus toward Mr. Dondero were justified based upon the Court's experience in the *Acis* Bankruptcy, **this Motion would be no less necessary** to safeguard the impartiality that Mr. Dondero and the Affected Entities are entitled to receive as litigants in *these* bankruptcy and adversary proceedings—regardless of Mr. Dondero's history with the Court.[4] Consequently, based on the facts stated herein and the trajectory they suggest, the only way to ensure that this required impartiality (and, of equal

[3] 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.

[4] Notably, the Affected Entities' investment base includes public investors beyond Mr. Dondero.

importance, the public perception of same) exists going forward is through recusal of this Court.

II. BACKGROUND

A. The risk of prejudice to Mr. Dondero in this Court has been apparent since this Bankruptcy's inception in Delaware, including by Debtor itself.

4. On October 16, 2019, the Debtor in this proceeding, Highland Capital Management, L.P. ("Highland" or "Debtor"), filed bankruptcy in Delaware (the "*Highland* Bankruptcy"). Debtor's counsel, Jeff Pomerantz, admitted that the bankruptcy was filed in Delaware in order to give Debtor, including its management, a "fresh start."[5] Shortly thereafter, however, the unsecured creditor's committee (the "UCC") moved to transfer the matter to the Northern District of Texas (the "Motion to Transfer").

5. During the December 2, 2019 hearing on the Motion to Transfer, while the UCC argued that transfer to this Court was appropriate because this Court was further along in the "learning curve" than the Delaware Bankruptcy Court due to this Courts prior presiding over the bankruptcy of *Acis Capital Management, L.P.* ("Acis") (the "*Acis* Bankruptcy"),[6] Mr. Pomerantz expressly acknowledged that the UCC's *actual* motive in seeking transfer to this Court was this Court's pre-existing negative views of Debtor's management, including Mr. Dondero:

> However -- Your Honor pointed to this at the beginning, in mentioning comments about forum-shopping -- 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.[7] … And it's not because she's familiar with this debtor's business, this

[5] December 3, 2019 Transcript - Motion to Transfer, at 78:21-23 [App. 0078], a true and correct copy of which is attached hereto as **Ex. 1 [APP. 0001]** and incorporated herein by reference. *See also* the Declaration of Michael J. Lang proving up exhibits 1-27 for this Motion, a true and correct copy of which is attached hereto as **Ex. 30 [APP. 2715]** and incorporated herein by reference.
[6] **Ex. 1** at 67:9-15 [App. 0067].
[7] *Id*. at 77:18-22 [App. 0077].

> debtor's assets, or this debtor's liabilities, because she generally is not. ***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***.[8]

6. At ***that*** time, Debtor effectively acknowledged the risk that this Court's prior opinions of Mr. Dondero would improperly impact this separate, new bankruptcy and the Court would be unable to set aside the negative views of Mr. Dondero it developed in the *Acis* Bankruptcy; thus, objectively questioning the Court's impartiality. In fact, Mr. Pomerantz specifically referred to the opinions the Court developed in the *Acis* Bankruptcy as "baggage":

> The debtor filed the case in this district because it wanted a judge to preside over this case that would look at what's going on with this debtor, with this debtor's management, this debtor's post-petition conduct, ***without the baggage of what happened in a previous case***, which contrary to what Acis and the committee says [*sic*], has very little to do with this debtor.[9]

7. The Delaware Bankruptcy Court also acknowledged that it would be improper for this Court to substitute its prior knowledge, experience, or opinions from the *Acis* Bankruptcy for evidence (or, equally, as a basis to ignore contradictory evidence in the record) in this proceeding:

> 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***.[10]

8. Ultimately, the Delaware Bankruptcy Court granted the Motion to Transfer and, thus, this

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[8] *Id.* at 78:3-8 (emphasis added) [App. 0078].
[9] *Id.* at 79:14-20 (emphasis added) [App. 0079].
[10] *Id.* at 90:15-24 (emphasis added) [App. 0090].

bankruptcy was assigned to this Court.

B. The Court has acknowledged that its opinions of Mr. Dondero from the *Acis* Bankruptcy have remained cemented in the mind of the Court in this proceeding.

9. Following the transfer, Debtor and the UCC entered into a compromise as to the management of Debtor (the "Compromise"), under which, among other things, Mr. Dondero, voluntarily surrendered all control of Debtor to an independent, three-person board appointed per the Compromise (the "Board").[11]

10. During the January 9, 2020 hearing on the Compromise, the Court acknowledged that it: possessed opinions regarding Mr. Dondero from the *Acis* Bankruptcy; was unable to extract those opinions from its brain; and was relying on those opinions as bases for certain rulings (*e.g.*, requiring certain language be included in its order, shown below):

> Now, there is one specific thing I want to say about the role of Mr. Dondero. When Ms. Patel got up and talked about the newest language that has been added to the term sheet, she highlighted in particular the very last sentence on Page 2 of the term sheet, the sentence reading, 'Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor.' Her statement that that was important, it really resonated with me, because, you know, as I said earlier, ***I can't extract what I learned during the Acis case, it's in my brain, and we did have many moments during the Acis case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way. So not only do I think that language is very important, but I am going to require that language to be put in the order***.[12]

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[11] January 9, 2020 Transcript at 14:4-11 [App. 0151], a true and correct copy of which is attached hereto as **Ex. 2 [APP. 0138]** and incorporated herein by reference. Mr. Dondero, however, remained a portfolio manager and an unpaid employee of Debtor. *Id*. *See also* **Ex. 30**.

[12] **Ex. 2** at 78:23-79:16 [App. 0215-0216] (emphasis added).

11. Later, the Court also indicated that it relied on knowledge of purported actions taken by Mr. Dondero in the *Acis* Bankruptcy as "evidence" of a presumed propensity of Mr. Dondero to engage in actions (that were allegedly taken in the *Acis* Bankruptcy) to support the required language and threat of contempt:

> 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]

12. Notably, at this time, this bankruptcy had only been in front of this Court for approximately a month. Consequently, there was nothing in the record in front of Court to justify its specific rulings and comments related to Mr. Dondero. The Court sustained the United States Trustee's ("U.S. Trustee") attempt to use the *Acis* Bankruptcy as evidence to support the U.S. Trustee's objection to the Compromise:

> "***I have to look at what's presented***, and is this reflective of sound business judgment? Is this fair and equitable? Is it in the best interest? ***So, assuming there are tons of bad facts here reflected in the arbitration award, reflected in other evidence, bad facts that might justify a trustee***, a Chapter 11 trustee, is this nevertheless, ***what's proposed today***, a reasonable compromise of, you know, the trustee arguments from the Committee could make or, you know, is this a reasonable framework for going forward? … ***I can assume there are terrible facts out there that might justify a trustee, but I'm looking at what's proposed***."[14]

13. Nonetheless, just a short time later, the Court confirmed that, based on its knowledge from the *Acis* Bankruptcy, it would require confirmed that it would require the above-referenced language directed at Mr. Dondero in its order based.

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[13] *Id*. at 80:3-6 [App. 0217] (emphasis added).
[14] *Id*. at 52:10-25 [App. 0189] (emphasis added).

C. The Court's (and Debtor's) actions in this proceeding have demonstrated the Court has a perceptible bias against Mr. Dondero.

1. The February 19, 2020 Application to Employ Hearing

14. The Court has demonstrated a predisposition against Mr. Dondero, including, for example, through its rulings discounting the testimony of demonstrably independent witnesses who testified in support of outcomes that could possibly benefit Mr. Dondero as testimony that is engineered by Mr. Dondero.

15. For example, on February 19, 2020, the Court held a hearing on Debtor's application to retain the law firm Foley Gardere to pursue appeals of the *Acis* involuntary petition and the *Acis* confirmation order (the "Application to Employ") on behalf of Neutra Ltd. (which is a company owned by Mr. Dondero and which succeeded to the ownership of Acis). Importantly, during this hearing, former Bankruptcy Judge Russell Nelms, **one of the three independent directors appointed to Debtor's Board**, testified that, in the Board's business judgment, the Application to Employ was considered by the independent directors, and they concluded that it was in the Debtor's best interest.[15]

16. Despite this testimony, the Court displayed a predisposition to contest positions that could possibly benefit Mr. Dondero on the pre-determined basis that any person sharing an opinion with Mr. Dondero (including, apparently, a member of the independent Board) was somehow being unduly influenced by him:

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[15] *See* February 19, 2020 Transcript at 62:6-17 [App. 0290] (emphasis added), a true and correct copy of which is attached hereto as **Ex. 3 [APP. 0229]** and incorporated herein by reference; *see also* **Ex. 30**.

> … ***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***.
>
> I mean, this is awkward, right, because you want to defer to the debtor-in-possession, ***but I have this long history***, and I can think through the scenarios. …And I know, you know, there are multiple ways it might play out, but I cannot believe there is a chance in the world there is economic benefit to Highland if these things get reversed. Economic benefit to Neutra: Yeah, maybe. Economic benefit to HCLOF: Well, they'll get what they want. You know, whether it's an economic benefit, I don't know. But benefit to Highland? ***I just don't think the evidence has been there to convince me it's reasonable business judgment for Highland to pay the legal fees associated with the appeal***.[16]

17. From here, unsurprisingly, Debtor began to leverage the Court's predisposition against Mr. Dondero (*i.e.*, what Debtor had previously described as the Court's "baggage") for Debtor's own benefit. This played out in a variety of ways.[17]

2. The December 2020 Restriction Motion

18. As the Court is aware, Debtor on the one hand, and Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors"),[18] on the other hand, previously

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[16] **Ex. 3** at 177:7-178:3 [App. 0405-0406].
[17] *See also* March 4, 2020 Transcript at 34:6-35:18 [App. 1544-1545]; 50:14-52:15 [APP. 1560-1562]; 58:17-23 [APP. 1568], a true and correct copy of which is attached hereto as **Ex. 15 [APP. 1511]** and incorporated herein by reference; *see also* **Ex. 30**.
[18] 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. 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.

shared office space, and the Advisors each paid for resources and services, including in-house legal services, pursuant to shared services agreements that each of the Advisors separately entered into with Debtor.

19. As the Court is also aware, Debtor manages more than $1 billion in assets owned by collateralized loan obligation investment vehicles ("CLOs") pursuant to certain Portfolio Management Agreements. Approximately $140 million of that amount is owned by Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (collectively, the "Retail Funds"). Although the Portfolio Management Agreements vary, they generally impose a duty on Debtor, when acting as portfolio manager, to maximize the value of the CLOs' assets for the benefit of the CLOs' noteholders and preference shareholders, such as the Retail Funds.

20. For most of 2020, Debtor's plan with respect to the CLOs was to reject the Portfolio Management Agreements. However, in approximately October 2020, Debtor's plan changed, and Debtor wanted to assume the Portfolio Management Agreements (*i.e.*, continue managing the assets). However, Debtor's new plan also contemplated releasing all Debtor's employees and liquidating all of Debtor's assets over a two-year period. In the Advisors' and the Retail Funds' opinion, this was incompatible with the CLOs' needs (which required an investment staff) and the belief that the CLOs had more upside. Moreover, Debtor began to liquidate certain assets of the CLOs.

21. Mr. Dondero, who, as stated above, continued to be a portfolio manager and unpaid employee of Debtor, and James Seery ("Mr. Seery"), one member Debtor's independent Board, disagreed on whether or not to liquidate the CLOs assets. Importantly, the CLOs were ***not assets of Debtor's estate*** but debt and preference equity is owned by third parties (*e.g.*, the Retail Funds,

which indirectly own $140 million of same).

22. The Advisors (on behalf of the Retail Funds and pursuant to their obligations under their respective advisory agreements) and the Retail Funds believed that Debtor's decision to liquidate underlying assets held by the CLOs did not maximize the value of the investments for the investors to whom the Advisors and the Retail Funds owed a fiduciary duty. As a result, the Advisors and the Retail Funds raised these concerns with Mr. Seery (Debtor's interim CEO) and requested that Debtor not liquidate the CLOs until the Plan confirmation (which, at that time, was scheduled for early January 2021). Debtor, a/k/a portfolio manager, declined.

23. Consequently, on December 8, 2020, pursuant to 11 U.S.C. §§105, 363, and 1107, the Advisors and the Retail Funds (not Mr. Dondero) raised these concerns in a motion that requested the Court exercise its equitable discretion to maintain the status quo and stop Debtor from liquidating the CLOs for 30 days (the "Restriction Motion").[19] The Restriction Motion was necessary to legally preserve the legal issue arising from the Advisors' and the Retail Funds' belief that this action by Debtor was contrary to the best interest of their investors.

24. On December 16, 2020, the Court held a hearing on the Restriction Motion and denied same.[20] Rather than simply denying the motion, the Court chastised counsel for the Advisors and the Retail Funds for filing the Restriction Motion (*i.e.*, for advocating a position in good faith that their clients firmly believed in).

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[19] Dkt. 1522, a true and correct copy of which is attached hereto as **Ex. 4 [APP. 0417]** and incorporated herein by reference; *see also* **Ex. 30**.

[20] *See* the December 16, 2020 Transcript, a true and correct copy of which is attached hereto as **Ex. 5 [APP. 0443]** and incorporated herein by reference. *Id.* at 63:5-13 [App. 0505]. *See also* **Ex. 30**.

25. Going further, the Court stated that it was "dumbfounded" by the Restriction Motion and that it agreed with Debtor's accusation that Mr. Dondero was behind the Restriction Motion, despite the fact that the Restriction Motion was filed by separate and distinct legal entities. The Court focused on Mr. Dondero's role with the Advisors to conclude that the Restriction Motion was brought for an improper purpose, despite the fact that the only evidence before the court was that the decision was made by senior management in consultation with the board of trustees and counsel.[21] Thus, the Court implicitly concluded that the Retail Funds (some of which are publicly-traded, highly-regulated entities) cannot independently decide to pursue action they deem in their best interest.

26. The Court further declared the Restriction Motion frivolous, "almost Rule 11 frivolous," and as having no statutory or contractual basis.[22] As stated above, these comments were made by the Court regarding a motion that: (a) was filed in good faith by fiduciaries seeking to protect the investments of investors; and (b) cited statutory authority which indisputably provided the Court with the discretion to grant the requested relief therein. While the Court had every right to deny the Restriction Motion, the Court additionally condemned Mr. Dondero, demonstrating that it could not set aside its animus towards Mr. Dondero to consider the separate entities involved and the actual issues being raised.

27. In December of 2020, due to the Court's denial of the Restriction Motion, K&L Gates, as

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[21] **Ex. 5** at 63:14-25 [App. 0505].
[22] *Id*. at 64:1-7 [App. 0506]. 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.

counsel for the Advisors and the Retail Funds, exchanged correspondence with counsel for Debtor (the "K&L Gates Letters").[23] The K&L Gates Letters were sent for the following reasons: to reiterate the Advisors' and the Retail Funds' objection to the Debtor's handing of the Retail Funds' investments; to request, again, that Debtor not liquidate the CLOs; to reserve any rights that the Advisors and the Retail Funds might have against Debtor for failure to maximize the value of the investment as required under the Portfolio Management Agreements; and to notify Debtor that the Retail Funds, ***subject to applicable bankruptcy law*** (which would include the stay existing by reason of section 362(a) of the Bankruptcy Code and the Compromise) and the underlying agreements, intended to initiate the procedure to remove Debtor as fund manager of the CLOs.

28. On January 6, 2021, Debtor filed a complaint for declaratory and injunctive relief against the Advisors and the Retail Funds,[24] claiming that: (a) the Advisors' purported refusal to book certain trades, which Debtor had, in actuality, already executed outside of the Advisors' process, interfered with Debtor's business and, thus, tortiously interfered with the prior sales; and (b) the K&L Gates Letters (*i.e.*, correspondence between counsel) violated the automatic stay.[25] Debtor's overall theme in the complaint was, because Mr. Dondero allegedly controlled the Retail Funds

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[23] True and correct copies of the K&L Gates Letters are attached to the Declaration of James Seery [ECF 4] in the Adversary styled *Highland Capital Mgmt. v. Highland Capital Management Fund Advisors, L.P., et al*. Adversary No. 21-03000-sgj, courtesy copies of which are attached hereto as **Ex. 18 [APP. 1777]** and incorporated herein by reference. *See also* **Ex. 30**.

[24] *Highland Capital Mgmt. v. Highland Capital Management Fund Advisors, L.P., et al*. Adversary No. 21-03000-sgj, a true and correct copy of which is attached hereto as **Ex. 6 [APP. 0509]** and incorporated herein by reference. *See also* **Ex. 30**.

[25] *See*, Dkt. 6, a true and correct copy of which is attached hereto as **Ex. 17 [APP. 1759]** and incorporated herein by reference. *See also* **Ex. 30**.This is one of many instances where the Debtor asked for and received expedited consideration, relief not afforded to Mr. Dondero or the Affected Entities.

(he does not), the Court should presume that Mr. Dondero (rather than the independent board and its independent counsel for the Retail Funds) caused the acts complained of by Debtor (thus enabling the Court to extend the prohibitions it imposed on Mr. Dondero to the Advisors and the Retail Funds). As a result, Debtor sought to enjoin 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 (which Debtor was then seeking to assume, and ultimately did assume, under its plan) if the injunction were not granted.

29. On January 26, 2021, the Court commenced the preliminary injunction hearing on the matter (the "Injunction Hearing").[26] The issue in the Injunction Hearing was whether the Advisors and the Retail Funds tortiously interfered with the Portfolio Management Agreements by: (1) hindering the Debtor's ability to sell certain CLO assets, (2) threatening to initiate the process for removing the Debtor as the portfolio manager of the CLOs, and (3) otherwise attempting to influence and interfere with the Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs.[27]

30. To obtain such an injunction, Debtor was required to, among other things, prove a substantial likelihood of success on the merits of its tortious interference claim and irreparable harm. However, during the Injunction Hearing, it should have become abundantly clear that there was no need or basis for an injunction, due, in large part, to the Debtor's concession that it did not

[26] A true and correct copy of the January 26, 2021 Transcript is attached hereto as **Ex. 7 [APP. 0528]** and incorporated herein by reference; *see also* **Ex. 30**.
[27] *See* Dkt. 1 in Adversary Proceeding No. 21-03000-sgj at ¶ 58.

have a substantial likelihood of success on the merits via its acknowledgment that the alleged acts of interference did not actually interfere with any contract. In addition:

31. ***First***, Mr. Seery admitted that none of the alleged actions caused Debtor to breach any contract with a third party.[28] Moreover, Debtor could not assert a direct breach of contract claim because: (a) there is no claim for contemplating a prospective breach; and (b) the Advisors and the Retail Funds had no contractual obligation to settle the trade.

32. ***Second,*** with respect to "hindering Debtor's ability to sell certain CLO assets," Mr. Seery admitted that every trade that he attempted to initiate in December closed.[29] In fact, the trades at issue were executed ***before*** Debtor even approached the Advisors, and the only thing that the Advisors did not do in connection with the trades was make a ledger entry booking the sale (which was due to the fact that Debtor had executed the trades outside of the historically-used system).[30] Moreover, Debtor itself had numerous authorized traders whose job was to settle Debtor's trades. Importantly, the Advisors had no obligation, contractual or otherwise, to perform any service for Debtor.

33. ***Third***, with respect to K&L Gates Letters' contemplation of future action "to initiate the process for removing the Debtor as portfolio manager:" (a) Debtor admitted that the K&L Gates Letters merely stated that the Advisors and the Retail Funds were "contemplating taking steps to terminate the CLO Agreements;"[31] (b) no steps would be taken without seeking relief from the

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[28] *See* **Ex. 7** at 180:12-17 [App. 0707].
[29] *Id.* at 173:16-19 [App. 0700]; 174:1-3 [App. 0701]; 174:8-175:5 [App. 0701-0702].
[30] *Id* at 173:16-19 [App. 0700]; 175:1-5 [App. 0702]; 219:17-22 [App. 0746]; 220:9-17 [App. 0747].
[31] *Id.* at 103:21-23 [App. 0630].

stay;[32] (c) no action was taken to lift the stay;[33] and (d) no action was taken to remove Debtor as the portfolio manager.[34] Moreover, while the Debtor disputed whether the Advisors' and the Retail Funds' right to terminate Debtor had been triggered, it never undisputed that the Advisors and the Retail Funds, as preferred shareholders, were third party beneficiaries under the Portfolio Management Agreements that, in certain instances, expressly provided them with a right to terminate the Portfolio Manager.[35] Generally, one cannot tortiously interfere by exercising one's own contractual rights.[36]

34. ***Fourth***, while Debtor (no doubt in response to the Court's comments in the January 9, 2020 hearing regarding contempt) claimed that Mr. Dondero caused these issues, the Retail Funds have an independent board of trustees (Mr. Dondero is not a board member).[37] The evidence in the record showed that the decision to send the K&L Gates Letters was made by and in consultation with two national law firms, K&L Gates and Blank Rome.[38] Consequently, Debtor's motion was

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[32] *Id*. at 180:8-11 [App. 0707].
[33] *Id.* 132:24-133:1 [App. 0659-0660]; 165:25-166:3 [App. 0692-0693].
[34] *Id.* 178:25-179:6 [App. 0705-0706]; 180:1-7 [App. 0707].
[35] *See* examples of Servicing Agreements at section 14 [APP. 2381-2382 and APP. 2416-2417 respectively], true and correct copies of which are attached hereto as **Exs. 24 and 25 [APP. 2366 and APP. 2402, respectively]** and incorporated herein by reference; *see also* the February 2, 2021 Transcript of Hearing at 54:6-56:12 [APP. 2124-2126] (authenticating Exs. 24 and 25), a true and correct copy of which is attached hereto as **Ex. 23 [APP. 2071]** and incorporated herein by reference; *see also* the chart of holdings of preference shares in CLOs (showing Movants are preferred shareholders), a true and correct copy of which is attached hereto as **Ex. 27 [APP. 2698]** and incorporated herein by reference; *see also* the February 3, 2021 Transcript of Hearing at 53:1-22 [APP. 2493] (authenticating Ex. 27), a true and correct copy of which is attached hereto as **Ex. 26 [APP. 2441]** and incorporated herein by reference. *See also* **Ex. 30**.
[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] One fund is comprised of five individuals, four of whom satisfy the stringent independence requirements mandated by the SEC and the New York Stock Exchange. Two of the funds have four board members, three of which are independents.
[38] *See* **Ex. 7** at 208: 13-22 [App. 0735]; *see also* January 8, 2021 Transcript at 119:6-120:12 [App. 0903-0904];126:7-

unnecessary and unwarranted.

35. Nonetheless, during the Injunction Hearing, the Court again turned its focus to Mr. Dondero (rather than the impropriety and groundlessness of Debtor's motion), warning him that the January 9, 2020 order (described above) prohibited him from causing any related entity to terminate an agreement with Debtor. Importantly, the Court made the implied finding that Mr. Dondero caused the Retail Funds to send the K&L Gates Letters despite the fact that it had, in a hearing just a week earlier, ***sustained*** Debtor's objections to Mr. Dondero being asked about why the K&L Gates Letters were sent ***on the grounds that: (a) Mr. Dondero lacked personal knowledge;*** (b) any answer would be hearsay; and (c) because the K&L Gates Letters (executed by K&L Gates, not Mr. Dondero) speak for themselves.[39] **In other words, the Court had to "go behind the letter" (which was sent by K&L Gates) in order to threaten Mr. Dondero with sanctions after the Court's ruling sustaining the objection that the letters speak for themselves**. Going further, the Court concluded 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 of this unwarranted motion filed by **Debtor**.[40]

3. The January 2021 Examiner Motion

36. Separately, on January 14, 2021, two trusts settled by Mr. Dondero, The Dugaboy Investment Trust and The Get Good Trust (collectively, the "Trusts"), requested the Court exercise

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16 [App. 0910], a true and correct copy of which is attached herein as **Ex. 8 [APP. 0785]** and incorporated herein by reference. *See also* **Ex. 30**.

[39] **Ex. 8** at 119:6-122:25 [App. 0903-0906]. Otherwise, Mr. Dondero should have been given the opportunity to answer the question, which the Court denied.

[40] **Ex. 7** at 251:24-252:5 [App. 0778-0779].

its discretion to direct the appointment of a neutral third-party examiner pursuant to 11 U.S.C. § 1104(c) as a less costly means to resolve various issues that had arisen in this bankruptcy (the "Examiner Motion").[41] Notably, The Dugaboy Investment Trust also has significant holdings in the CLOs.

37. The Examiner Motion was made in connection with the issues raised by the Advisors and the Retail Funds in the Restriction Motion, various objections to the proposed Plan raised by the Advisors and the Retail Funds and the U.S. Trustee (discussed below), and concerns expressed **by the Court** about costs and expenses. Moreover, when the Trusts made the Examiner Motion, they believed that the motion would cause delay or a continuance of the confirmation hearing on the Plan (defined below).[42] Notably, despite the Trusts' request, the Court elected not to set that motion for hearing on an "emergency" basis and, instead, set it for hearing long *after* the date for confirmation, rendering it moot.

4. The February 2021 Confirmation Hearing

38. On February 2 and 3, 2021, the Court held a hearing on *Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [docket no. 1808], as further modified (the "Plan"). At that hearing, the Advisors and the Retail Funds, pursuant to their rights under the Portfolio Management Agreements, objected to provisions in the Plan that would eliminate or alter their legal and contractual claims against Debtor (the "Objections").

[41] *See* the January 14, 2021 Motion to Appoint Examiner, a true and correct copy of which is attached hereto as **Ex. 22 [APP. 2057]** and incorporated herein by reference. *See also* **Ex. 30**.
[42] *See* ECF 1752.

Additionally, Dondero, the Advisors, and the Retail Funds objected to, among other things, the Plan's significant release and exculpation provisions for the management of Debtor—including the Independent Directors, Debtor's professionals, the Committee, professionals retained by the Committee, *etc*.—and the Plan's "gatekeeper" provision that prohibited lawsuits against any exculpated party without prior permission from the Court.

39. On February 8, 2021, the Court announced its oral ruling regarding the Plan,[43] in which the Court did not rely solely on evidence in the record in front of it but also referred extensively to proceedings in the ***Acis Bankruptcy***.[44] In its ruling, the Court summarily rejected ***all*** of the Objections, decreeing them as bad faith: "[T]he Court questions the good faith of the [the Advisors and the Retail Funds]. In fact, the Court ***has good reason to believe*** that these parties are not objecting to protect economic interests they have in the Debtor, but to be disruptors."[45]

40. The Court stated no basis for its "belief," but concluded that the other entities objecting to the Plan were "controlled by" Mr. Dondero:[46]

> To be clear, 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.[47]

41. To support its conclusion, the Court disregarded witness testimony on the grounds that the

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[43] *See* the February 8, 2021 Transcript, a true and correct copy of which is attached hereto as **Ex. 9 [APP. 0990]** and incorporated herein by reference. *See also* **Ex. 30**.
[44] **Ex. 9** at 15:15-16:5 [App. 1004-1005].
[45] *Id.* at 20:17-20 [App. 1009] (emphasis added).
[46] *Id.* at 20:13-15 [App. 1009].
[47] *Id.* at 22:15-21 [App. 1011].

witness had previously been engaged with Debtor:

> …While the evidence presented was that they have independent board members that run these companies, the Court was not convinced of their independence from Mr. Dondero.[48] None of the so-called independent board members of these entities have ever testified before the Court. Moreover, they have all been engaged with the Highland complex for many years.
>
> The witness who testified on these Objectors' behalves 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. [49]
>
> Finally, various NexBank entities objected to the Plan. The Court does not believe they have liquidated claims. Mr. Dondero appears to be in control of these entities as well. [50]

42. The Court then went on to question the good faith basis for the Objections based upon the perceived limited economic interest, despite the fact that each Objector had standing to object, irrespective of the size of their economic interest.[51] Indisputably, a Court must presume that anything filed by a licensed attorney, who is bound by ethical obligations, is filed in good faith unless proved otherwise. Therefore, insinuating a lack of good faith in light of this presumption suggests bias, especially when bad faith was not alleged by another party.

43. Next, even though it had "not been asked to declare Mr. Dondero and his affiliated entities

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[48] *Id.* at 21:22-24 [App. 1010].
[49] Notably, Jason Post resigned from Debtor and was hired by NPA because NPA and Debtor had to separate compliance programs, which was previously jointly administered. This decision was discussed with and approved by Thomas Surgent and Mr. Seery.
[50] *Id.* at 22:12-14 [App. 1011].
[51] *Id.* [App. 1011]

as vexatious litigants *per se*,"[52] the Court summarily decreed that Mr. Dondero and other Affected Entities were "vexatious litigants"[53] in its ruling and held that objected to "gatekeeper provision "appears necessary and reasonable in light of the ***litigiousness of Mr. Dondero*** and his ***controlled entities*** that has been described at length herein."[54]

44. In addition to **not** tied to evidence in the record from this bankruptcy, this finding of vexatious litigation does not meet the requirements set forth by the Court itself. To enjoin future filings due to vexatious litigation, the bankruptcy court must consider the circumstances of the case, including four factors: (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.[55] Here, the factors did not weigh in favor of a vexatious litigation finding, much less even being considered.

45. ***First***, the "litigiousness" described in the Court's ruling were: (a) efforts taken by Mr. Dondero and other entities in the bankruptcy to defend against injunctions filed against them; (b) legitimate objections or responses to certain provisions in the Plan and other motions, made to preserve rights on appeal; and/or (c) lawsuits in which Mr. Dondero or other entities ***had been sued*** and were defending themselves (which, notably, Debtor—after Mr. Dondero relinquished

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[52] *Id*. at 46:20-22 [App. 1035].
[53] *Id.* at 46:20-25 [App. 1035].
[54] *Id.*at 45-47 [App. 1034-1036] (emphasis added).
[55] *Id.* at 46:6-15 [App. 1035] (emphasis added).

control of same—asserted were not frivolous or vexatious in various disclosures):

(a) *Acis Action*, in which Debtor filed a 65-page objection that it described as having "numerous basis" and in which USB filed an objection;[56]

(b) *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;[57]

(c) *Daugherty Action*, in which Debtor asserted that the Daugherty Claim lacked merit;[58] and

(d) *HarbourVest Action*, in which Debtor "vigorously defen[ded]" the HarbourVest Claims on numerous grounds.[59]

Notably, neither Mr. Dondero nor any of the Affected Entities were parties to these lawsuits.

46. ***Second***, the record actually reflects little, if any, litigation and motion practice initiated by Mr. Dondero, individually, as referenced in the charts attached to this Motion as Exhibits 28 and 29.[60]

47. ***Third***, the Objections were made in good faith.[61] In fact, the U.S. Trustee, whose "good faith basis" was not questioned and who was not labeled a "disruptor," asserted the some of the same objections to the exact same provisions. This demonstrates that, in fact, the record actually shows that the independent boards of the Advisors and the Retail Funds appropriately exercised their right to object to the Plan to preserve various contractual, due process, and appellate rights.

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[56] *See* ECF 891.
[57] *See* ECF 895.
[58] *See* ECF 895.
[59] *See* Dkt. 1384.
[60] *See* Chart regarding this bankruptcy proceeding, a true and correct copy of which is attached hereto as **Ex. 28 [APP. 2700]** and incorporated herein by reference; *see also* Chart regarding the injunction proceeding, a true and correct copy of which is attached hereto as **Ex. 29 [APP. 2713]** and incorporated herein by reference; *see also* **Ex. 30**.
[61] **Ex. 9** at 23:8-11[App. 1012].

48. ***Fourth***, the Court failed to address the fourth prong of the test to support a vexatious litigant finding and conducted no analysis or consideration of the burden on the Courts or any purported plaintiff or the adequacy of any alternative to the pre-suit injunction.

49. Consequently, nothing in this the record supports a finding that Mr. Dondero is a vexatious litigant or that any of the Advisors' or the Retail Funds' independent board members would disregard their fiduciary duties simply to benefit Mr. Dondero.

50. ***Fifth***, as demonstrated herein, the record reflects that the parties are being judged by two different sets of rules that disadvantage Mr. Dondero and the Affected Entities while favoring others. While, for example, as stated above, the Court referred to the Restriction Motion as "almost Rule 11 frivolous," it has not applied the same level of scrutiny to the pleadings filed and positions taken by Debtor or other parties. This is illustrated by the mandatory injunction filed by Debtor in February 2021 seeking the limited relief of mandating the Advisors and the Retail Funds to express a transition plan after Debtor indisputably terminated the shared services agreements (indicating that it would not be providing services going forward).[62] Despite the fact that the Advisors and the Retails Funds did not contest the termination and had no obligation to share their transition plan with Debtor following its termination of the shared services agreement, and Debtor's termination of the shared services agreement posed no harm to Debtor. As a result, there was no need for the filing the mandatory injunction—much less a seven-hour evidentiary hearing on the issue.[63]

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[62] *See* the Mandatory Injunction, a true and correct copy of which is attached hereto as **Ex. 19 [APP. 1792]** and incorporated herein by reference; *see also* **Ex. 30**.

[63] *See* the February 23, 2021 Transcript on Hearing for Mandatory Injunction, a true and correct copy of which is attached hereto as **Ex. 21 [APP. 1818]** and incorporated herein by reference; *see also* **Ex. 30**.

Nevertheless, the Court, who ruled Debtor's mandatory injunction moot, went beyond the pleadings and relief requested by Debtor **to issue findings of fact adverse to Mr. Dondero**[64] and, the again, specifically blamed Mr. Dondero.[65]

5. Other Issues Demonstrating Bias.

51. In addition to the examples above, the Court's inability to rule impartially as a result of its preconceived opinion of Mr. Dondero has manifested itself in other ways throughout this case.

52. ***First***, the Court has admitted to relying upon extrajudicial information from an article that referenced "Mr. Dondero or Highland affiliates" receiving PPP loans as a basis for the Court to direct Debtor's counsel in this bankruptcy to investigate the loans and report back to it.[66] Neither Mr. Dondero nor the so-called "Highland affiliates" referred to in the article were the property of or governed by Debtor. In fact, the PPP loans had ***nothing*** to do with the Debtor.[67]

53. ***Second***, the Court's bias against Mr. Dondero has prejudiced the legal rights of separate and distinct legal entities simply because such entities have a connection to Mr. Dondero. Specifically, with respect to the Retail Funds, regardless of whether Mr. Dondero purportedly

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[64] *See* the order on the Mandatory Injunction, a true and correct copy of which is attached hereto as **Ex. 20 [App. 1813]** at pp. 3-5 [APP. 1815-1817] and incorporated herein by reference; *see also* **Ex. 30**.
[65] *See* **Ex. 21** at 232:3-234:19 [APP. 2049-2051].
[66] *See* July 8, 2020 Transcript at 42:10-24 [App. 1082] ("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."), a true and correct copy of which is attached hereto as **Ex. 10 [APP. 1041]** and incorporated herein by reference; *see also* **Ex. 30**.
[67] *See* July 14, 2020 Transcript at 53:17-59:3 [App. 1429-1435], a true and correct copy of which is attached hereto as **Ex. 14 [APP. 1377]** and incorporated herein by reference; *see also* **Ex. 30**.

controlled the entities at issue, the record does not reflect that any decision at issue was made other than by a vote of the independent board of trustees (which does not include Mr. Dondero).

54. Likewise, CLO Holdco, which is a wholly owned subsidiary of a charitable Doner Advised Fund ("DAF") established by Mr. Dondero, has an independent trustee who is a licensed attorney, Grant Scott. CLO Holdco moved to have $2.5 million in funds that indisputably belonged to CLO Holdco released from the registry of the Court. There were no objections to the liquidation at issue. There were no objections that bona fide investors, like CLO Holdco, should not receive their portion of the funds received from the liquidation. The Court admitted that CLO Holdco's lawyer made "perfect arguments" regarding the potential legal issues and whether "holding the money in the registry of the Court that a non-debtor asserts is its property, is that tantamount to a prejudgment remedy?"[68] Despite these "perfect" arguments and the lack of objection, the Court, again concluded that Mr. Dondero was behind the CLO Holdco filing and, therefore, questioned the "good faith" basis,[69] even though the Court had, prior to that time, expressly stated that the parties reserved all rights to file motions requesting the funds be disbursed to them.[70]

55. The Court gave the UCC 90 days to file a complaint asserting a legal basis to the funds,[71] but held that, it could not continue to withhold the funds from CLO Holdco unless the UCC proved an injunction was required to permit the Court to keep the funds (which would be unlikely because

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[68] *See* June 30, 2020 Transcript at 85:17-22 [App. 1236], a true and correct copy of which is attached hereto as **Ex. 12 [APP. 1152]** and incorporated herein by reference; *see also* **Ex. 30**.
[69] **Ex. 12** at 82:3-11 [App. 1233]; 85:4-16 [App. 1236].
[70] *See* **Ex. 15** at 49:22-25[App. 1559].
[71] **Ex. 12** at 88:1-11 [App. 1239]; *see also* July 21, 2020 Transcript 97:13-23 [App. 1348], a true and correct copy of which is attached hereto as **Ex. 13 [APP. 1252]** and incorporated herein by reference; *see also* **Ex. 30**.

the UCC would be seeking quantifiable, monetary damages). After multiple extensions, the UCC ultimately filed an adversary, but never sought injunctive relief. Still, the Court has not released the funds to CLO Holdco and has relieved the UCC of its burden to establish the elements for injunctive relief.[72]

56. ***Third***, and possibly most concerning, the Court has admitted to forming conclusions about Mr. Dondero prior to even seeing evidence. Specifically, in a September 2020 hearing in the *Acis* Bankruptcy, an issue arose regarding a lawsuit that certain DAFs and other entities filed against Acis (and other non-Acis or Debtor entities) concerning a post-confirmation dispute. That lawsuit was not pending in this Court or anywhere in the Northern District of Texas; nevertheless, **the Court, after admitting to having not seen the lawsuit, declared it vexatious**:

> 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. I haven't seen it, but, come on.***[73]

57. It is the Court's admission that, "I haven't seen it," paired with the finding of the Court that the suit was "transparently vexatious litigation" that illustrates, perhaps most clearly, the increasing need for this Motion.[74]

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[72] Needless to say, the Affected Entities and every entity that the Court believes has any affiliation with Mr. Dondero is 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 Court retaining the $2.5 million, has not been chastised or otherwise threatened.
[73] *See* September 23, 2020 Transcript at 51:10-16 [APP. 1149], a true and correct copy of which is attached hereto as **Ex. 11 [APP. 1099]** and incorporated herein by reference; *see also* **Ex. 30**.
[74] 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 Bridage circumvented CLO indenture covenants and materially increased the risk in the portfolio. Recently, JP Morgan

D. Recusal is necessary in light of the pending and future issues and proceedings.

58. Importantly, there are numerous adversary proceedings currently pending before this Court that involve Mr. Dondero, individually, or one or more of the Affected Entities (collectively, the "Adversary Proceedings").[75]

59. The claims in the Adversary Proceedings include various tort and breach of contract claims, claw-back claims, and *alter ego* claims seeking to hold Mr. Dondero and the Affected Entities liable for any recovery ordered as to other entities. In addition, the UCC has indicated that there are more suits to come, and Debtor specifically reserved claims against over five-hundred "Dondero related-entities and current or former employees who will be branded with the "Dondero disciple" moniker. Naturally, each of the Adversary Proceedings will require Mr. Dondero and the Affected Entities to take legal positions and defend themselves—actions that this Court has indicated that is predisposed to considering vexatious (and has already threatened large fee shifting awards on preliminary injunction matters, even where a defendant has technically prevailed), even, as stated above, in a situation where the Court had never seen the facts, the claims or the legal

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.

[75] 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.

theories; or where the Court has not admonished another party for the same position or a similar assertion of its rights.

60. For the reasons stated above, the Court has demonstrated what appears to be a high degree of antagonism toward Mr. Dondero and the Affected Entities that has grown to such a point that a reasonable question as to the Court's impartiality has arisen and must be resolved. As a result, Movants respectfully request the Court recuse itself from the Adversary Proceedings.

III. ARGUMENTS & AUTHORITY

61. Section 28 U.S.C. § 455 requires a judge to be recused if the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,"[76] and when the court's "impartiality might reasonably be questioned."[77] These provisions afford separate, though overlapping, grounds for recusal.[78]

62. Under section 455(a), recusal is required whenever a judge's partiality might reasonably be questioned, ***even if the judge does not have actual personal bias or prejudice***.[79] The test under § 455(a) is ***not*** whether the judge believes he or she is capable of impartiality[80] and ***not*** whether the judge actually has a bias (or actually knows of grounds requiring recusal).[81] Instead, the test is whether the "'average person on the street who knows all the relevant facts of a case'" might

[76] 28 U.S.C. § 455 (b)(1).
[77] 28 U.S.C. § 455 (a).
[78] *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).
[79] *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).
[80] *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).
[81] *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 805 (2001)).

reasonably question the judge's impartiality.[82] As Congress recognized when enacting section 455, litigants "ought not have to face a judge where there is a reasonable question of impartiality."[83] At its core, this statutory provision is "designed to promote public confidence in the impartiality of the judicial process."[84]

63. The words "prejudice" and "bias" mean a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because: (a) it is undeserved; (b) it rests upon knowledge that the holder of the opinion ought not to possess; or (c) it is excessive in degree.[85]

64. Despite holding that "judicial rulings alone *almost* never constitute a valid basis for a bias or partiality motion," the Supreme Court has also recognized that predispositions developed during the course of a trial will sometimes suffice.[86]

65. Moreover, while the presence of an extrajudicial source is a factor in favor of finding either an appearance of partiality under section 455(a) or bias or prejudice under section 455(b)(1),[87] an extrajudicial source for a judge's opinion about a case or a party is not necessary for recusal.[88] In addition, while, ordinarily, "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, do not constitute a basis for a bias or partiality motion," they "***may do so*** if they reveal an opinion that derives from an

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[82] *In re Kansas Pub. Employees Retirement Sys*., 85 F.3d 1353, 1358 (8th Cir.1996).
[83] H. Rep. No. 1453, 93d Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.
[84] *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.
[85] *Liteky v. United States*, 510 U.S. 540, 550 (1994).
[86] *Liteky v. United States*, 510 U.S. 540, 554 (1994) (emphasis added).
[87] *Bell v. Johnson*, 404 F.3d 997, 1004 (6th Cir. 2005) (citations omitted).
[88] *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).

extrajudicial source; and ***they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible***."[89]

66. Mr. Dondero and all other non-debtors, like every litigant, are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum.[90] Beyond that, "fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside."[91] "[J]ustice must satisfy the appearance of justice."[92] Notably, the Fifth Circuit has held that "***[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.***"[93]

67. Here, the facts detailed above, and incorporated herein, including but not limited to specifically paragraphs 1-60, show that the Court's conduct in this bankruptcy would lead an objective observer to reasonably question the Court's impartiality. By way of summary, the Court has:

(a) admitted that the negative opinions about Mr. Dondero formed during the *Acis* case cannot be excised from the Court's mind;

(b) made repeated reference to proceedings in the *Acis* case to justify findings made in this case that are not otherwise supported by *this* record and repeated negative statements about Mr. Dondero in connection with the Court's rulings;

(c) repeatedly threatened sanctions on and questioned the good-faith basis Mr. Dondero and the Affected Entities, for (i) defending lawsuits and motions; (ii) asserting valid legal positions; and/or (iii) 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),

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[89] *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citation omitted) (emphasis added).
[90] *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)).
[91] *Id.*
[92] *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).
[93] *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (emphasis added).

even declaring Mr. Dondero and the Affected Entities as behind "vexatious" litigation the Court admits it has not actually seen; and

(d) Disregarded the presumption that related corporations of separation have institutional independence and concluded, without supporting evidence from this proceeding, that any entity the Court deems connected to or controlled by Mr. Dondero (i.e., including the highly regulated Affected Entities, which are governed by independent boards) is essentially *no more than* a tool of Mr. Dondero and that Mr. Dondero is the ultimate decision-maker behind all the motions they file and actions they take in this proceeding; [94] and

(e) disregarded the testimony of any witness with a connection to Mr. Dondero as per se less credible, which includes attorneys and persons who owe fiduciary duties and ethical obligations.[95]

68. This Motion is not being filed because of prior adverse rulings; or because of any predispositions formed by the Court based upon ***facts or evidence*** introduced in the course of the current proceeding; or because of ordinary admonishments from a court to a litigant. Instead, this Motion is being filed because the facts and circumstances, including the non-exhaustive examples described above, reveal a deep-seeded antagonism toward Mr. Dondero and the Affected Entities that goes enough beyond "normal" admonishment as to render fair judgment and impartiality toward Mr. Dondero (and the required perception of same) impossible.

69. Importantly, this Court will sit as both judge and jury in the various Adversary Proceedings

[94] **Ex. 7** at 254:4-25 [App. 0781].
[95] *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 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*, **Ex. 8**, The January 8, 2021 Transcript, at 175:8-176:25 [App. 0959-0960].

(and any additional ones that are filed) and contested matters in the future, and the Court has demonstrated a willingness to retain jurisdiction whenever possible.[96] In doing so, the Court must, but appears unable to despite best efforts, set aside any prejudice or bias against Mr. Dondero in those proceedings. As demonstrated above, the Court is predisposed against Mr. Dondero (on issues that have not yet been tried and evidence that has never been entered in any proceeding in this bankruptcy) and has already disregarded the corporate separateness between Mr. Dondero and entities—which Mr. Dondero does not control—that are defendants in the Adversary Proceedings.

70. Practically and importantly, the Court's predisposition against Mr. Dondero (and the Affected Entities), including its prior declarations of vexatiousness (and threats of sanctions) and its questioning of counsels' good faith in taking legally-supported positions, indisputably threaten the ability of counsel for Mr. Dondero (and the Affected Entities or any entity or person that is perceived to be associated or aligned with Mr. Dondero) to put forward any claim or defense or seek certain relief. In effect, counsel is now forced to choose between: (a) raising an issue to preserve it for appeal and risk sanctions; (b) waiving raising a valid issue to avoid sanctions and, thereby, committing malpractice; or (c) withdrawing from its representation.

71. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."[97] As described herein, the cumulative weight of both prejudicial comments and peremptory rulings by the Court demonstrate that the Court appears to have developed a personal bias or prejudice

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[96] *See, e.g.,* **Ex. 11** at 50:4-52:7 [App. 1148-1150].

[97] *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 877 (2009) (internal quotation marks and citation omitted); 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)).

concerning Mr. Dondero (and various entities that the Court has deemed "under his control") that now render the Court unable to be impartial and render fair judgment related to Mr. Dondero. At a minimum, that is the perception that has been created.[98]

72. As a result, the Court should recuse itself from the Adversary Proceedings, any contested matter involving Mr. Dondero or any of the Affected Entities from acting as the "gatekeeper" in determining whether any future claim by Mr. Dondero (or any of the Affected Entities) is valid.

IV. PRAYER

FOR THE FOREGOING REASONS, Movants respectfully request that the Court recuse itself from the Adversary Proceedings and any future contested matters involving Movants or any entity connected to Mr. Dondero; and grant Movants all other further relief, at law or equity, to which they are justly entitled.

[98] *Liteky v. United States*, 510 U.S. 540, 551 (1994).

Dated: March 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 18, 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 3

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

In re:	)	Case No. 19-34054-sgj-11
	)	
Highland Capital Management, L.P.,	)	Chapter 11
	)	
Debtor.	)	
	)	

APPENDIX TO 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, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

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, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "Movants") file this Appendix in support of their Motion to Recuse Pursuant to 28 U.S.C. § 455 and Brief in Support of same:

Exhibit No.	Description	Appendix Page Nos.
1	December 2, 2019 Transcript - Motion to Transfer	APP. 0001-APP. 0137
2	January 9, 2020 Transcript - Debtor's Motion to Compromise Controversy with Official Committee of Unsecured Creditors	APP. 0138-APP. 0228
3	February 19, 2020 Transcript	APP. 0229-APP. 0416

4	December 12, 2020 Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles	APP. 0417-APP. 0442
5	December 16, 2020 Transcript - Motion for Order Imposing Temporary Restrictions	APP. 0443-APP. 0508
6	January 6, 2021 Plaintiff Highland Capital Management, L.P.'S Verified Original Complaint for Declaratory and Injunctive Relief	APP. 0509-APP. 0527
7	January 26, 2021 Transcript - Motion for Entry of Order Authorizing Debtor to Implement Key Employee Plan	APP. 0528-APP. 0784
8	January 8, 2021 Transcript - Preliminary Injunction Hearing	APP. 0785-APP. 0989
9	February 8, 2021 Transcript - Bench Ruling on Confirmation Hearing and Agreed Motion to Assume	APP. 0990-APP. 1040
10	July 8, 2020 Transcript - Motion to Extend Exclusivity Period and Motion to Extend Time to Remove Actions	APP. 1041-APP. 1098
11	September 23, 2020 Transcript – Debtors' Motion to File Redacted Quarterly Reports	APP. 1099-APP. 1151
12	June 30, 2020 Transcript - Motion for Remittance of Funds Held in Registry of Court filed by CLO Holdco, Ltd.	APP. 1152-APP. 1251
13	July 21, 2020 Transcript - Official Committee of Unsecured Creditors Emergency Motion to Compel Production by the Debtor	APP. 1252-APP. 1376
14	July 14, 2020 Transcript - Applications to Employ James P. Seery and Development Specialists, Inc.	APP. 1377-APP. 1510
15	March 4, 2020 Transcript - Hearing on Motion of The Debtor for Entry of an Order Authorizing, but not Directing, the Debtor to Cause Distributions to Certain "Related Entities"	APP. 1511-APP. 1631
16	June 15, 2020 Transcript - UBS's Motion for Relief from the Automatic Stay to Proceed with State Court Action	APP. 1632-APP. 1758
17	January 6, 2021 Debtor's Memorandum of Law in Support of its Motion for a Temporary Restraining Order and Preliminary Injunction Against Certain Entities Owned and/or Controlled by Mr. James Dondero	APP. 1759-APP. 1776
18	K&L Gates Letters	APP. 1777-APP. 1791
19	February 17, 2021 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	APP. 1792-APP. 1812
20	February 24, 2021 Order on Mandatory Injunction	APP. 1813-APP. 1817
21	February 23, 2021 Mandatory Injunction Hearing Transcript	APP. 1818-APP. 2056
22	January 14, 2021 Motion to Appoint Examiner	APP. 2057-APP. 2070
23	February 2, 2021 Transcript of Proceedings	APP. 2071-APP. 2365

24	Servicing Agreement – Exhibit N from February 2, 2021 Hearing	APP. 2366-APP. 2401
25	Servicing Agreement – Exhibit J from February 2, 2021 Hearing	APP. 2402-APP. 2440
26	February 3, 2021 Transcript of Proceedings	APP. 2441-APP. 2697
27	Chart of Holdings of Preference Shares in CLOs – Exhibit 2 from February 3, 2021 Hearing	APP. 2698-APP. 2699
28	Demonstrative #1 Showing Motions in this Bankruptcy Proceeding No.19-34054-sgj-11	APP. 2700-APP. 2712
29	Demonstrative #1 Showing Motions in Injunction Proceeding No. 20-03190-sgj	APP. 2713-APP. 2714
30	Declaration of Michael J. Lang	APP. 2715-APP. 2719

Dated: March 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on March 18, 2021, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT 1

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

Motion for Entry of an Order (I) Authorizing Bradley D. Sharp to Act as Foreign Representative Pursuant to 11 U.S.C. Section 1505 and (II) Granting Related Relief (Docket No. 68).

Motion of the Official Committee of Unsecured Creditors for Entry of an Order Authorizing Filing Under Seal of the Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtor's (1) Motion for Final Order Authorizing Continuance of the Existing Cash Management System, (II) Motion to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, and (III) Precautionary Motion for Approval of Protocols for "Ordinary Course" Transactions (Docket No. 123).

Motion of Debtor for Entry of Interim and Final Orders Authorizing Debtor to File Under Seal Portions of Its Creditor Matrix Containing Employee Address Information (Docket No. 8).

Debtor's Application for an Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date (Docket No. 69).

Debtor's Application for an Order Authorizing the Retention and Employment of Lynn Pinker Cox & Hurst LLP as Special Texas Litigation Counsel, Nunc Pro Tunc to the Petition Date (Docket No. 70).

Motion of Debtor for Entry of Interim and Final Orders Authorizing (A) Continuance of Existing Cash Management System and Brokerage Relationships, (B) Continued Use of the Prime Account, (C) Limited Waiver of Section 345(b) Deposit and Investment Requirements, and (D) Granting Related Relief (Docket No. 5).

Motion Pursuant to 11 U.S.C. Sections 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc as of the Petition Date (Docket No. 75).

Precautionary Motion of the Debtor for Order Approving Protocols for the Debtor to Implement Certain Transactions in the Ordinary Course of Business (Docket No. 77).

Motion of the Official Committee of Unsecured Creditors for an Order Transferring Venue of This Case to the United States Bankruptcy Court for the Northern District of Texas (Docket No. 86).

Transcribed by: Clara Rubin

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ALSO PRESENT:

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FRANK WATERHOUSE, Partner and CFO, Highland Capital Management

BRADLEY SHARP, Pres. and CEO, Development Specialists, Inc.

FRED CARUSO, COO, Development Specialists, Inc.

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Please be seated.

MR. O'NEILL: Good morning, Your Honor.

THE COURT: Good morning.

MR. O'NEILL: James O'Neill, Pachulski Stang Ziehl & Jones, here today on behalf of the debtor, Highland Capital Management. With me, Your Honor, at counsel table is Jeff Pomerantz, Ira Kharasch, John Morris, Greg Demo, and Max Litvak, representing the debtor. Also in the courtroom with us, from our client, Isaac Leventon and Frank Waterhouse and, from DSI, Brad Sharp and Fred Caruso.

THE COURT: Welcome.

MR. O'NEILL: Your Honor, we have a number of matters on the agenda today, but we are going to proceed with item number 12 on the agenda, which is the committee's venue motion. So I will yield the podium to them.

THE COURT: Okay.

MR. CLEMENTE: Good morning, Your Honor.

THE COURT: Good morning.

MR. CLEMENTE: Matthew Clemente from Sidley Austin, proposed counsel to the official committee of unsecured creditors. With me here today, my colleagues Dennis Twomey and Penny Reid, along with our co-counsel from Young Conaway, Mike Nestor and Sean Beach.

Your Honor, we have filed our venue motion. We believe that venue -- it's appropriate to transfer venue to the bankruptcy court in the District of Texas for the reasons that we laid out in the motion. Based on Your Honor's -- discussions with Your Honor this morning, we understand that we would proceed with what I believe would be a short proffer from the debtor, we would have an opportunity to cross, and then we would proceed to argument from there. If that's acceptable to Your Honor, that's --

THE COURT: That's fine. Thank you.

MR. CLEMENTE: -- that's the way we'd proceed.

THE COURT: Yes.

MR. CLEMENTE: Thank you, Your Honor.

MR. POMERANTZ: Good morning, Your Honor. Jeff Pomerantz, Pachulski Stang Ziehl & Jones, on behalf of the debtor. We'd also like at this time, Your Honor, to move into evidence Exhibits A through U, except for Exhibit G. Exhibit G is one of those documents that we refer to in chambers as would be subject to seal. We don't need to refer to it in connection with the venue motion. But if Your Honor would like, I can approach with a binder containing the --

THE COURT: Yeah, I don't have those.

MR. POMERANTZ: -- exhibits. There have been no objections to them.

MR. POMERANTZ: Your Honor, if Mr. Sharp were called

to testify, he would testify --

THE COURT: Hang --

MR. POMERANTZ: Oh, sorry.

THE COURT: Hang on. Okay.

MR. POMERANTZ: Okay.

THE COURT: Look at the documents. It's the first I've seen them.

(Pause)

THE COURT: So you're moving A through U, except for G?

MR. POMERANTZ: Correct, Your Honor.

THE COURT: Any objection?

MR. CLEMENTE: Sorry, Your Honor, one --

THE COURT: No; yeah, that's fine.

MR. CLEMENTE: No objection, Your Honor.

THE COURT: All right, they're admitted without objection, other than G. G is not admitted at this time.

(Debtors' Exhibits A through U, except for Exhibit G, were hereby received into evidence, as of this date.)

THE COURT: All right, you may proceed with the proffer.

MR. POMERANTZ: Thank you, Your Honor.

If Mr. Sharp were called to testify, he would testify that he is the proposed chief restructuring officer of the debtor; he's also the president of Development Specialists,

Inc., a financial advisory firm. He would testify that he's been a restructuring professional with over twenty-five years of experience as a trustee, a chief restructuring officer, and a financial advisor, in a myriad of industries. He would testify that he has been appointed as chief restructuring officer in four cases in Delaware, including In re Variant before Judge Shannon, In re Woodbridge before Judge Carey, In re WL Homes before Judge Shannon, and In re Beverly Hills Bancorp before Judge Carey.

He would testify that he has a national practice, he's physically headquartered in Los Angeles, and it would be as convenient for him to travel to this court in Delaware than it would be for him to travel to Dallas. He would testify that the debtor's counsel, Pachulski Stang Ziehl & Jones, has offices in Delaware and, if the case were transferred, the debtor would need to retain local counsel in Dallas.

He would testify that he was initially engaged by the debtor on October 7, 2019 and that, prior to his engagement as a CRO, he had no prior involvement with Highland or any of its senior management employees or principals. He would testify that he was introduced to Highland by Pachulski Stang Ziehl & Jones.

He would testify that, since his engagement, he and his colleague, Fred Caruso, who functions as an extension of him in his role as chief restructuring officer, and other

employees of DSI have devoted themselves to learning about the debtor's business and financial affairs, knowledge that only increases as the days go by. He would testify that he and others from DSI have spent hundreds of hours meeting with various employees of the debtor and reviewing and accessing the debtor's books and records. He would testify that he's been given complete access to a wealth of information by the debtor, and nothing he or his team have requested from the debtor have been withheld by them.

He would testify that the debtor's a limited partnership organized under the laws of Delaware and that the debtor's general partner, Strand Advisors, is a corporation organized under Delaware law as well, and Strand is the manager of the debtor. He would testify that over ninety-nine percent of the debtor's limited partnerships are held by Delaware entities.

He would testify that the debtor owns and manages a sophisticated financial-advisory-services and money-management business that has assets and interests all over the world; that the debtor's assets under management, including its own proprietary assets and those of its clients, through various related parties, exist in the United States, Asia, South America, and Europe.

He would testify that the debtor has over two-and-a-half billion dollars of assets under management and receives

management and advisory fees from a multitude of sources around the world. He would also testify that the debtor provides shared services for approximately 7.5 billion of assets managed by a variety of affiliated and unaffiliated entities, including other affiliated registered investment advisors.

He would testify that although the debtor is based in Dallas, the debtor's affiliates and related parties maintain offices or have personnel in many international locales, including Buenos Aires, Rio de Janeiro, Singapore, and Seoul. He would testify that the debtor owns and manages targeted funds in Korea, South America, and Singapore.

He would testify that the debtor's filed the motion that's pending today to appoint him as foreign representative in order to manage certain foreign interests, including those proceedings pending in Bermuda and Cayman. He would testify that the principal assets in the United States consist of custodial and noncustodial interests and investments located all over the country, and that the debtor's prime brokerage account that holds the bulk of the debtor's liquid assets is located in New York City with Jefferies.

He would testify the debtor owes approximately 30 million dollars to Jefferies on account of margin obligations that are secured by the securities in the prime account, and that the debtor's other principal secured creditor, Frontier State Bank, is based in Oklahoma City and is owed approximately

5.2 million dollars as of the petition date.

He would testify that one aspect of the debtor's business is management advisory services in connection with various investments and collateralized loan obligations, or "CLOs", and that the debtor previously provided submanager, subadvisory, and shared services to Acis CLOs pursuant to certain contractual agreements that were terminated during the course of Acis' bankruptcy in or around August 2018. He would testify that he's informed and believes that the compensation structure for subadvisory and shared-service agreements is different for CLOs than with other types of private equity or hedge funds that the debtor manages.

He will testify that a focus of DSI's efforts in this case will be to evaluate the appropriateness and the economics of the shared-service agreements and subadvisory agreements that the debtor's a party to with both affiliated and unaffiliated third parties, and he would determine what modifications are appropriate given the facts and circumstances.

He would testify that, since the petition date and, he believes, since August 2018, the debtor has not had any direct business dealings with respect to Acis or the CLO assets for which Acis serves as CLO manager, and that the debtor no longer advises or subadvises any active CLOs; the debtor only has CLOs that are in liquidation and in the process of monetizing their

underlying assets and paying off their remaining investors' revenues that will decrease over time; and that the CLO portion of the debtor's business provides just ten percent of the debtor's revenue, which, again, will shrink over time.

He would testify that the debtor derives ninety percent of its other revenue from managing asset classes that have nothing to do with Acis, including private equity, hedge fund, mutual funds, open-ended retail funds, and real-estate funds.

He would testify that the debtors and Acis assert various substantial disputed and unliquidated claims against each other, and the debtor has outstanding claims against Acis that total no less than eight million dollars for services rendered. He would testify that the debtor and Acis have been, and continue to be, involved in highly contentious litigation, including matters that are subject to multiple appeals from the bankruptcy court and pending fraudulent-transfer claims brought by Acis against the debtor, in Texas. He would testify the debtor is currently supporting two pending appeals of orders of the Texas bankruptcy court, granting the involuntary petition against Acis and confirming Acis' Chapter 11 plan that put Mr. Terry in charge of Acis.

He would testify that, although he serves subject to the debtor's ability to terminate him, he has full responsibility with respect to analyzing and pursing insider

transactions and is in charge of the debtor's restructuring efforts, and that he has no prior relationship with either Acis or the Texas bankruptcy court with respect to this matter. He would testify that his goal in this case is to maximize the value of the debtor's estate for the benefit of all constituents, and he intends to evaluate all available strategic options for accomplishing the goal, and hopes to work constructively with the committee in that regard.

He believes that the outcome of this case will not turn on the day-to-day management of the debtor's assets but instead will be driven by the debtor's ability to restructure its balance sheet and maximize the value of its assets, many of which are liquid. He would testify that either he or Fred Caruso would provide substantially all the testimony that would be provided for the debtor in this case.

Lastly, he would testify that he's been on the job for over a month-and-a-half, that the debtor has been following the protocols set out in the motion for which approval is being sought today. He would testify the debtor's being transparent with the creditors' committee, has met with and communicated with FTI on many occasions, and shared a lot of information. And he would testify that there have been no allegations made by the committee or any other party, regarding any post-petition impropriety by the debtor.

That concludes my proffer of Mr. Sharp's testimony.

THE COURT: All right, thank you very much.

Does anyone wish to cross-examine the witness?

UNIDENTIFIED SPEAKER: Yes, Your Honor.

THE COURT: Yes?

UNIDENTIFIED SPEAKER: Yeah.

THE COURT: Okay.

MS. REID: Yes, Your Honor.

THE COURT: Mr. Sharp, would you please take the stand? And remain standing for your affirmation.

THE CLERK: Would you step up to the stand, please? Raise your right hand.

(Witness affirmed)

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Bradley Sharp, B-R-A-D-L-E-Y; last name, S-H-A-R-P.

THE CLERK: Thank you.

THE COURT: Very good.

MS. REID: Good morning, Your Honor. Penny Reid on behalf of the creditors' committee.

THE COURT: Good morning.

Mr. Sharp, just -- you look like a veteran, but if you could stay close to the microphone, I'd appreciate it.

THE WITNESS: Yes, sir.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MS. REID:

Q. Mr. Sharp, you've only met Mr. Dondero once; correct?

A. That is correct.

Q. And that was in Dallas; correct?

A. That is correct.

Q. And your team has been at the debtor's offices; correct?

A. Yes.

Q. And worked over a hundred hours at the debtor's offices; correct?

A. Yes.

Q. And that's all been in Dallas; correct?

A. Yes.

Q. Your team has not been to a New York office; has it?

A. No.

Q. Has your team -- your team has not been to Korea; has it?

A. No.

Q. Your team has not been to Singapore; has it?

A. With respect to this engagement, no.

Q. Okay. And you haven't met any employees in the Singapore office; have you?

A. No.

Q. And under this proposed engagement, you're going to report to Mr. Dondero; correct?

A. Yes.

MS. REID: We will reserve our rights to further question him on the other issues, non-venue issues.

THE COURT: Of course.

MR. SHAW: Good morning, Your Honor. Brian Shaw on behalf of Acis Capital Management, a creditor.

THE COURT: Yes, Mr. Shaw, you may proceed.

CROSS-EXAMINATION

BY MR. SHAW:

Q. Mr. Sharp, you were hired nine days before the bankruptcy petition was filed in this case; correct?

A. Correct.

Q. Other than the retention of DSI, are there any other new managers at the debtor, that didn't exist prior to the bankruptcy filing?

MR. MORRIS: Objection. Beyond the scope, Your Honor. This should be a traditional cross.

THE COURT: You're going to need to find a microphone or talk into one that's in front of you.

MR. MORRIS: John Morris, Pachulski Stang Ziehl & Jones, for the debtor.

This line of questioning is beyond the scope. This should be a traditional cross. The moving parties have called no witnesses, as Your Honor is aware.

THE COURT: Well, they reserved the right to call witnesses based on what you did in your direct. So I'm not

going to hold them to technicalities.

You may proceed.

MR. SHAW: Thank you, Judge.

THE COURT: Do you remember the question, Mr. Shaw?

THE WITNESS: I do.

A. Not that I'm aware of.

Q. Okay. So other than -- so DSI is the only difference pre-petition and post-petition; is that right?

A. With respect to management. Obviously, the company's now operating in bankruptcy, which is significantly different.

Q. You testified, in your proffer, regarding the provision of shared services and subadvisory to Acis; do you remember that proffer your counsel commented about?

A. I do.

Q. And one of the core parts of the debtor's business is the provision of shared services and subadvisory services to affiliates and nonaffiliates; right?

A. Yes.

Q. Okay. And so that was true for Acis and it's true for current affiliates of the debtor; right?

A. Yes, except for, you know, Acis was primarily CLOs, which is a reducing part of the debtor's business.

Q. Do you have any reason to believe that the Northern District of Texas cannot hear this case expeditiously and fairly?

A. No.

MR. SHAW: Pass the witness.

THE COURT: Any other cross-examination?

Hearing none, any -- redirect; that's what it's called. There we go.

MR. MORRIS: No, thank you, Your Honor.

THE COURT: All right. Thank you, sir. You may step down.

THE WITNESS: Thank you.

THE COURT: Any further evidence by any party, in connection with the venue motion only?

MR. CLEMENTE: Your Honor, I believe we would like to call Mr. Waterhouse to the stand to testify in connection with the venue motion briefly.

THE COURT: All right. Mr. Waterhouse. I thought we -- there we go. If you could please take the stand as well, sir, and remain standing.

MR. GUERKE: May it please the Court. Good morning, Your Honor. Kevin Guerke on behalf of the creditors' committee.

THE CLERK: Please raise your right hand.

(Witness affirmed)

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Yes; it's Frank Waterhouse, F-R-A-N-K,

W-A-T-E-R-H-O-U-S-E.

THE CLERK: Thank you.

THE COURT: Thank you. Please be seated and try to remain close to the microphone, if you would, please. It's a little awkward here.

You may proceed.

DIRECT EXAMINATION

BY MR. GUERKE:

Q. Mr. Waterhouse, you've worked for the debtor, Highland Capital Management, L.P., since 2006; correct?

A. Yes.

Q. You started there as a senior accountant; right?

A. That is correct.

Q. You were promoted to chief financial officer at the end of 2011; correct?

A. Yes.

Q. That's the title that you hold today; right?

A. Yes.

Q. You also currently hold the title of partner; right?

A. Yes.

Q. You were made partner three or four years ago; correct?

A. Yes. I mean, I don't remember the exact time but, yeah, approximately three or four years ago.

Q. You are an officer in Highland Affiliates; correct?

A. Yes.

Q. James Dondero is the president of Highland Capital Management, L.P.; right?
A. Yes.
Q. Mr. Dondero owns and controls Highland's general partner, Strand Advisors, Inc.; right?
MR. MORRIS: Your Honor, I'm just going to object for the record. This is supposed to be a rebuttal witness. This isn't rebutting anything; it's just new facts --
THE COURT: He's laying
MR. MORRIS: -- that they're seeking --
THE COURT: I'm sure he's laying foundation.
MR. GUERKE: I am, Your Honor. It's background, it's foundation. It has to go (sic) with the organizational structure.
THE COURT: That's fine. Objection overruled.
Q. Mr. Waterhouse, Mr. Dondero owns and control Highland's general partner, Strand Advisors, Inc.; correct?
A. I don't remember his exact title but, yes, he is president.
Q. He owns a hundred percent of the equity in Strand; right?
A. Yes.
Q. He also has a limited-partnership interest in Highland; correct?
A. That is correct.
Q. Mr. Dondero's the portfolio manager of all Highland funds;

right?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

You can answer.

A. Yes, he -- he is the portfolio manager or the -- or a co-portfolio manager. We have several funds. I -- I -- I can't recall if he is the sole portfolio manager on every single fund or -- but he -- he -- but yes, he is -- he is a portfolio manager.

Q. As the president of Highland, Mr. Dondero promoted you to CFO back in 2011; right?

A. Yes. My -- my promotion was recommended by the -- the former CFO and, as president, Mr. Dondero had to, you know, obviously, approve that taking.

Q. You report to Mr. Dondero; right?

A. Yes.

Q. He's your boss; correct?

A. Yes.

Q. And after the transition period from the old CFO to you, you've reported only to Mr. Dondero; right?

A. That is correct.

Q. After the bankruptcy was filed, you still report to Mr. Dondero; right?

A. Yes.

Q. And Mr. Dondero doesn't report to anyone; correct?

A. Yeah, not -- not to my knowledge. Yeah, it's correct.
Q. Mr. Dondero has the ability to terminate you; right?
A. Again, I -- I assume so. Again, I think I -- I testified earlier last week, I -- I -- I -- you know, again, I don't know through this process -- again, I'm not -- bankruptcy is not something that I -- I am, you know, a specialist. I'm not a bankruptcy attorney. But maybe the CRO can, or Jim, or something in -- in conjunction. But I think, theoretically, yes.
Q. Post-bankruptcy, you don't report to Bradley Sharp; right?
MR. MORRIS: Objection, Your Honor. Same objection: beyond the scope.
THE COURT: Overruled.
A. I do not.
Q. Post-bankruptcy, you don't report to Fred Caruso; correct?
A. I do not.
Q. Mr. Sharp doesn't have the power to terminate your employment; right?
A. Again, I'll --
THE COURT: Actually, he already answered that question; said he wasn't sure.
Q. Mr. Waterhouse, there are six groups below Mr. Dondero in Highland's organizational chart; correct?
A. Give or -- give or take.
Q. The heads of those groups are the executive-level

management employees that you describe in your declaration that was submitted in association with the first-day motions; right?
A. Yes.
Q. You manage one of those teams; correct?
A. Yes.
Q. Your team is made up of the corporate accounting folks, Funding Accounting, the tax group, Valuation, Operations, Retail Fund Operations, Human Resources, and IT; right?
A. That -- that is correct.
Q. The other Highland teams are the legal-compliance team -- correct?
A. Yes.
Q. The credit-research team; right?
A. Yes.
Q. Public-relations team; correct?
A. Yes.
Q. Private-equity team; right?
A. Yes.
Q. And the trading team; true?
A. Yes.
Q. The heads of each one of those groups report up to Mr. Dondero; isn't that true?
A. Yes, and we -- we -- well, and we also -- and -- but we have a risk-management team as well, at Highland. That -- that risk-management team reports up through the trading team.

Q. As the CFO, your office is in Dallas, Texas; right?
A. Yes. My -- yes, we office in -- or my office is in Dallas, Texas.
Q. That's been the location of your office since you joined Highland; correct?
A. My current location in Dallas, Texas, is not the same as it was when I joined Highland Capital in October of 2006.
Q. You started in 2006 and your office was in Dallas; right?
A. Well, my offices were in Dallas but it was not at the same location as we are currently.
Q. Your current offices are also in Dallas; right?
A. Yes, their address is in Dallas, Texas.
Q. Over seventy Highland employees work out of Highland's Dallas office; right?
A. Yes.
Q. Dallas is the only location where Debtor Highland employees work; correct?
A. Yes.
Q. Mr. Dondero's office is in Dallas; true?
A. Yes.
Q. Members of the legal team have offices in Dallas; right?
A. Yes.
Q. You meet with Mr. Dondero at a minimum of once a week; correct?
A. Yes, give or take.

Q. Usually those meetings are in his office in Dallas; right?
A. Yes.
Q. All the group heads that we just discussed all have offices in Dallas; right?
A. Yes. We used to -- our -- our risk-management team used to be officed in New York. But yes, we -- we -- yes.
Q. You mentioned New York. There's a location in New York that we discussed at your deposition; do you remember that?
A. Yes.
Q. That office in New York is not in Highland -- the debtor's name; true?
A. That is correct.
Q. It's in another nondebtor-entity name; correct?
A. Yes.
Q. There are no Highland employees in that New York location; correct?
A. That is correct.
Q. In the proffer that you just heard, and at your deposition, there was some discussion about offices outside of the United States. Do you recall that?
A. Yes.
Q. The people who work in those locations are not employees of the debtor, Highland Capital Management, L.P.; right?
A. That's right.
Q. The offices outside the U.S. are subsidiary offices with

subsidiary employees; correct?
A. That is correct.
Q. You've never been to those offices; right?
A. I have not.
Q. You have members of team who include David Klos, Clifford Stoops, and some other folks; right?
A. Yes.
Q. You have standing weekly meetings with those folks --
THE COURT: All right --
Q. -- right?
THE COURT: -- I'm going to reprimand -- this is well beyond -- I was giving you some leeway but, if this is what you wanted to put on -- it's your motion, sir. I mean, this is -- you're laying your foundation in your case-in-chief. Why didn't you put this on to begin with?
MR. GUERKE: Your Honor, it's rebuttal to the proffer that Mr. Sharp just offered.
THE COURT: In what way?
MR. GUERKE: Related to the organizational structure and how decisions are made currently at the debtor.
MR. MORRIS: Your Honor, if I may. I don't believe any aspect of the proffer went to the location of decision-making.
THE COURT: Would you like to reply to that?
MR. GUERKE: Yes. The proffer was made that decisions

are made in California and around the country, and around the world I believe. And this evidence rebuts that; that the organizational structure and the day-to-day operations are still run in Dallas, Texas, as they were before bankruptcy.

And, Your Honor, I have three questions, then I'll sit down.

THE COURT: Okay. All right, I'll allow it.

Q. When you meet with people on your team that we just identified, you meet with them in Dallas; correct?

A. That's correct.

MR. GUERKE: Those are my only questions. Thank you, Mr. Waterhouse.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: That was direct. Any further direct?

Yes, sir.

MR. SHAW: Real briefly, Your Honor.

DIRECT EXAMINATION

BY MR. SHAW:

Q. Mr. Waterhouse, as the CFO of the debtor, were you aware that the debtor intended to file bankruptcy prior to the filing?

MR. MORRIS: Objection. Beyond the scope.

MR. SHAW: Judge, we designated any witness that they designated, so I don't know that we necessarily have called --

THE COURT: Well, yeah, but it's your motion --

MR. SHAW: Correct.

THE COURT: -- and you declined to put any evidence on in support of your motion. They then put on evidence in opposition to your motion. So you're limited, sir, to rebutting the evidence they put on. You had your chance to make your case-in-chief; you decided not to do it. It's not my fault.

MR. SHAW: My understanding was that we were -- that, depending upon what the proffer was, which we -- we're not aware of what the proffer was before today, that we reserved the right to call Mr. Waterhouse, which I understood from our chambers conference is what we exercised that right to do. If I misunderstood how procedurally we were going about it, then --

THE COURT: Well, I don't understand how -- that doesn't make any sense to me. You get a free shot to hear their case first, and then you get to make your direct case? Why would I allow that? It's your motion.

MR. SHAW: Understood.

THE COURT: All right, so let's stick to rebutting what they put on.

MR. SHAW: Okay.

THE COURT: I gave a lot of leeway to your colleague; I'll give you leeway. But I don't really want to sit through

forty-five minutes of direct that you could have done in the first place.

MR. SHAW: And I promise you, I have a very few limited questions.

THE COURT: All right.

BY MR. SHAW:

Q. With regard -- where is Mr. Dondero today?

A. I don't know.

Q. For the shared services and subadvisory services that the debtor previously provided Acis -- are you aware of those?

A. I'm aware of them generally.

Q. All right. Have you ever reviewed the shared-services and subadvisory agreements between Acis and Highland?

A. I'm sure I reviewed them at -- at some point, but I honestly can't recall.

Q. How are those agreements different than the shared-services and subadvisory agreements currently between the debtor and various affiliates?

MR. MORRIS: Objection. No foundation.

MR. SHAW: It's directly relevant to -- the foundation being he said he's aware of them. I --

MR. MORRIS: The witness just testified that he's not familiar with them as he sits here --

THE COURT: I can't hear you.

MR. MORRIS: The witness just testified that he's not

familiar with them as he sits here today. He may have seen them in some -- at some point in the past.

THE COURT: Well, he can qualify the answer further. Overruled.

You can answer.

A. You know, again, I -- I don't -- I don't know. I don't have the documents in front of me. I -- I -- like I said, I'm generally aware of -- of the Acis agreements. You know, I don't have these agreements memorized to any certain degree, so I -- I -- I -- I don't know specifically.

Q. As -- you're familiar with the -- as the CFO, with the shared-services and subadvisory agreements that govern the seven billion dollars in assets under management that the debtor provides for affiliates and nonaffiliates; right?

A. Yes, I'm generally aware of those agreements.

Q. And are those agreements typical in form? Do they differ widely in their content?

A. Again, I don't know -- I mean, they -- they can. Again, it -- it depends on the nature of the services. And -- you know, it -- there isn't a standard template, I would say, for shared services. Yes, they can differ. As I said, I don't have those agreements memorized, so I can't speak as to how they are similar or how they are not.

MR. SHAW: Pass the witness.

THE COURT: Thank you.

I guess it'll be cross of your own witness. Any cross?

MR. MORRIS: No, thank you, Your Honor.

THE COURT: All right, sir, thank you. Mr. Waterhouse, you may step down.

THE WITNESS: Thank you.

THE COURT: You're welcome.

Any further evidence?

MS. PATEL: Your Honor, as I referenced, we just have some exhibits; I believe these to be the unobjected-to pieces of it. We -- Acis provided a witness-and-exhibit list. These are the unobjected-to exhibits, and we would just move them in. And --

THE COURT: Is this the ones I already have?

MS. PATEL: No, Your Honor. I believe you only have the debtor's.

THE COURT: Yeah.

MS. PATEL: And I will apologize, Your Honor; we've given debtors a copy of the exhibits. Our -- there was miscommunication. They are not bound.

THE COURT: That's fine.

MS. PATEL: But they are numbered.

THE COURT: All right.

MS. PATEL: If I may approach?

THE COURT: Yes. Please don't hurt yourself. It's a

bit of a mess there.

MS. PATEL: There's a little trash back here.

THE COURT: These are all not objected to; is that correct?

MS. PATEL: (Indiscernible), Your Honor, but I go through them.

THE COURT: Are they -- okay.

MS. PATEL: What I've handed the Court and to opposing counsel are Exhibits 1 -- Acis Exhibits 1 through 18, with the exclusion of Exhibit 3 and Exhibit 9, which were objected to; and then also Exhibit Numbers 24 and 25, which were not objected to. We do have one additional exhibit, Your Honor, that was objected to, that I would like to move in.

THE COURT: All right. Is there any objection to the admission of the documents that counsel has represented there's no objection to?

MR. MORRIS: No, Your Honor.

THE COURT: Okay. They are admitted without objection.

(Acis' Exhibits 1 through 18, with the exception of Nos. 3 and 9; and Exhibits 24 and 25, were hereby received into evidence, as of this date.)

MS. PATEL: If I may approach, Your Honor?

THE COURT: Yes.

Thank you.

MS. PATEL: And, Your Honor, my co-counsel will handle that -- will handle it since we -- this was a late objection and he prepared with respect to this; I prepared with respect to argument.

THE COURT: Okay.

Yes, sir.

MR. CLEMENTE: I believe there's a hearsay objection regarding this.

MR. MORRIS: Relevance and hearsay, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: Your Honor, I'll address hearsay first. Federal Rule of Evidence 807 is a residual exception to the hearsay rule; provides that a hearsay statement is admissible if the statement is supported by sufficient guarantees of trustworthiness, after considering the totality of the circumstances under which it was made and evidence, if any, corroborating the statement, and (2) it is more probative on the point for which it is offered, than any other evidence that the proponent can obtain through reasonable efforts.

This is an email exchange between counsel for Acis and the courtroom deputy for Judge Jernigan, just requesting and ask -- inquiring about the court's availability. Everything about that email supports the fact that it is -- that it is authentic and that there's no question about whether or not it is -- it's trustworthy. How would we put on evidence of

whether or not Judge Jernigan in the Northern District of Texas has sufficient time to hear these numerous motions that are set, other than by providing something like this? I mean, we can't call or depose the courtroom deputy or the judge. So based upon that, also -- there also is an exception, under the hearsay rule, to a public record. I think this also falls within that exception to the rule. So for that reason, we don't believe the hearsay objection is proper.

As far as relevance, it goes to the argument about transfer and whether or not the transferee court can expeditiously hear the matter. And that's one of the elements and one of the core questions about judicial efficiency.

So for those reasons, we believe that the objections are not well-founded and we offer this exhibit. And it's Exhibit 26.

THE COURT: Reply?

MR. MORRIS: Briefly, Your Honor.

THE COURT: Yes.

MR. MORRIS: I'm not aware of any case where a court has ever considered, let alone decided, a venue motion on the availability of another court's time. So I don't think it's relevant at all. I do think it's an out-of-court statement being offered for the truth of the matter asserted, and I do believe it's hearsay.

MR. CLEMENTE: It most certainly is hearsay, Judge;

just to respond. But the question is not whether it's hearsay but whether it's admissible. And of course the Court is well aware that hearsay can be admissible, and one of the exceptions is the exception that I outlined.

THE COURT: All right, I'll overrule the objection and admit the document. It is hearsay but it clearly meets the reliability aspects for the exception to hearsay. With regard to the relevance, I think its relevance is very -- well, let me put it this way; I think it's tangentially relevant. I mean, it certainly is relevant whether the Northern District of Texas has the ability to handle the case were it transferred there. To me that's -- I don't even think that's disputed, I mean, it's obvious, it's a fantastic bankruptcy court. They're more than capable of handling it. So I -- it's probably duplicative, if nothing else.

Also, it's very carefully written so that you don't actually identify what case you're talking about. So whether the courtroom deputy realized what you were saying or not saying with regard to this specific motion is obviously unclear. But I will allow it for very limited purposes.

(Email exchange between Acis' counsel and Hon. Jernigan's courtroom deputy was hereby received into evidence as Acis' Exhibit 26, for the stated limited purposes, as of this date.)

MR. CLEMENTE: Thank you, Your Honor.

THE COURT: Any other evidence?

I'm going to -- all right, last chance. I'm going to close the evidentiary record.

All right, the evidentiary record's closed. Let's take a short recess; then I'll hear argument. We will start with the movants and their supporters, and then we'll turn it over to the debtor. Okay? We'll take a short recess.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

(Recess at 10:48 a.m. until 11:05 a.m.)

THE COURT: Be seated. Sorry about the delay. We had some computer difficulties. But they're all ironed out.

You may proceed.

MR. CLEMENTE: Thank you, Your Honor. Again, Matthew Clements from Sidley Austin, on behalf of the committee.

Your Honor, to begin, everything we rely on in our venue argument is uncontested and uncontroverted and is in the record that either the debtor's exhibits or the Asic's (sic) exhibits or the record of this case, or published opinions of the Dallas bankruptcy court, and which Your Honor can take judicial notice of -- we believe that that record more than amply carries our evidentiary burden with respect to the venue motion.

With respect to the Sharp proffer, Your Honor, it attempted to create the appearance of a debtor with operations in far-flung jurisdictions, employees at nondebtor entities that may be located in places other than Dallas, offices that

may be in New York that aren't actually debtor offices. And the testimony of Mr. Waterhouse rebutted that and made clear that the debtor has no employees other than in Dallas and that Mr. Dondero makes all of the decisions, and he is in Dallas. The nerve center of this debtor is in Dallas. And we wanted to make that clear, Your Honor, after the proffer, the rebuttal, and the evidentiary record. We believe that the evidentiary record is largely uncontroverted with respect to the arguments that we're going to be made (sic) in our venue motion, and that Mr. Sharp's testimony has been effectively rebutted.

With that, Your Honor, we believe that this case is atypical and presents a set of unique facts which we believe are uncontroverted, that warrant transfer of venue to the Dallas bankruptcy court. And frankly, Your Honor, it does beg the question as to why the debtor chose not to file in Dallas, what we believe the most logical venue is, in the first instance. Let's talk about some of these unique facts here; then we'll move into some of the arguments we made in our motion, and then we'll talk about some of the things that the debtor made (sic) in its reply.

First and perhaps most importantly, which is obvious from the nature of this proceeding, not a single creditor or party-in-interest has filed papers supporting the debtor's venue in Delaware, other than, obviously, the debtor. The official committee has unanimously supported venue transfer to

Dallas, Texas. Acis, in its own capacity as creditor, has joined the transfer request. It's not surprising to us, Your Honor, that no creditor has affirmatively come out in favor of venue in Delaware, because the debtor is in Dallas and, in fact, that is where its nerve center is.

Your Honor, we do believe that it's particularly significant because in this case, although schedules and statements have not yet been filed, the creditors' committee makes up the vast majority of creditors in this case, in terms of absolute dollar amounts. There may be multiple creditors in number, but the vast majority of dollar amount of creditors are represented by the official committee of unsecured creditor (sic).

There was reference to Jefferies. They're owed thirty million dollars. There was reference to Frontier Bank. They're owed five million dollars. A single claim of one committee member dwarfs that by multiples, Your Honor. So we believe the fact that no other creditor supports venue in Delaware is a very significant fact, Your Honor, and is not controverted.

Second, Your Honor, until a few months ago, the Acis case, which is pending in the Dallas bankruptcy court, was an affiliated case. And again, this can be gleaned from the published decisions and the record that's been put into evidence. Had this case been filed prior to confirmation of

the Acis plan, under Rule 1014 the Dallas bankruptcy court would be the appropriate court to determine venue. And although I would never suppose to predetermine how a judge would rule, I think there would have been a high probability that the Dallas court would have taken venue over the debtor's case.

This is important, Your Honor, because the third point I'd like to make is that Highland and the debtor, and as we have described in our papers and related attachments, and as Mr. Sharp referred to in his proper -- in his proffer, has itself filed an appeal, seeking to overturn the confirmed Acis plan of reorganization and return the equity that was distributed to Mr. Terry under that confirmed plan, to an entity called Nutro (ph.).

Second on Nutro, Your Honor. Nutro's wholly owned by Mr. Dondero and, therefore, if Acis were returned underneath Nutro, it would become an affiliate of this debtor, and Acis would once again be subject to, as an initial matter, a venue -- excuse me, this debtor would be subject to, as an initial matter, a venue determination by the Dallas bankruptcy court. If we have a successful appeal, we would have affiliated cases with dueling jurisdictions, Your Honor, and the Dallas bankruptcy court, as I mentioned, would determine venue.

On that, Your Honor, the debtor must believe -- it's

not just me speculating. The debtor must believe that there is a material possibility of this occurrence, as it has been seeking to employ counsel -- and you'll hear about that shortly -- and expend estate resources on behalf of Nutro, a nondebtor affiliate, in an attempt to have the Acis confirmation order overturned, with, again, the result being Acis would, again, be a debtor affiliate. Therefore, the debtor cannot argue that such possibility does not materially impact the venue decision or is remote, in particular where they're trying to convince the committee and this Court to use estate resources to achieve that very outcome. The debtor's effectively arguing for a ruling on appeal, but the debtor is an affiliate of Acis, in which case the current Chapter 11 proceeding should be in Dallas, Texas.

Fourth, Your Honor --

THE COURT: Well --

MR. CLEMENTE: Yes, Your Honor.

THE COURT: -- let me interrupt you for a moment, because that hasn't happened. As we sit here today --

MR. CLEMENTE: That's correct, Your Honor.

THE COURT: -- they're not affiliates. There seems to be an assumption that, were this case to be transferred to the Northern District of Texas, it would be assigned to -- sorry, I'm losing my notes --

MR. CLEMENTE: Judge Jernigan, Your Honor.

THE COURT: Jernigan, yes. Thank you. Sorry. I know Judge Jernigan fairly well.

But if they're not affiliates, isn't the case subject to random assignment under the normal procedures in the Northern District of Texas? And if it's not assigned to Judge Jernigan, don't your arguments about judicial knowledge and experience in connection with this case fall away because nobody other than Judge Jernigan has that special knowledge in Texas? And all -- what other colleagues would be able to do there is simply walk down the hall and talk to her. And of course, I can pick up the phone and talk to her any time, as well.

So I'm just teasing out this assumption that definitely feels to be behind everybody's arguments, that she's going to get this case. Is there anything in the record that would support that? Is there some sort of rule I'm not aware of in Texas or that I'm -- am I assuming something that's not consistent with practice down there, which is that this case would be randomly assigned?

MR. CLEMENTE: Your Honor, I believe you are correct in the sense that the case would be randomly assigned, but I believe Your Honor could look at -- as I understand, there are three judges located in the Dallas court district; one is obviously Judge Houser. I could be getting the name wrong. But she's overseeing the Puerto Rican proceeding --

THE COURT: Um-hum.
MR. CLEMENTE: -- so her docket is clearly beyond --
THE COURT: She's also --
MR. CLEMENTE: -- full.
THE COURT: -- about to retire, so I don't even know if she's taking new cases.
MR. CLEMENTE: Correct. So that leaves two judges, Your Honor. And we understand -- perhaps Acis' counsel would be able to expand on that, given their familiarity with the Dallas bankruptcy court, but that judge is not being assigned new cases, given a circumstance with that particular judge.
But to answer your direct question, Your Honor, I believe you are correct; it would be a random assignment. But we do believe that there is a high probability it would wind up with Judge Jernigan.
THE COURT: But it might be a pool of one; right?
MR. CLEMENTE: That is correct, Your Honor. And even if it wasn't, I think, clearly, for all the reasons we'll discuss, we would have a very strong case to make that it should be transferred to Judge Jernigan, even if it initially got somebody else on the --
THE COURT: Well, you know, I mean, if a judge were a lawyer, a judge couldn't have both these cases. A judge (sic) couldn't have a case with two warring former affiliates, because it would create a conflict of interest. Now, those

rules don't apply to judges. We're assumed to be above all that. But -- since we don't have clients. But it does -- it might inform someone's decision about do I really feel comfortable having Acis and Highland, given the situation -- I mean, they wouldn't be jointly administered, certainly, of course. They're --

MR. CLEMENTE: That's correct, Your Honor.

THE COURT: Again, they're not affiliates, at least as we stand here today; although the debtors are trying to change that, purportedly. It might create a situation where a judge might take that into consideration in deciding whether to have the case or not. And I --

Now, we deal all the time with jointly administered affiliated cases, right, because there's always intercompany debt --

MR. CLEMENTE: That's correct.

THE COURT: -- and we all just assume it away (ph.).

MR. CLEMENTE: That's correct, Your Honor.

THE COURT: But this is a little different in that they're not affiliates.

MR. CLEMENTE: I do think, Your --

THE COURT: Again, she would -- the judge wouldn't be required -- Judge Jernigan wouldn't be required -- it's not a recusal issue. It's not a disqualification issue. It's just a -- sort of something to think about in making the decision.

MR. CLEMENTE: I don't disagree, Your Honor. I do think Your Honor hit on it, though. Bankruptcy judges are unique in that perspective that they're put in situations all the time where a decision may impact one particular entity to the detriment of another entity that's also before Your Honor in connection with a particular bankruptcy proceeding.

THE COURT: Yeah.

MR. CLEMENTE: With that, Your Honor, I'll continue to move forward.

THE COURT: Yeah, please.

MR. CLEMENTE: Fourth, and this gets back to the point we were just discussing with Your Honor, we do not believe there's any credible dispute that the Dallas court has already upped the learning curve relative to this Court. Again, not that Your Honor wouldn't be able to come up to speed and that Your Honor has tremendous capacity to do that, but the record is clear, from our perspective, that the Dallas bankruptcy court has already had to wrestle with issues involving the debtor. There has been extensive proceeding (sic) in the Dallas bankruptcy court, not just the bankruptcy court but also the district court, with respect to the Acis case.

There are several written opinions, again, that Your Honor can take judicial notice of and which are also in the record, that provide, after an extensive and developed factual record, that Acis only operated through Debtor Highland -- the

debtor, Highland. It is clear that the Dallas court had to develop an understanding of how the debtor's complex business worked. It is the same business as the debtor engages in here, albeit a subset.

That's consistent with Mr. Sharp's testimony. Mr. Sharp didn't say that they no longer are in the CLO business. He characterized it in a certain fashion, but the debtor clearly still manages and advises CLOs. That is a part of the debtor's business. That is what was at issue in the Acis proceeding. And also, as Mr. Waterhouse testified to quite clearly in the rebuttal, and as Mr. Sharp testified to in the cross, it's the same principal actors: Mr. Dondero and others on his management team.

Your Honor, this case, although the idea is to get a fresh start, we believe will necessary require a backward-looking review of the facts. And the Dallas court has upped the learning curve from that perspective. The committee recognizes that the Dallas court would take time and determine issues as presented to it. And depending on the issue, the past experience of the court will have varying degrees of relevance. But that experience is nonetheless important to the committee to ensure maximum efficiency, with an entity that has demonstrated itself to be highly litigious, Your Honor. One needs only to review the top-twenty list of creditors, made up largely of law firms and other professionals, to make the

determination that the debtor is highly litigious, as well as the record in this proceeding.

So Your Honor, those four facts, we believe, are unique, and we believe that they strike in favor of transferring venue to Dallas. I do want to walk through some of the arguments we made in our papers, as well, but I wanted to highlight what we believe are truly distinguishing features of this particular situation.

Your Honor, as we more fully lay out in our papers, we do believe the convenience of the parties supports transfer of venue. The debtor's nerve center is in Dallas; Mr. Waterhouse was clear on that. Mr. Dondero is the portfolio manager for all of the Highland funds, and he is the one-hundred-percent owner of Strand. Strand's the general partner of this debtor. All decisions run through Mr. Dondero. And it's clear that Mr. Dondero and all of the other key personnel are located in Dallas.

Your Honor, a large number of creditors are located in Dallas; you need not look past the list of twenty largest unsecured creditors to determine that. There are almost a majority of those creditors that are located in Texas. While the committee agrees that the overall organization with several thousand affiliates is complex -- and you'll hear about that as we go on this afternoon -- there's 2,000 affiliated entities with Highland -- the debtor is only Highland. And so the idea

that there may be offices in far-flung jurisdictions, those are not debtor offices.

Your Honor, the interests of justice also support the transfer of venue. The Dallas bankruptcy court has clearly invested time and resources that are applicable to this debtor. In this context, the learning curve that is referred to in the cases clearly favors transfer of venue to Dallas. Although this case has been pending for a while, Your Honor, there's only been a first-day hearing with very limited relief granted, and one brief status conference.

There are also economic efficiencies in Dallas. Dallas is convenient for all debtor employees. Yes, people can get on planes, but it's hard to argue that being a mile-and-a-half away from the courthouse isn't more convenient.

THE COURT: I don't know. Parking's tough.

MR. CLEMENTE: And perhaps an overnight trip is helpful for the family life, Your Honor. It depends.

Dallas is convenient for the professionals. It's easy to fly in and out of Dallas, as we point out in our papers, Your Honor. There's no real, I believe, disagreement that Dallas would not be convenient.

Additionally, Your Honor, and we think that this is a unique factor as well, if the long history of Highland's litigious nature is any indicator here, there will be discovery disputes. And under Rule 45, contested nonparty discovery

would likely occur in the Northern District in Texas, in Dallas. Given the massive number of nondebtor affiliates -- again, we only have 1 box here; there's, like, 2,000 others. It is highly likely that nonparty discovery will become an issue.

The fact that -- I heard Mr. Sharp testify in his proffer that he believes he and Mr. Caruso will provide all of the testimony. That's great and good and well for him to think that. I think the committee's going to take a different view of that, Your Honor.

Our own limited history in this case shows the relevance of Dallas. Two of the three depositions occurred in Dallas. I believe we informed Your Honor of that on the status call that we had. And the third didn't, only because we believe Mr. Sharp was not able to travel to Dallas.

The justice that the debtor seeks in the Acis case, Your Honor, yields a result that this places -- excuse me, Your Honor. The justice that we talked about in the appeal with respect to the Acis confirmation order yields a result that places this debtor in the Dallas bankruptcy court, which is also in the interest of justice.

So, Your Honor, we believe there are several unique factors. We believe that the traditional factors, as we lay out in our papers, support the transfer of venue. And I wanted to just briefly touch on some of the objections that the debtor

raised to our venue motion. First, the debtor thinks too little of the Dallas court, in asserting that we're trying to gain some type -- the committee is trying to gain some type of litigation advantage. We have no doubt, as Your Honor has tremendous respect for the Dallas court, that the Dallas court will take each issue as it comes to it, without prejudice or predetermination. History and experience doesn't mean prejudice or predetermination; it just means familiarity, Your Honor. That's all it means.

Our point is simply that the Dallas court clearly had to spend time wrestling with the debtor, how it operated, and its opaque structure. And let me spend a second on how. As we point out in our reply and, again, as the record is clear based on the published opinions, Acis had no employees; it was a box. And it subcontracted its management services to the debtor. The Dallas court examined that contract, that subadvisory agreement that Mr. Sharp and, I believe, Mr. Waterhouse referred to, and had to become familiar with it. That's clear from the published opinions. And the debtor has numerous other similar contracts.

The Dallas court also made determinations -- and these, again, are in published opinions -- whether certain of the debtor's contracts with Acis were personal-services contracts. Again, they may differ, Your Honor, in terms of the specifics, but these are clear examples of where the Dallas

bankruptcy court had to wrestle with contracts of Highland, the way Highland operated, and the way that it was managed.

Additionally, Your Honor, on the point of litigation advantage, as I thought about this, I think the debtor's, sort of, arguments regarding a litigation advantage, frankly, worked the other way. If I may, here, for a second, Your Honor. Mr. Dondero is the sole controlling party, as the testimonies made clear. He's based in Dallas. As we demonstrated in our papers, Dallas is clearly the most efficient and convenient forum for the creditors. And the creditors have sent this message loud and clear through this motion to transfer and the lack of any party affirmatively supporting the debtor and venue in Delaware.

Mr. Dondero, in our view, as he has shown in the past, consistently makes decisions that are in his best interest, potentially fleeing from a jurisdiction and not his creditors. And we believe that fleeing from the Dallas court, that is, steps away from his office -- and that is convenient for his creditors and, frankly, seems to be the most logical choice of venue -- again, understanding -- we don't dispute that the debtor is a Delaware limited partnership. We're not disputing that. But we're talking about what's logical. That's the point that I would like to make here, Your Honor.

Again, back to --

THE COURT: Well, I mean --

MR. CLEMENTE: Yes, Your Honor.

THE COURT: -- I mean, a cynic -- and after almost fourteen years, maybe I'm becoming one; I don't know. But a cynic would say -- and not necessarily badly (ph.), that both sides want -- are interested in forum-shopping; the debtor fleeing, obviously, adverse rulings in Texas, and the creditors fleeing Delaware to go back to the home of adverse rulings against the debtor in Texas. And it's six one, half dozen the other. However, at least the cases -- or some of the cases say that the debtor is entitled to some deference in its forum-shopping, as opposed to the creditor, in their opposition, in their forum-shopping. I'm not sure I buy that. And as a matter of fact, I've ruled previously that there is no deference --

MR. CLEMENTE: Correct.

THE COURT: -- that should be afforded to the debtor, in the EFH case. But --

MR. CLEMENTE: That's correct, Your Honor.

THE COURT: -- I just throw that out there.

MR. CLEMENTE: And I believe Your Honor also made a point, in the EFH ruling, regarding the support of the various parties for the venue. And so I believe that is actually a very strong factor that weighs in favor of transfer to --

THE COURT: Well, and -- yeah, I mean --

MR. CLEMENTE: -- Dallas.

THE COURT: -- and that case had -- the government of Texas or the committee, or both, supported venue. That case probably, thankfully, would have been sent to Texas, freed up five years of my life, and twenty appeals and --

MR. CLEMENTE: You're stronger for it, though --

THE COURT: -- everything else.

MR. CLEMENTE: -- Your Honor.

THE COURT: Yeah -- I don't know about that. I'm heavier, that's for sure.

MR. CLEMENTE: I wish I could blame that for my weight, Your Honor, but I can't.

Your Honor, back -- very briefly, because we did touch on it already. We do believe that the Dallas court experience is highly relevant, contrary to what the debtor remarks in their objection. The debtor again tries to cast the Acis bankruptcy as being narrow and only involving CLOs. Again, the testimony, I believe, showed, in -- shows, in point of fact, the debtor does manage a significant number of CLOs. Even if they are in liquidation, there are still decisions that are being made. And therefore, exposure to how the debtor operated with respect to CLOs is highly relevant.

Your Honor, I already mentioned, so I won't repeat myself, that Acis was a box and it had no employees, and therefore, obviously, the court had to look through to what was going on at Highland in terms of how the debtor was managed.

Your Honor, the CRO, unfortunately, I believe, for the debtor, does not cleanse the venue choice. The CRO was not around. The CRO didn't decide venue. And as clear from the testimony, the CRO reports to Mr. Dondero. Nothing has changed. There has been no management changes. I believe that was also consistent with the testimony. And everybody still reports to Mr. Dondero, and he's located in Dallas, and Dallas is the nerve center.

Additionally, as I mentioned, the cases will be very much about the past, unfortunately, Your Honor, a time when the CRO was not involved, and about transactions and conduct engaged in by the debtor and Mr. Dondero in the run-up to this bankruptcy.

In short, I believe the CRO issue is a red herring, Your Honor; it doesn't erase the history the Dallas bankruptcy court has with the debtor through the Acis proceeding, and it doesn't erase the history of the decision-making process that the debtor engaged in, in the past and currently engages in today.

With that, Your Honor -- we already had a colloquy about how we do not believe the Dallas bankruptcy court is conflicted, so I won't spend any further time on that. But I would like to sum up. Your Honor, let me be very clear. We have the utmost respect for you and for this Court, so I want to make sure that Your Honor is very clear on that. However,

the committee respectfully believes that this case presents the unique combination of facts which dictate that the transfer of venue to the Dallas bankruptcy court is appropriate.

THE COURT: You don't need to worry. My ego assumes you have respect for me.

(Laughter)

MR. CLEMENTE: Thank you for that, Your Honor. Unless Your Honor has any questions, I'll sit.

THE COURT: I do not. There may be others in support who want to be heard.

Mr. Pomerantz (sic).

MR. LUCIAN: Your Honor, for the record, John Lucian of Blank Rome, local counsel for Acis.

Just during the break, we had a binder made for Your Honor so that the exhibits that Ms. Patel had handed up that were admitted -- I know Mr. Morris has no objection to us handing that up, Your Honor. It's the -- 1 through 26, with the ones that were not admitted. This will save you from --

THE COURT: Is that these?

MR. LUCIAN: Yeah. That's the -- you got them in the binder now.

THE COURT: Okay. Is this in there --

MR. LUCIAN: Yeah.

THE COURT: -- the email?

MR. LUCIAN: Yes; 26, yes. If you want to switch to

that. Perfect.

MS. PATEL: Thank you, Your Honor. For the record, Rakhee Patel on behalf of Acis Capital Management, L.P., who joined in the committee's motion. And I will make reference to those -- certain of those documents. I'm generally loathe to hand up big binders or big stacks of documents without telling the Court of what's been handed up. So, very briefly, Your Honor, I will say, Exhibits 1 and 2 (sic) in the binder are the involun -- the issue -- I'm sorry, the opinion issued by the Dallas bankruptcy court, in connection with the involuntary trial, and Exhibit number 2 is the opinion that was issued in connection with confirmation of Acis' plan. I would also point the Court to Exhibit Number 17, which is the actual confirmation order in Acis Capital Management. And I'll make reference to one other exhibit as I go through my presen -- or a number of other exhibits, but -- one additional ruling by the court, as I go through my presentation.

THE COURT: What was the date of -- oh, okay. Never mind. So the confirmation was late January?

MS. PATEL: Yes, Your Honor. January 31st, 2019. And the plan went effective on February 15th of 2019.

THE COURT: Okay.

MS. PATEL: And the Highland bankruptcy, I believe, was just a little bit over eight months later.

And, Your Honor, I'll try not to duplicate necessarily

what the committee did, and I will promise to keep this as brief as I can. I'm happy to answer any questions, because standing here before you is the counsel -- at least the bankruptcy counsel that lived and breathed the Acis case from the date that they were filed on January 30th of 2018, through today.

Now, Your Honor -- and along with my co-counsel, Mr. Shaw, who has been living and breathing, frankly, the issues longer than I have, even.

Your Honor, I will repeat something that was in our moving papers. And I know Your Honor and Your Honor's team has probably read all the moving papers. but I think this bears repeating, and that is that this case is unique. It is, in my mind, exceptionally unique. These facts are so unique, Your Honor, that I would venture to say I don't think that this is necessarily a case that would even possibly or remotely or even tangentially open any floodgates, because these facts are so different from the typical motion to transfer venue.

Your Honor, touching quickly on the burden-of-proof issue that Your Honor referenced in your colloquy with Mr. Clemente. Your Honor, Acis concedes, obviously, the burden of proof is clear that it's the preponderance of the evidence. And I won't go through ad nauseum all of the factors. I know the Court is exceptionally familiar with all the factors on both the convenience-of-the-parties and interest-of-justice

side. But I would just note that, at least in the Court's prior rulings, you've said that the factors are not really a scorecard, that we're not counting three factors versus three factors, or four versus two.

And I would just --

THE COURT: Well, that follows with my fundamental tenet, which is that any legal test with more than three factors is useless. It's just a -- it's just a question of discussion.

MS. PATEL: I think -- and I think this Court has wide discretion with whether to transfer this case or not.

Your Honor, one final quick point that I'll call the -- kind of the four corners or setting the table, for purposes of go-forward, is back to the reference to the -- that there's no real deference, necessarily, to the debtor's choice of venue. That's sort of subsumed in the burden of proof. The movant bears a burden of proof and, if they meet the preponderance of the evidence, then the burden shifts. And that's really kind of where the debtor's choice of forum weighs in.

Now, Your Honor, one other quick point is that there's been a lot of discussion in the objections and the responses and the replies, indicating that this whole issue is about Acis as a creditor. And what I'm here to say, Your Honor, is that this, actually, the issue, the motion to transfer venue, is not

really about Acis as a creditor. And I'm here representing Acis as a creditor. This has been painted as there's one creditor that's driving this, and that's Acis. That's just simply not the case, Your Honor.

The reality is that you've got hundreds of millions of dollars or claims represented by the committee, as a fiduciary to those claims, that have made this motion. This is not Acis' motion. Yes, we did join with respect to it. And really, it has -- that has more to do with the fact that we're the Texas folks, we're the Texas creditor. And we -- again, I and Mr. Shaw lived and breathed the Texas cases. And I'm here to stand before the Court and answer any questions you may have with respect to what happened, what transpired, but, more importantly, what could happen on a go-forward basis.

Your Honor, it's important -- and I -- again, harking back to this concept of this is unique. As Your Honor noted in EFH, had the committee signed on, had the Texas comptroller signed on, perhaps that outcome would have been a little bit different. But here, Your Honor, we've got the committee moving for transfer of venue. And I think that's really significant. And I'll go through in a little bit sort of the debt stack that we're dealing with here, and you'll see that, hands down, the committee is the fulcrum debt here. It is the fulcrum debt, Your Honor.

Your Honor, one final quick note on forum-shopping.

And there's been conversation with respect to the committee's forum-shopping, the debtor's relationship. Look, I've read Your Honor's prior opinions and I really do think the issue boils down to -- I think it's probably neutral with respect to both sides. As Your Honor pointed out, the debtor has the ability to choose the state of its incorporation as its venue for filing of bankruptcy. And also, the committee has the ability to move, to transfer, pursuant to 1412, to a place that is the interest of justice and the convenience of the parties. I really view that as being the -- there should be no negatives cast on, frankly, either side, with respect to forum-shopping, because it's kind of invited by the structure of the statute.

So if the case isn't about Acis as a creditor, what is this case about? Well, I -- or what is this motion about? Here I really do think that -- at its heart, that this particular motion to transfer, and probably motions to transfer in general, boil down to the bankruptcy case itself. So here that would be -- this is all about Highland's bankruptcy and where it should be administered, what makes sense.

And, Your Honor, I want to go through a couple of different subtopics on this. First I want to talk about the business lines that the debtor engages in. What does it do? And this is all from the -- what I'm going to refer the Court to is all included in the first-day declaration of Mr. Waterhouse, which is Debtor's Exhibit O.

And, Your Honor, in Mr. Waterhouse's declaration, he goes through the three kind of general lines of the debtor's business. First is proprietary trading. And that involves sort of trading with the debtor's money or leveraged money in certain brokerage accounts. And I really think that proprietary trading is probably that line of business -- when we're thinking about which court is best suited to oversee that line of business and what's going to happen with respect to it, I think that's really neutral. I think both Delaware and Dallas could adequately handle that issue.

The issue really becomes a lot more focused, though, when we look at the other two lines of business. The next line of business is investment management services. And this is -- and a big piece of that is the debtor's operation of its CLOs or collateralized loan obligations.

If the 2018 financials -- again, I believe they're contained in debtor's exhibits -- if you take a look at those you'll see that as a part of investment management fee revenue, a lot of the revenue that was generated is related to the debtor's operation of eighteen CLOs along with some managed separate accounts, et cetera.

Your Honor, the CLO piece and the separate accounts are issues that the Dallas court was faced with through Acis' bankruptcy and Highland's management of it. And I'll borrow from Mr. Clemente his phrase: Acis was effectively a box. It

had no employees of its own. It only had two officers, Mr. Dondero and Mr. Waterhouse, who was the treasurer of Acis, until their resignation shortly after the appointment of -- shortly after the involuntary filings and the appointment of a trustee.

Now, Your Honor, the other -- the last piece that's also involved is shared services. So we've got investment management, and there's subpieces of it. And I won't represent to the Court that is Judge Jernigan familiar with every aspect of Highland's investment management services? No, likely not. But neither is this Court. This Court is still, very much so, on the learning curve with respect to that.

And I would submit, Your Honor, that Judge Jernigan is frankly just further along that learning curve with respect to the investment management services.

On shared services, Your Honor, as Mr. Clemente referenced, the opinions are very clear -- again, Exhibits 1 and 2 -- with respect to there is -- it's clear that Judge Jernigan had to evaluate shared services. And I'll kind of summarize what the structure of what Judge Jernigan had to evaluate was. Again, Acis is a box. It was provided its services by Highland, pursuant to two key agreements: a subadvisory agreement and a shared-services agreement. And that shared-services agreement is relatively generic. And all that is is the subadvisory -- I like to think of it as that's

the thinking brain stuff. That's the investment advisory. Does this comply with SEC guidelines? Should these trades be made? What does the marketplace look like?

Shared services, on the other hand, Your Honor, are all that middle- and back-office typical type stuff. There's no real rocket science with respect to it. It's just providing infrastructure: accounting, legal, bookkeeping functions, all those things that any sort of generic business would provide.

And again, that is something that Judge Jernigan is just more familiar with. She is familiar with Highland's business modus operandi.

And, Your Honor, if you look sort of across the Highland structure, you will see that Acis really was just a little microcosm. It's a little template, because it gets repeated throughout the Highland empire.

And one of the exhibits -- and forgive me; I didn't bring up the other exhibit list, but multiple parties have designated it, and it's the entities list. And there's 2,000 entities, approximately. I didn't count them all up. But that's a number that's been thrown around: 2,000 entities under this. And they are all each little microcosms. Certainly, Judge Jernigan is further along with respect to the Acis microcosm, but also with respect to the template as well.

Your Honor, with respect to then, therefore, economy or -- judicial economy or efficiency, again, Judge Jernigan,

further along the learning curve.

Your Honor, now turning then to the debt stack, as I had referenced earlier -- again, this is all set forth in the declaration of Mr. Waterhouse -- you've got two secured lenders, Jefferies and Frontier. And no one's heard with respect to -- from them with respect to their position. Your Honor, these are two creditors that are vastly oversecured, and so really they -- I'll put them as sort of neutral with respect to what's going to happen in this bankruptcy case.

Then the next item in the debt stack that Mr. Waterhouse identifies is Highland CLO Management. Well, Your Honor, it's a note that was transferred -- Highland is the obligor on the note. It's about nine-and-a-half million dollars. And it was a note that was previously held by Acis and that was transferred to an entity by the name of Highland CLO Management, by Mr. Dondero.

Highland CLO Management, in turn -- Mr. Waterhouse references that there's sort of -- Highland doesn't have a beneficial interest with respect to it. But if you look at the retention applications that are set for hearing a little bit later today, you'll see that actually the debtors (sic) are claiming there is an interest in this, that the debtor has an interest in making sure that Highland CLO Management has a defense when it comes to the issue of was that transfer from Acis to Highland CLO Management a fraudulent transfer.

And again, these are issues that Judge Jernigan has had to grapple with all throughout the bankruptcy case. There have been no -- there has been no adjudication that it was a fraudulent transfer; but certainly she's had to evaluate it in connection with four injunctions that were issued in connection with the Acis case.

First there was a -- excuse me -- a sua sponte injunction. Second there came an ex parte injunction. Third there was a preliminary injunction. And then fourth there was a plan injunction. And that plan injunction, Your Honor, is embodied in Exhibit Number 17. And again, all of these transfers and transactions -- part of the debt stack of Highland has been evaluated by Judge Jernigan.

Last in the debt stack, but certainly not least, Your Honor, we have the general unsecureds. And Mr. Waterhouse, in his deposition that was held in Dallas, estimated that perhaps the general unsecureds could be upwards of two billion dollars, all told.

Now, just looking at the twenty largest, we're still in the hundreds of millions, and we don't have the benefit of schedules yet. But this is -- this is the big dog. This is the big layer of debt. This is who is really the fulcrum here.

And keep in mind, Your Honor, this is a free-fall bankruptcy. No one knows where this is going to go. At the first-day hearings, debtor's Counsel referenced that there

could be sales of assets and divestiture of certain things, operational restructuring. There's really no idea where this case is headed. And I think that's significant, Your Honor, because this is an operational restructure or perhaps a liquidation.

I hope not. I hope that this is an operational restructure and that all creditors can be paid either in full or close to in full, but that's significant. And the reason why it's significant here is because, Your Honor, you've got the fiduciary for that fulcrum debt voting with their feet with what could happen -- what should happen on a plan.

And they're saying we think this case should be administered in Texas. And I think, again, going back to what makes this case so unique, I think that's what makes it so unique is that there are -- just from a dollar perspective and volume perspective, the significant creditors and the committee with respect to who's a fiduciary telling you, Judge, we think this case should be administered in Texas. And those votes are going to be important with respect to any exit that happens here.

Your Honor, I'll hit sort of on another factor, the sort of forum's interest or a local interest in the controversy. And I concede, clearly -- and I think Your Honor has referenced in the past -- Delaware, when it -- when an entity is organized under Delaware law, that the forum state

has an interest in protecting its entities. However, I will say, I think what's different here is --

THE COURT: Say that again?

MS. PATEL: I'm sorry, Your Honor. I probably misstated that. That the state of incorporation has an interest in entities that are --

THE COURT: Yeah, but --

MS. PATEL: -- formed under its state's law.

THE COURT: -- you're in the wrong court for that. That's state court. This is --

MS. PATEL: I'm sorry?

THE COURT: -- the --

MS. PATEL: Oh, yeah.

THE COURT: You're in the wrong court for that. I don't care about that. This is --

MS. PATEL: All right.

THE COURT: -- this is federal court.

MS. PATEL: Fair enough. I'll take that one, then.

THE COURT: This is federal court. That's for the chancery and the governor.

MS. PATEL: Well, Your Honor, and going back just to the issue of the unique factors here, usually, Your Honor, in a motion to transfer venue, you have what I'll call relatively similarly situated courts, certainly if you've got a transfer-of-venue motion that was filed as early as the one that was

filed in this case, within the first few weeks of the case, and within, I believe, two days of the committee's formation.

That's just not the scenario here, Your Honor. You have a bankruptcy court in Texas who is familiar with various aspects of the debtor's business. Is it familiar with every aspect of the debtor's business? No. But that certainly can't be said as to the Delaware Court either, that you are familiar with every aspect of the debtor's business.

Your Honor, in Texas there's not only a bankruptcy court, there's a district court who is familiar with all of the -- with aspects of the debtor's business, and that is the Honorable Judge Fitzwater.

And what I will say -- Your Honor was asking questions with respect to the judge -- the bankruptcy judge that it would be assigned to. I'm happy to address those from my perspective. But what I will note is that every appeal that stemmed out of the Acis bankruptcy case -- and there were in excess of ten -- every single one was transferred ultimately to Judge Fitzwater for adjudication.

So even if -- even if we look just one layer up from the bankruptcy court to the district court, Judge Fitzwater is intimately familiar. And now we've got three -- in connection with the Acis cases -- three appeals that are pending before the Fifth Circuit, two of which involve Highland or a Highland-related entity.

Your Honor, I want to quickly touch on the --

THE COURT: Is it the practice in the -- it's the practice in our district court that once a district judge is assigned an appeal in connection with a bankruptcy, any further appeals in that bankruptcy go to that district judge. Is that the practice in Texas?

MS. PATEL: It's the practice, Your Honor. I don't believe that there's a specific local rule that says that that will happen, but that's functionally what happens. And sometimes you have to make a motion to transfer between two courts, but invariably, it usually goes to sort of either the first-filed court or kind of the first court to really get into a substantive issue.

THE COURT: Okay.

MS. PATEL: Your Honor, I'll touch on a couple more quick points. It is offensive to me when I read through the debtor's pleadings and that there is an implication that the Dallas court is somehow biased. I think of Judge Jernigan and I think of this Court and I think of virtually every bankruptcy court that I've ever had the privilege of appearing before as being fair and impartial. And this concept of bias, that's only grounded in the fact that the debtors have -- or I'm sorry -- the debtor has lost a few.

And I will say, just to kind of forestall that easy conclusion based on the opinions, I would note, in Acis'

exhibits, if you look at Exhibit Number 12, that is -- it's an email that the court sent in connection with Acis' first confirmation hearing. And that was a confirmation hearing that occurred in August of 2018. And the court ultimately denied confirmation of the first sort of plan. And there were kind of three sub-plans. But the court denied it.

And so again, I'm offended that there would be even an implication that the court is somehow biased, because this isn't a scenario where there have been only adverse rulings to Highland in connection with the Acis bankruptcy case. Judge Jernigan has called the balls and strikes as she sees them, Your Honor.

Your Honor, I'll conclude with the following, which is that I would venture to guess that if this Court were in sort of -- if we reversed the scenario and this Court had expended hundreds of hours, hundreds of pages of opinions, untold hours of its courtroom staff's time, going through and poring through an exceptionally voluminous record, over 100,000 pages, and having expended over forty days of courtroom time, with that significant of an interest in the case and that expenditure of time, I would venture to guess that this Court would want this case transferred back to Delaware, if it had been filed anywhere else.

And so I would submit to Your Honor that this Court should -- this case should be transferred to Dallas for all of

the reasons proffered by the committee and as joined by Acis. Thank you, Your Honor.

THE COURT: You're welcome.

Anyone else in favor of the motion?

All right. This time it will be short. We're going to take a very short recess, and then I'll hear from the debtor.

(Recess at 11:50 a.m. until 12:00 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated. I apologize. I know it's getting warmer and warmer in here. And we're trying to contact -- we're trying to find someone in Maintenance who's working today.

MR. POMERANTZ: It's usually motivation to get the hearings done quickly, in my experience.

THE COURT: Yeah, it's -- if I take off my robe, don't be offended. I do have clothes on underneath.

MR. BOWDEN: Thank you.

THE COURT: I heard you, Mr. Bowden.

All right, go ahead.

MR. POMERANTZ: Good afternoon, again, Your Honor. Jeff Pomerantz, Pachulski Stang Ziehl & Jones, on behalf of the debtors-in-possession (sic). Before I go on to my prepared remarks, I just want to address a couple of the points that were raised by Mr. Clemente and Acis' Counsel.

First, we are not aware of any formal statement that Judge Hale, in the Northern District of Texas, is not taking cases. So I think Your Honor's point was a good one. There's no definite -- there's no requirement, and it may or may not be that this case gets transferred, if Your Honor were to transfer it.

Second, Your Honor, Highland has -- there have been appeals made not only from confirmation of the plan but also from the involuntary itself. If the involuntary appeal succeeded, there wouldn't even be a bankruptcy case to be related to. And in any event, the case law says that events that may or may not happen in the future are not really relevant to the venue analysis.

Lastly, Your Honor, Mr. Clemente started by saying he thinks the facts are largely in dispute, and you heard Counsel then go through in detail, as did Acis' Counsel, about how there's no dispute that Judge Jernigan has a learning curve.

Of course they need to say that because that is the focus and the crux of their venue-transfer argument. As I will demonstrate in my comments and as the evidence is before the Court, other than the opinions that were written and other than the amount of time the court has spent, there is no real nexus between what happened in that case and what happened in this case.

We have no doubt that Judge Jernigan learned all about

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

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

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

However -- Your Honor pointed to this at the beginning, in mentioning comments about forum-shopping -- 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.

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

appoint a trustee after this hearing. The motion has not yet been filed, Your Honor, because they want Judge Jernigan to rule on that motion. And it's not because she's familiar with this debtor's business, this debtor's assets, or this debtor's liabilities, because she generally is not. 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.

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

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

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

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

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

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

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

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

think it highlights the weakness of their argument.

It is clear that the Delaware venue is proper, and 1408 says the places where a Chapter 11 debtor can file the case. As the vast majority of debtors who file cases in this district, the debtor filed here because it was domiciled in Delaware. It is a Delaware LP. But it goes further than that. 99.94 percent of its LP interests are owned by Delaware entities. And the general partner, Strand Advisors, is a Delaware general partner.

While many cases, Your Honor, before this court, rely on the domicile of one affiliate to bring other non-Delaware related affiliates before the court, that's not the case here. All you have, virtually, are Delaware entities, through the ownership structure.

As I will also discuss in a few moments, Your Honor, domicile is not the only connection that this debtor has to this district, as significant litigation matters involving the debtor, including those commenced by committee members, that was the catalyst to the filing, are pending in Delaware. Accordingly, the committee acknowledges, as they must, that Delaware is, of course, a proper venue.

However, they rely on 1412 which sets forth the standard -- test that the movant has to meet in order to transfer venue, either for the convenience of the parties or the interest of the justice.

And courts, including the written opinions in this district by your colleagues, most often cite to the six factors in the CORCO decision in the Fifth Circuit in 1979. And as Judge Gross, in his 2016 opinion in Restaurants Acquisition makes clear, the movant bears the burden of demonstrating that the factors strongly weigh in favor of a transfer.

Similarly, Judge Gross stated in that case -- and I know Your Honor may not fully subscribe -- that courts generally grant substantial deference to the debtor's choice of forum.

And in the case here, where not only do you have the debtor is a Delaware entity, but virtually all of its holdings are well -- are Delaware entities as well, it is even more appropriate to defer to the debtor's choice of forum. As Judge Walsh said in his 1998 opinion at PWS Holding, it is a fundamental legal tenet that every citizen of a state is entitled to take advantage of the state and federal judicial process in that state.

So the question before Your Honor is whether the facts in this case strongly weigh in favor of a venue transfer such that the Court will disregard the debtor's reasoned business judgment to commence the case in this district?

We submit, Your Honor, that the committee and Acis have not come close to meeting that standard, and the CORCO factors do not support a transfer.

The first one is the proximity of creditors. And the committee is focused on the fact that the committee -- the representative fiduciary of the estate -- has determined that venue is appropriate. But the factor not only looks at the number of creditors, it looks at the dollar amount of the creditors. And if you analyze -- an analysis of either demonstrates that convenience of the parties does not support a transfer of venue in this case.

The debtor has two secured creditors. Jefferies is headquartered in New York City. Frontier Bank is headquartered in Oklahoma. There was reference by Acis' Counsel to HCLOF. Their secured claim is unrelated to the note that was at issue in Acis, and there's nothing in the record to say that that secured instrument has anything to do with the Acis case. Neither of those creditors has weighed in on the motion to transfer venue.

So let's look at the unsecured creditors. Of the twenty that were listed in the debtor's petition, seven have Texas addresses. Five of those are debtor's either current or former law firms. Two of them are in the courtroom today. And as Your Honor I'm sure appreciates, debtor professionals -- former debtor professionals are not usually active in bankruptcy cases. Indeed, none of them filed a notice of appearance in this case.

The other two that have Texas addresses are the claims

related to Acis: the Acis claim and the Josh Terry claim. There are no other unsophisticated creditors that the Court needs to worry about that would not be able to travel to Delaware, as needed.

The two largest unsecured creditors in the top twenty are the Redeemer Committee and Patrick Daugherty, each of whom had pre-petition litigation pending against the debtor that they each commenced in the Delaware Chancery Court. And the arbitration proceeding that preceded the Redeemer chancery court litigation was pending in New York City.

UBS, a member of the committee, listed as number nineteen with a disputed and unliquidated claim, will likely claim it is the largest creditor of the estate. It is based in New York. It has litigation pending against the debtor in New York, and used Latham & Watkins' DC office for that litigation.

And lastly, the fifth largest creditor, Your Honor, Meta-e Discovery, is also on the committee. Where is their address? Stamford, Connecticut.

As Judge Gross reasoned in Restaurants Acquisition, in order to overcome the strong presumption in favor of the venue transfer, a transfer must substantially improve the administrative feasibility with respect to the creditor body as a whole. So the committee sits out there and Acis sits out there saying that it's convenient for the creditors, it's much more convenient in Dallas. Their actions belie their

statements. All this litigation was focused on either Delaware or the Northeast. It is just simply disingenuous for them to argue otherwise.

The next factor, Your Honor, is the proximity of the debtor. And in applying this factor, the courts focus primarily on the parties who appear in court. The debtor retained Brad Sharp, and he has demonstrated its intention -- and the debtor has demonstrated its intention of having Mr. Sharp be the face of the reorganization efforts before the Court.

Indeed, in cases where a CRO is reported, Your Honor, the CRO is more apt to testify in court than any other debtor representative. And I believe Mr. Sharp's testimony, which was uncontroverted, was that he expects that he and Mr. Caruso will provide the bulk of the testimony required from debtor representatives during this bankruptcy case; and that's because the debtor has given Mr. Sharp broad authority to evaluate the propriety of post-petition transactions and to pursue and analyze insider claims.

And at today's hearing the debtor will offer the testimony of Mr. Sharp and his colleague, Mr. Caruso, to support the relief requested. They have developed a substantial amount of knowledge regarding the debtor's assets, liabilities, and operations, in the six weeks they've been on the job; and that knowledge will continue to grow.

And Mr. Sharp has significant experience, as he testified to, being a CRO in cases in this district; and he could travel just as easily to Delaware as he can to Texas.

While the debtor acknowledges that other debtor employees like Frank Waterhouse may be called to testify, as he was today, the involvement of the debtor's personnel in this court is likely to be immaterial. And he was the only Texas person called to testify in this case. And if the committee and Acis felt it was so important that representatives of the debtor be -- it would be easier for them to travel to court, they didn't call any witnesses in today, which is the most important hearing in the case.

Also, Your Honor, our offices, as you know, are in Delaware. And while it's true that we practice all around the country, we would need separate counsel if we were to -- if the case was to be -- to move.

And similarly, the committee retained Young Conaway, which took a significantly active role in the litigation leading up to today. That information and knowledge and expertise would be lost if the case was transferred.

Next, Your Honor, related, is the proximity of witnesses. And a I said, the committee can't demonstrate that witnesses in this case would find Texas a substantially more convenient forum than this court. And you would have expected them to have subpoenaed Texas witnesses if that were so

important.

Location of assets, Your Honor, is one of the CORCO factors. And the committee makes a big point that all the decision-making is in Texas and all the people are in Texas and the office is in Texas. The courts that look at location of assets as being critical typically involve cases that are single-asset real-estate cases, or cases that are small local businesses that have significant regional connections.

But if you look at the debtor's assets here, it's not the case. Their assets generally include financial instruments and investments in a wide variety of public stock; advisory contracts; shared services; and interests in nonpublic hedge funds and private equity funds.

The assets are located throughout the United States and in Latin America, Korea, and Singapore. And the majority of the debtor's liquid assets are in New York. We were not -- we don't dispute the point that there aren't significant people in Dallas and that the offices are in Dallas and all the employees. We don't dispute that. But the assets are far-flung around the country, and the cases, again, that focus on the assets, focus on local expertise that the court will bring to bear, particularly in real-estate cases with respect to valuation. You have nothing of that here.

The debtor intends to use its Chapter 11 to provide breathing room and to evaluate, hopefully in a constructive way

with the committee, how best to maximize value for the debtor's assets through a consensual restructuring; and there's no reason to believe why Texas rather than this court, would be a more appropriate forum for this restructuring.

The last factor, Your Honor, is the economic administration of the estate, which the courts generally point to as the most important factor. And the committee points to five reasons, which is essentially retreads of its previous arguments.

Again, they argue a higher concentration of creditors in Texas and Midwest. That's not the case, as I mentioned. They argue that there's a higher concentration of professionals in Texas and Midwest. And if you look at all the professionals, they're all from national firms; they're all metropolitan areas that practice routinely before this Court. And the concept that the flights being different and the mileage being different is in any way -- is in any way important, is just not -- is just not the case.

People practice in a global, national world, these days. And if that argument succeeded, most of the -- your brethren and yourself would not have much to do, because that argument could support transfers in most cases.

THE COURT: Well, I think really goes to why -- I mean, I know this is the standards that are generally applied, but it's a case from 1979. It's really behind the times. I

don't think the factors reflect corporate practice of bankruptcy reality of 2019.

MR. POMERANTZ: And that's exactly what Judge Gross said in the Caesar's opinion --

THE COURT: Right.

MR. POMERANTZ: -- which is cited in the material, that this argument, given technology, given frequency of air -- ease of air travel, it's just not a relevant factor anymore.

And the two pages that the movants spent in the brief talking to you about how many direct flights there are from LA to Delaware as opposed to LA to Dallas, that, Your Honor, I think is just silly.

The committee also argues that most creditors would need to retain local counsel if they were here. Well, if you look, the case has been pending a month-and-a-half, and other than notices of appearance filed by committee members, there have only been two notices of appearance that have been filed that are unrelated to debtor entities. And one of those is Daugherty, who commenced litigation in chancery court. So the argument that is made typically in cases where they're filed in jurisdictions far off from where the debtor's operating is, is that it'll be burdensome on the mom-and-pop creditor, Your Honor, we don't have mom-and-pop creditors here. And there's nobody out there with material claims against the estate that will not have the ability and have trouble and demonstrated the

willingness to hire Delaware Counsel.

The last argument --

THE COURT: Even when you do have mom and -- again, to comment on reality, even when you do have mom-and-pop creditors in businesses that are very locally focused, general practice today is to make their claims irrelevant, in that to the extent they have avoidance claims, they're paid on the first day. Their real concern is whether the business will continue or not.

Now, it's certainly true that pension claims are important, and proofs of claim are important. But we have many -- all courts have many procedures in place to ensure that those types of creditors can participate without having to go to the courthouse.

MR. POMERANTZ: Yes. So, Your Honor, Judge Gross also mentioned that in the Restaurants Acquisition case, which was a Texas-based --

THE COURT: He's a smart guy.

MR. POMERANTZ: We'll be sorry to see him go, Your Honor.

THE COURT: Yeah, absolutely.

MR. POMERANTZ: Which was a Texas-based restaurant chain that had more of a local flair. But he made the comments Your Honor made.

The last argument the committee makes is that Texas is

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

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

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

THE COURT: 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.

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

familiarity with the type of business -- if I wasn't speaking to Your Honor or your brethren or many other judges around the country, I'd say well, maybe there are certain judges who haven't dealt with large financial services company, may not know what a CLO, may not know what a hedge fund is or private equity fund is. I'm very confident that Your Honor has had many cases with sophisticated financial instruments, likely CLO obligations, so that Your Honor not only has a good base of knowledge that would give you the same base of knowledge that Judge Jernigan has, but as we've also found, you are a fairly quick study and that I have no doubt that you could come up-to-speed without very little effort.

So their argument is a grossly overstated interpretation of what the Acis case was about and that what was learned in that case has any relevance. As a part -- as a result of the Acis plan confirmation, Acis is no longer part of the debtor's organizational structure. The debtor owns no equity in Acis. And the debtor no longer provides any advisory services to Acis.

We admit that Judge Jernigan conducted many hearings, and she issued several lengthy opinions, and she heard from a variety of witnesses. And I'm sure Your Honor -- if Your Honor has not -- Your Honor might read the opinions that she wrote that are attached to the exhibits, the plan confirmation opinion, the arbitration opinion, the involuntary opinion; and

you will conclude, I believe, as I have concluded, that ninety-five percent of that stuff has nothing to do with this debtor.

It focused on the CLO obligations -- CLO business, the relationship, the transfers of certain assets away from Acis that basically Acis is claiming were fraudulent conveyances, and that was the real focus; not on any of the debtor's business operations.

Acis was the advisory arm through which the debtor structured its collateral loan portfolio. The fees -- the uncontroverted evidence is the fees generated from the CLO business represent approximately ten percent of the debtor's revenue and that that will reduce over time, because since the market crash in 2009 the debtor has not created any new CLO funds. So there's no active management and advisory services going on for the CLOs. They're just being liquidated in the normal course. Their importance will continue to decrease. And even right now, it's only ten percent.

The debtor generates its revenues from trading public securities; its equity positions in a variety of nonpublic, private-equity, and hedge funds; and advisory and back-office service provided to third parties. It is the monetization of those assets that will provide the basis for the restructuring of this debtor. And Judge Jernigan's prior experience with the small sliver of what the debtor's business currently is, will be only marginally relevant, at all.

Acis didn't have any other balance-sheet assets. They were basically an advisor of CLOs.

For example, Judge Jernigan has no experience or knowledge surrounding the debtor's multi-strat. fund; its Korean, Latin American, or Singapore private-equity investments; its investments in the PetroCap funds; or the other myriad of assets that are on the debtor's balance sheet which Your Honor will likely will hear about in connection with the hearings that will go on later.

The committee and Acis make a big point of arguing that Judge Jernigan is familiar with the shared-service and management agreements between Acis and the debtor. However, there was a lot of testimony from the podium on that. The only testimony before Your Honor is that the contracts are different. Mr. Waterhouse wasn't even familiar with the contracts, couldn't provide any testimony. But Mr. Sharp testified that the type of shared-service and advisory agreements for CLOs are markedly different than the type of services and advisory agreements for non-CLO entities. While Acis' Counsel stood up there and said there's a template and they're pretty much the same, that was purely argument. There was no evidence in the record to reflect that.

And in fact, the only two agreements that involved Highland in the Acis case were these two agreements. But again, they're like apples and oranges.

In any event, Your Honor, one of the matters that Mr. Sharp is focusing on will be the appropriate economic arrangement between the debtor and its affiliates and nonaffiliates, through its shared-services and advisory agreements. That has been a focus of DSI's analysis. The committee has indicated that's something that they want to focus on. And Mr. Sharp will come up with a recommendation as to what those should be, and it'll be that recommendation that'll be based on the market rate for these contracts in these particular businesses that will be relevant for Your Honor to consider, at some point.

They attached a post-confirmation opinion that Judge Jernigan issued with respect to denial of a motion to seek arbitration regarding provisions of those agreements. But if you read that opinion carefully, you will see that the primary issues in that case were whether an arbitration provision actually survived, given that the last version of the agreement did not have them -- there were five different iterations in each of the agreements. And after concluding that the arbitration provision did survive, she ultimately ruled that that notwithstanding, she would not enforce arbitration because the claims were too related to the other claims that were being asserted. Again, nothing to do with the debtor's business.

In fact, Your Honor, after today, I have no doubt that Your Honor will be a lot more familiar -- if Your Honor is not

already -- with what the debtor does. So Your Honor will hear testimony from Mr. Caruso; Your Honor will hear testimony from Mr. Sharp, about various aspects of the debtor's business, what it's doing, its management structure, how that structure is working. All that you will hear, which will put you in an advanced state, compared to Judge Jernigan, as opposed to being behind.

And there are other aspects of this case that are on the way that have nothing to do with Acis. For example, we just filed a motion to approve ordinary-course bonuses to employees. And we may also seek approval of a KERP and a KEIP. Acis had their own employees, and Judge Jernigan had no special knowledge of the debtor that would put her in a better position to give her an advantage over this Court in determining an appropriate compensation structure.

It isn't that difficult. Your Honor hears it all the time: KEIPs, KERPs. Judge Jernigan hears it all the time. My point is, Your Honor, there's nothing that would help her, from her knowledge of Acis, that would justify a transfer of venue.

They also stress that -- in their papers, that Judge Jernigan heard a lot of testimony from debtor's management. But they really don't discuss what the content of that testimony is or how it's, in any event, relevant to this case. They just really want to rely on the sheer volume of information that they have foisted on Your Honor, citing to the

entire record, by saying there's so much; there's been hundreds of pages, dozens of hearings, and then that means Judge Jernigan is in a much better position.

If they wanted to point to specific things in the record where the judge had specific knowledge, they could have. They shouldn't (sic) have. And they're trying to do this on a big holistic view, but when Your Honor looks at the record, I think Your Honor will conclude otherwise.

In any event, it's not really -- they don't explain why familiarity with the debtor's management is at all relevant. Look, they clearly want a trustee in this case and believe that because Judge Jernigan found debtor's management to not be credible, she'll be more apt to appoint a trustee than this Court. But that argument doesn't withstand scrutiny.

This case is different. This case is being managed by a CRO. This case had the debtor file a motion it didn't have to file for ordinary-course protocols. This case has -- thus far, you haven't heard anything about any discovery disputes, you haven't heard anything -- although you heard a couple weeks ago there might be issues with cooperation, we provided a substantial amount of documents, produced witnesses, in a significantly accelerated time frame. You have heard nothing about that.

So any un-cooperation or difficulty of any -- that they may have encountered in the Acis case, there's no evidence

that that's occurring here, for good reason; because Mr. Sharp is in charge. And although he is still reporting to Mr. Dondero, as his corporate structure, Mr. Dondero can terminate him, and if he terminates him, he has to give notice. That's appropriate. That's one of the issues we address in connection with the U.S. Trustee's concerns with the CRO motion. In order to file a corporate governance, he has to report. But there are certain things, as you'll hear later, that he has been given primary responsibility for.

Your Honor, Chapter 11 is about giving a debtor a fresh start, and this court is no -- this case is no exception. This Court is fully capable of evaluating the veracity of the debtor's witnesses; and transferring the case to Judge Jernigan, when the real motivation is because of how she has dealt with the prior case -- which they may not say it, but that's clearly what's happening here -- would be unduly prejudicial to the debtor.

We have nothing against Judge Jernigan. She is a fine jurist. But in this case I think it's a challenge and there's a reason why we decided to have the case filed here.

And then I'll also point to Your Honor the significant adversity between the two estates. Your Honor mentioned that. Counsel said, well, it happens in all cases. True. We've been involved in many, many cases with multi debtors, that they have issues in intercompany claims. That's a fact of modern

corporate life.

But this is different. The whole -- one of the -- the most significant asset of Acis are their claims against this debtor. How those claims are prosecuted and when they succeed, may make or break the Acis case as to whether unsecured creditors get paid or not.

In a case like this, this factor does not support a transfer of venue; we argue that it supports keeping the case before Your Honor so that it can maintain the separateness of the estates.

In conclusion, Your Honor, we don't believe the committee has come close to satisfying its burden that a change of venue is appropriate under 1412. And as I mentioned at the beginning of my presentation, the committee's motive in bringing the motion and Acis' motive in joining the motion is clear. Even though the debtor has installed a CRO with expanded powers, with impeccable credentials to address creditor concerns, the committee and Acis are focused on the appointment of a Chapter 11 trustee and believe the transfer of the case to Texas is the most likely to get that goal accomplished.

But rather than filing the case -- or filing a trustee motion here, they took their shot on a venue motion and hope that Your Honor will give them a shot to do it in Texas.

Your Honor, for those reasons, we respectfully request

that Your Honor deny the motion.

THE COURT: Thank you.

MR. POMERANTZ: Does Your Honor have any more questions?

THE COURT: No.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: Reply?

MR. CLEMENTE: Briefly, Your Honor. I will be brief. It will be a little less organized, because I'll just run through some points very quickly.

THE COURT: Okay.

MR. CLEMENTE: First of all, on Restaurant Acquisitions, I believe in that opinion, Your Honor, there were creditors that supported venue in Delaware. We do not have a single creditor on the record supporting Delaware -- excuse me -- supporting venue in Delaware.

Regarding the litigation in New York and Delaware, that's a red herring, Your Honor. They're forced creditors. They were forced to bring lawsuits to achieve their view of justice. It's not relevant to whether -- the location of that -- those lawsuits being in Delaware and New York. They were forced to bring those lawsuits in order to get paid by Mr. Dondero and the debtor.

Your Honor, we didn't call witnesses this morning, because we believe -- as I mentioned in my argument -- that the

uncontroverted facts support our venue-transfer motion. The other motions are their burden, Your Honor. And so I wanted to remind Your Honor of that.

Regarding Young Conaway, obviously, we shouldn't -- it shouldn't be held against us that we decided that the smart and prudent thing to do is to have able Co-Counsel advise us as we proceed in front of Your Honor. So I believe that that's something that simply is of no moment.

The location of the assets, Your Honor, these are financial instruments. They're interests in limited partnerships. They're documents. They're things that are created by documents. And again, it's not controverted. That's all located in Dallas, Your Honor.

So this idea of far-flung assets throughout the country just simply isn't true. These are documents. They're interests. They're things that exist on paper.

Your Honor, we have not made this about the mom-and-pop creditors. We take Your Honor's comments to heart on that. As Counsel for Acis suggested, this is about the large body of unsecured creditors that are sitting at the bottom of this cap structure with oversecured creditors on top of it. And this large body of unsecured creditors has said we believe that venue is appropriate in Dallas.

Regarding the rules of evidence, of course Judge Jernigan is not going to ignore the rules of evidence. But

we're talking about judicial efficiency.

For example, when I need to look at an indenture, I know in article 2 it's going to have payment terms. That's the type of thing that we're talking about, Your Honor; not that she's going to pre-judge or ignore the rules of evidence as she makes her determinations.

Finally, Your Honor, two things that I would -- that I would like to say. The testimony you may hear this afternoon, obviously that should not factor into what you're up the learning curve today, right now, in terms of considering the venue motion. That would put the cart before the horse, I think.

And, Your Honor, I'd be remiss if I didn't talk about this ordinary-course motion that we keep hearing about. If they didn't need it, they shouldn't have filed it. But instead, what they're trying to do is create some type of transparency and legitimacy around transactions that I think we'll make clear, are not in the ordinary course.

And the final point that I would make there, Your Honor; it's interesting Mr. Pomerantz referred to the multi-strategy transaction. That one is -- Your Honor, I will call -- a doozy. And you will hear more about it this afternoon, to the extent Your Honor decides not (sic) to keep venue.

With that, unless you have questions for me, I'll sit

down.

THE COURT: No questions.

MR. CLEMENTE: Thank you.

THE COURT: Thank you.

MS. PATEL: Your Honor, I'll be brief, and I won't repeat anything that Mr. Clemente, on behalf of the committee, said. But I did want to just address kind of the first point Mr. Pomerantz made with respect to Judge Hale, and he's not aware of any formal statement that Judge Hale is not taking cases. Your Honor, that's accurate. I'm not aware of any formal statement that Judge Hale is not taking cases either.

So to answer Your Honor's question, in terms of random assignment, in the Northern District of Texas, where I have practiced my entire career, and primarily practice before the courts that are there -- and I'm a former law clerk to Judge Hale also -- I will say that although there may be a random assignment, it is not -- absolutely not unheard of that when you've got the matter -- for example, if a case were assigned to Judge Hale, but Judge Houser were to hear first-day matters and other significant matters, that Judge Hale would then transfer that case for judicial efficiency and economy within the district, to Judge Houser for further proceedings.

In other words, the Northern District of Texas always finds the easiest way in which to handle matters. And I am confident, Your Honor, that if this matter were transferred to

the Northern District of Texas, that despite whoever it would be assigned to, that everyone is well aware of the time that Judge Jernigan has spent becoming familiar with Highland, these issues, and the amount of court resources that have been expended, such that this case would be transferred to Judge Jernigan.

But perhaps that's just a question for Judge Jernigan and her courtroom staff or the Northern District of Texas and the courtroom -- I'm sorry -- the court clerk or the staff that's there.

Your Honor, one last very quick point. The comment was made that -- with respect to CLOs that Highland hasn't had a new CLO since 2009. That, Your Honor, is because every new CLO that was issued from 2009 going forward to 2017, every one of those was issued in Acis. Acis was the structured-credit arm of Highland. It is how it issued new CLOs.

Indeed, it issued seven CLOs under Acis, with over two billion dollars in assets under management. The fact that there have been no new CLOs since then, simply means that they haven't been able to get one off the ground.

But make no mistake, Your Honor, the CLO business is valuable enough that it is now the subject of significant litigation because of all of the attempts to transfer those CLO assets away. So in terms of the court's familiarity, I would submit, again, that the bankruptcy court is clearly more

familiar with a significant piece of Highland's business.

One last thing, Your Honor, and somewhat similar to that, that Judge Jernigan was not familiar with the Korean entities, the Singapore entities, or the multi-strat. I submit to Your Honor that this Court hasn't been exposed to those things as well, other than conclusory statements that well, we've got some Korean assets; oh, we've got some Singapore assets; and we've got multi-strat; and other than Mr. Waterhouse's, like, five-minute testimony at the first-day hearing where I was questioning him with respect to the assets which he didn't really quite know about what's inside a multi-strat.

Other than that, this Court hasn't been exposed either to those assets, so when we're looking at the broad playing field rather than looking at specific assets, there is a learning curve. Judge Jernigan is further along it with respect to certain things. Otherwise both courts are similarly situated or neutral to each other. But it's those assets that she is familiar with, the business model of Highland, and that further along the learning curve that she is, that's what's significant here, Your Honor.

And that will play into, clearly, what will ultimately be how Highland is going to restructure. Again, the creditors here have voted with their feet in filing this transfer motion. And these are the very same creditors, Your Honor, that will be

necessary in order for this -- if it's going to be a successful restructure, they're the ones that are necessary to make it a successful restructure. Thank you.

THE COURT: You're welcome.

All right, let's break for lunch until 1:45. And when I come back at 1:45 -- when we come back at 1:45, I am going to issue an oral decision on this motion. All right.

(Recess at 12:39 p.m. until 1:47 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

Okay, good afternoon. Thank you for coming back. I'm now prepared to rule on the motion to transfer venue, which I'm going to grant.

So I think, as I hinted at during argument, that the case law that we're kind of clinging to on motions to transfer venue, really do not reflect the modern reality of Chapter 11 practice in the U.S. and internationally. And I think a lot of the parts of the test really don't reflect what's going on generally in Chapter 11 cases.

The thing I take greatest umbrage -- no, "umbrage" isn't the right word -- but disagree with the most is the idea that there's somehow a strong presumption of the debtor's choice of forum.

Look, every debtor that files bankruptcy -- certainly every sophisticated Chapter 11 debtor that files bankruptcy --

is engaged in forum-shopping. There is an element to that. Where you file will depend on a lot of things that are unique to the forum.

I don't think you need to be ashamed of that. I don't think that's bad. As long as the venue you're choosing is appropriate under the law, certainly you're going to make decisions based on what the law is in that particular district, perhaps even a preference to individual judges or judge in that district.

To compound that with a strong presumption in favor of the debtor is to really give a boost to the debtor's choice of forum, which is made -- included in the decision-making process is an element of forum-shopping, to a level that makes it very difficult to overcome that presumption.

Of course, the creditors that file a motion to transfer venue are engaged in forum-shopping themselves. Otherwise, why would they be switching forums and going for a different location. Again, I don't think that the word "forum-shopping" should have the negative connotation that it has come to have in the law. It is the reality of bankruptcy practice.

Now, if that's involved -- if that goes a step further and somehow involves chicanery or something inappropriate just from an ethical standpoint, of course that's problematic. But there's absolutely no indication here whatsoever that anyone, on behalf of the debtor or the creditors or the Dallas court or

the Delaware court, is doing anything other than acting appropriately.

The question about a motion to transfer venue is whether the motion should be granted by a preponderance of the evidence. If you add a strong presumption, you're turning it into a harder motion to be granted; and I don't think that's appropriate.

However, I find the laundry list of factors that are generally discussed to be irrelevant or almost irrelevant to the actual issues that are going on, particularly in a case like this. And I'll get to that in a second.

So six of the debtors are located in Texas; UBS is located in New York. UBS is located everywhere. Wells Fargo is located everywhere. Certainly companies have executive suites. But whether or not that should be the decision about where a case should file, to me, isn't particularly clear. It depends on the facts of the case.

I think a more general approach that would involve looking at the facts and circumstances of a case and seeing whether it points to a specific jurisdiction might be a more helpful way of proceeding. And that's what this case is really about.

This is a unique case, I think. It is a different case than those that we usually run into. And although maybe not completely different from every case, but in any event,

this case is very focused on responding to existing litigation. And that existing litigation of a former affiliate, as of a few months ago, and a pending appeal that could make it a current affiliate, is located in the Northern District of Texas.

The judge in the Northern District of Texas has done a tremendous amount of work and has done -- issued a number of opinions, had a number of trials. That work creates a familiarity with the facts, issues, and players in a case which, while it may not affect the actual decision based on evidence on a motion-by-motion basis, certainly could color a judge's approach to a case.

Judges are human. Judges make judgments over time as to the parties, as to the lawyers. That's not inappropriate, as long as you stick by the rules of evidence. But it certainly can color what credibility you might give to a witness or to counsel.

I think here we have a situation where the real gravitas of this case is in Dallas. The two facts that really come out to me are, in this case, the fact that the executive suite is very focused and very Dallas-oriented. It's a global empire, but it's clearly focused in Dallas. And the existing litigation in the Acis bankruptcy that's been going on for some time; those are the two predominant factors.

Everything else kind of falls away. The creditors are scattered. The assets are scattered. The economic

administration isn't being affected one way or the other. I mean, people can get on planes and you can go to Philly or you can go to Dallas. Either way, you're stuck on American Airlines. But so be it.

It can be done. And as a result, I think that the best solution here, to give the debtors a fair shot at reorganization, but to balance the creditors' rights and the creditors' desires, is to move the case to Texas.

And on that latter point, just to finish up. As I said with my previous decision in EFH, it was striking in that case that only one creditor moved to transfer venue and that none of the other creditors either actively opposed or simply stayed silent with regard to that motion, including significant creditors, like the official committee.

In this case, we have the opposite. We have the debtor defending its venue choice, of course. But there's a lot of silence, because there's no one else on that side. I thought it highly significant that Jefferies and -- is it Fortress?

UNIDENTIFIED SPEAKER: Frontier.

THE COURT: Frontier, thank you. That Jefferies and Frontier did not take a position. And no other creditors opposed the committee's motion. And the committee consists of a series of very large creditors.

So I think that given these facts and circumstances,

particularly the unique nature of the ongoing litigation and the existing tie to Dallas, the executive suite and management, principal place of business, if you will, being focused in Dallas, and creditors -- as Counsel said -- voting with their feet to move the case to Dallas, and applying just a good old fashioned preponderance of the evidence standard, that the Court should grant the motion, which I will do.

Now, I need an order. And we will get the machinery in place, as soon as I get the order signed, to transfer the file as quickly as possible.

I did call Judge Jernigan prior -- right before I came out -- well, right before I went and got lunch and then came out -- to inform her what I was going to do, so the Dallas court is aware that this is -- that this is an issue that's coming their way.

Is there anything -- I'm not going to create a lot of law of the case for Judge Jernigan on matters that don't need to be decided today. Is there anything the parties actually agree on that needs to go forward today or can go forward today? If not, I'd rather just save everything for Judge Jernigan to have a fresh look at. I know that she did mention that she has availability on her calendar over the next several weeks. So you should be able to get on it rather quickly, once the case gets transferred.

We used to send big boxes in the mail to do this, but

now it's just hitting a couple buttons on a computer to take care of that.

So is there anything we could -- we need to decide?

Okay. Just a question. Obviously there are estate professionals -- Pachulski not really a problem, since you'll stay in the case, but I'm thinking of Young Conaway -- and I don't know if there are any other firms that are Delaware firms that might fall out of the case that would be subject to the Court. But I'll leave that for Judge Jernigan to decide whether to retain them for a limited period of time or to pay them or not pay them. Hopefully, of course, they've earned their money; they should be paid.

Yes, sir.

MR. KHARASCH: Your Honor, Ira Kharasch of Pachulski. I think Your Honor, there is one vital matter that you should hear today and rule on. I would think it would be generally an easy motion. It is the application to employ the CRO. That is within the debtor's business judgment, given -- as we described the reasons for that, considering the concerns raised by creditors.

I think it's critical that the CRO be formally engaged. They've done a tremendous amount of work in the past six weeks. They've been at the company full time, for a team, for a month. They have done a lot of good stuff in this case. They have a lot more things to do.

The CRO has been tasked under the modified -- under the protocols, with broadened authority to take all kinds of and accept all kinds of decision-making over key decisions of this case, involving insider transactions, ordinary-course transactions. We've done a lot of work modifying the protocols that relate to that.

This company is operating every day. I think the CRO and his team deserve some comfort that they should get employed as of today, Your Honor. I -- you know --

THE COURT: Let me hear from the committee.

MR. CLEMENTE: Thank you, Your Honor. Matthew Clemente on behalf of the committee.

Your Honor, we don't agree with that. Again, it's not about DSI being paid or not being paid. As Your Honor mentioned with Young Conaway, that isn't the issue. But to the extent Your Honor has any familiarity with the motions, they're all intertwined. The CRO is all part of the protocols that they're advancing in the ordinary-course motion.

So this isn't about simply retaining a professional to ensure that that professional gets paid. It really is about setting what I like to call concrete pillars in the ground in terms of how the debtor views the case should be managed going forward. And I think based on Your Honor's ruling, that's something that Judge Jernigan should be given the opportunity to weigh in on.

So again, it's not about Mr. Sharp and his firm getting paid. I don't believe that that is the issue. They can continue doing what they've been doing, up to this point, just like we have, for example, at Sidley, and the rest of the professionals that haven't been retained. And I don't see why that should cause a problem.

But we do believe that that is integrated with the other suite of motions that would be before Your Honor; and we think it's appropriate for Judge Jernigan to make those decisions.

THE COURT: All right. Well, I don't view a retention application to be an emergent basis to hear a motion anyway. But I'm certainly not going to agree to sign it over objection of the committee, given how I just ruled. So --

MR. CLEMENTE: Thank you, Your Honor.

THE COURT: -- I'd also say. So I'd ask the committee Counsel to circulate a form of order and submit it under certification of counsel. I think the simpler the better; just for the reasons set forth on the record, and it's transferred. Don't put a lot of findings in there. That'll just cause trouble. That's my belief. But you can negotiate what you want to negotiate, and as soon as that's ready, upload it, inform chambers, we'll get it signed, and we'll start the machinery in place.

MR. CLEMENTE: Great. Thank you very much, Your

Honor. We appreciate it.

THE COURT: All right. We're adjourned.

(Whereupon these proceedings were concluded at 2:02 PM)

I N D E X

E X H I B I T S

RULINGS

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

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EXHIBIT 2

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	January 9, 2020
	)	9:30 a.m. Docket
Debtor.	)	
	)	DEBTOR'S MOTION TO COMPROMISE CONTROVERSY WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS [281]

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

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

DALLAS, TEXAS - JANUARY 9, 2020 - 9:56 A.M.

THE COURT: All right. Let's roll to Highland now. Let's get appearances from lawyers in the courtroom, please.

MR. POMERANTZ: Good morning, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones. Happy New Year, Your Honor.

THE COURT: Happy New Year.

MR. POMERANTZ: Here on behalf of the Debtor.

THE COURT: Okay. Thank you.

MS. HAYWARD: Good morning, Your Honor. Melissa Hayward and Zachery Annable on behalf of the Debtor.

THE COURT: Good morning.

MS. LAMBERT: Lisa Lambert, and I think Ms. Kippes will be joining me, representing William Neary, the United States Trustee.

THE COURT: Thank you.

MS. CHIARELLO: Good morning, Your Honor. Annmarie Chiarello and Rakhee Patel here on behalf of Acis Capital Management, LP and Acis Capital Management GP, LLC.

THE COURT: Thank you.

MR. CLEMENTE: Good morning, Your Honor. Matthew Clemente from Sidley Austin on behalf of the Official Committee of Unsecured Creditors. With me today are my partners Dennis Twomey and Penny Reid.

THE COURT: Okay. Good morning. All right. Is that

all of the courtroom appearances?

All right. We have several people on the phone. I think most of them are just listening in. If you're on the phone, though, and you wish to appear, you may do so at this time.

MR. BENTLEY: Good morning, Your Honor. This is James Bentley of Schulte Roth & Zabel. Also on the line is my co-counsel, Joseph Bain of Jones Walker. We represent the Issuers.

THE COURT: Okay. Good morning.

MS. MASCHERIN: Good morning, Your Honor. This is --

MR. MAXCY: Good morning. Patrick --

MS. MASCHERIN: Good morning, Your Honor. This is Terri Mascherin of Jenner & Block. Also on the line with me is my partner, Mark Hankin. We represent the Redeemer Committee of the Highland Crusader Fund, which is one of the members of the Unsecured Creditors' Committee.

THE COURT: Okay. Good morning.

MR. MAXCY: Good morning, Your Honor. This is Patrick Maxcy from Dentons US, LLP on behalf of Jefferies, LLC.

THE COURT: Okay. Thank you. All right. Well, I guess that is it for the phone appearances.

Mr. Pomerantz, we're -- we have just one matter on the calendar, the motion to compromise with the Committee. I saw two limited objections, and then a U.S. Trustee's broader

objection. I'll start with, Do you have any of these objections worked out?

MR. POMERANTZ: Yes, we do.

THE COURT: Okay.

MR. POMERANTZ: We believe we have the Jefferies objection worked out, as well as the objection of the Issuers. And I'll, during the course of my presentation, alert Your Honor to how that's worked out.

THE COURT: Okay.

MR. POMERANTZ: And then we'll have a revised order that basically addresses each of their concerns, or at least Jefferies' concerns, but the statements on the record for the Issuers' concerns.

THE COURT: Okay. Very good.

MR. POMERANTZ: Good morning again, Your Honor. Jeff Pomerantz; Pachulski, Stang, Ziehl & Jones. I'm joined in the courtroom by Ira Kharasch, Greg Demo, and John Morris from my office. I would also like to introduce the Court to the proposed new members of the board of directors of Strand Advisors, which is the Debtor's general partner. They're all sitting in the first row behind counsel's well. And that's Mr. James Seery, --

THE COURT: Good morning.

MR. POMERANTZ: -- Mr. John Dubel, --

THE COURT: Good morning.

MR. POMERANTZ: -- and the Honorable Russell Nelms.

THE COURT: Yes. I've met him before.

MR. POMERANTZ: As have we. We thought you would remember him.

The resumes of Mr. Seery and Mr. Dubel were attached to the motion filed on December 27th, and those two resumes and the resume of the Honorable Judge Nelms were attached to the reply that was filed last evening. And while Mr. Seery and Mr. Dubel may be new names to Your Honor, we know that you are familiar with Judge Nelms, who sat with you in this district.

THE COURT: Uh-huh.

MR. POMERANTZ: Also in the courtroom, Your Honor, is Brad Sharp, the Debtor's chief restructuring officer from DSI, --

THE COURT: Good morning.

MR. POMERANTZ: -- and his colleague, Fred Caruso, who spends most of his working hours at the Debtor's Dallas headquarters.

THE COURT: Good morning.

MR. POMERANTZ: We have the declaration of Mr. Sharp that we would move into evidence at this point in time.

THE COURT: All right. I've got a stack of paper. If you have an extra copy for me to use, --

MS. HAYWARD: Your Honor, may I approach with the --

THE COURT: You may.

MS. HAYWARD: Your Honor, it was filed, the declaration was filed. I'm not sure that we have a copy of --

MR. POMERANTZ: Your Honor, we will also at the appropriate time during my presentation, I'll bring up to Your -- ask to bring up to Your Honor revisions to the term sheet that was attached to the motion.

THE COURT: Okay.

MR. POMERANTZ: Copies have been given to Ms. Lambert as well as the Committee.

THE COURT: Okay. Very good. All right. Well, what was handed to me was the preliminary term sheet as well as the CVs for the proposed new board members. I don't see the declaration --

MR. POMERANTZ: Your Honor, if I may approach, I have a copy.

THE COURT: You may. All right. Very good.

MR. POMERANTZ: So we would move that declaration into evidence.

THE COURT: All right. The Court will admit this. It was filed on the docket at 327, but I will additionally admit it as Exhibit 1 today.

(Debtor's Exhibit 1 is received into evidence.)

THE COURT: At some point in time, I want to give parties the opportunity to cross-examine Mr. Sharp. Do you want to do that now, or shall we hear an opening statement?

MR. POMERANTZ: However Your Honor prefers. I mean, maybe it's helpful to hear argument first, and then, before the Trustee --

THE COURT: I think I'd like to hear opening statements and then we'll --

MR. POMERANTZ: Thank you.

THE COURT: -- make the opportunity available. Okay.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Your Honor, by way of background, we appeared before Your Honor on December 6th and December 19th. And during each of those hearings, we described for the Court negotiations that were underway between the Committee and the Debtor which, if successful, would have -- would eliminate the need for contested and uncertain and costly litigation regarding the appointment of a Chapter 11 trustee and really put this case in a position where the Debtor and the Committee would be able to work together constructively towards negotiation of a plan.

As a result of our hearing on December 19th, Your Honor entered a scheduling order that set deadlines for either the filing of a motion to approve a settlement, or alternatively, the filing of one or more motions for the appointment of a trustee.

As set forth and required by the scheduling order, we filed our motion on December 27th, and in that motion we

sought approval of a term sheet and ancillary documents between the Debtor and the Committee, which I'll describe shortly.

While a couple of items had not yet been agreed to at the time the motion was filed, I'm pleased to report that over the last couple of days we've been able to reach closure with the Committee with respect to those items, and there would also be some modifications to the term sheet, which I'll go through in a few moments.

The motion, Your Honor, seeks approval of the term sheet, which accomplishes a variety of things that, again, will allow the Debtor and the Committee to put the acrimony that has existed in this case for the first three months behind us and allow us to focus on productive matters. In the last 24 hours, as I mentioned, there have been a few changes to the term sheet that I will describe. And I would like to hand up Your Honor a redline and a clean copy of the revised term sheet and exhibits. May I approach?

THE COURT: All right. You may. Do you have an extra for the law clerk? Okay. Thank you.

(Pause.)

MR. POMERANTZ: Your Honor, the term sheet does a number of things. Would you like me to give Your Honor some time to look through the redlines?

THE COURT: No. You may proceed.

MR. POMERANTZ: Okay. The term sheet does a number of things. The first thing the term sheet does is appointment of an independent board at Strand Advisors. Strand Advisors is the GP of the Debtor. The Debtor is an LP. The Debtor previously had filed a motion to approve the retention of Brad Sharp as the chief restructuring officer, and that initial agreement and motion contain details regarding the scope of Mr. Sharp's authority and the scope of what the Debtor could do without Mr. Sharp's prior consent.

The Committee raised concerns that the structure was not sufficient to ensure that decisions were being made for the Debtor only in their best interests and without any inappropriate influence from Mr. Dondero.

To address the Committee's concerns, a focal point of the settlement was the Debtor's agreement to appoint an independent board of directors at Strand who would be responsible for managing the operations of the Debtor.

Over the last few weeks, a principal aspect of the negotiations between the Committee and the Debtor have been discussing who should the independent directors be. Conceptually, the Debtor and the Committee both agreed that the board should include, first, a person with significant industry experience in which the Debtor operates -- hedge funds, money management; second, a person with deep restructuring experience from the financial advisor side; and

third, a person with some sort of judicial or governmental experience.

The Debtor originally provided the Committee with three proposed candidates. The Committee considered the Debtor's request, but instead presented the Debtor with four different candidates and asked the Debtor to choose from those four. The Debtors interviewed each of those people and ultimately agreed on Messrs. Dubel and Seery, who were each on the original list.

As of the deadline to file the motion on December 27th, the Committee and the Debtor had still not agreed on the identity of the third board member, but the parties were hopeful that an agreement could ultimately be reached and we decided to go ahead and file the motion. As I'm sure Your Honor saw in the motion, it was contingent upon everyone agreeing on the third board member.

Ultimately, the Debtor and the Committee both agreed that Mr. Dubel and Mr. Seery could identify the third board member out of a pool of four people: Two of the people originally requested by the Committee and two people identified by the Debtor. This week and over the weekend, Mr. Seery and Mr. Dubel interviewed each of the four candidates, and ultimately decided on the appointment of Judge Nelms as the third independent board member.

The board, as it will be constituted going forward, in the

Debtor's opinion, consists of three exceptional individuals who are independent of the Debtor, have a sterling reputation in the community, and bring to the Debtor a variety of the skills that we believe, and believe the Committee agrees, gives the Debtor the best opportunity to achieve a consensual restructuring and otherwise manage the affairs of the Debtor in the best interests of the stakeholders.

It is contemplated that the Debtor will continue to retain the services of DSI as the chief restructuring officer, and ultimately the board will determine if it's important to retain a CEO going forward.

The second thing that the term sheet does, Your Honor, was the removal of Mr. Dondero as an officer and director of Strand and eliminate all of his control over decision-making of the Debtor. The Debtor recognized early on in this case that Mr. Dondero's continuing role with the Debtor in a position of authority made the Committee extremely uneasy. Accordingly, the term sheet provides for him removing himself as an officer and director of Strand and that he would no longer be in a position of control at the Debtor.

However, since the filing of the motion, over the last several days, concerns have been raised about whether removing Mr. Dondero from the business entirely would have unintended consequences. I believe I may have mentioned at prior hearings that, because of his involvement as a portfolio

manager under various contracts with third parties, that there could be adverse economic consequences to the Debtor if he didn't stay in some role.

As a result of discussions over the last 24 hours, the Committee has agreed and the Debtor agreed to modify the term sheet to allow the new board to decide whether to retain Mr. Dondero in his capacity as a portfolio manager, provided, however, that he will not receive any compensation and he will agree to resign if requested by the board.

In any event, he will have no decision-making control at all and he will report to the independent board.

The corporate governance documents that create the new independent board of Strand also provide that Mr. Dondero, as the owner of the equity in Strand, may not replace the board without the Committee consent or court order.

The third major aspect of the term sheet, Your Honor, was the agreement on operating protocols, and it really relates to the ground rules for the Debtor's operations going forward and when notice to the Committee is required of certain transactions that would otherwise be in the ordinary course of business.

Importantly, Your Honor, we are not trying to modify the Bankruptcy Code in any way. Any transactions out of the ordinary course of business would still be subject to Your Honor's approval.

However, in this case, as we indicated in the initial motion we filed when the case was in Delaware, whether or not something is ordinary is not straightforward in a case such as the Debtor's, given the nature of the Debtor's operations. So we thought it was important to establish ground rules up front, and establishing those ground rules was one of the things we did initially in the case. We had opposition from the Committee, and we've worked through the opposition and ultimately arrived at the operating protocols that are attached to the term sheet.

They have been slightly modified in nonmaterial ways in the documents I handed up to Your Honor.

They were subject to substantial negotiations between the Debtor and the Committee, and we also expect them to be the subject of future discussions with the Committee and the independent board after the independent board takes -- takes place. Takes over.

Two parties in interest, Your Honor, Jefferies and a group of Issuers, the CLOs, have filed comments to the term sheet, which I'll describe in a few moments.

THE COURT: Okay.

MR. POMERANTZ: The next aspect, Your Honor, of the term sheet was the provision of standing to the Creditors' Committee to pursue certain insider claims.

During the negotiations, the Committee requested immediate

standing to investigate and potentially prosecute claims against insiders to the extent those insiders were not employed by the Debtor. Granting standing at this stage of the case was a difficult give by the Debtor. However, the Committee impressed upon the Debtor the importance of them being able to control the filing of any actions against the insiders, and the Debtor decided to accede to the Committee's request.

It still remains the Debtor's hope that, with the creation of the independent board, that the Debtor, the Committee, and any insiders who might be subject to any such claims will be able to come together and negotiate a consensual resolution of this case. While all parties, I'm sure, can and know how to litigate, hopefully they will agree that a negotiated outcome is better than a litigated outcome.

The next aspect of the term sheet, Your Honor, was the document preservation protocols, and it provides for certain procedures to be put in place to address the Committee's concerns about document preservation. They are contained in an exhibit to the term sheet. Again, slight nonmaterial modifications were made in what I handed up to Your Honor. And essentially they provide also for the Committee's access to privileged documents to aid in their investigation and prosecution of claims to which they are granted standing, and also sets forth a procedure to be followed to address concerns

if the information is subject to shared privileges by several entities.

As I mentioned, Your Honor, three parties have filed responses to the motion. The first is Jefferies. Jefferies is a secured creditor of the Debtor with respect to its margin account held at Jefferies, and also has a similar account held by a non-debtor affiliate. They have asked for clarification that, one, nothing in the protocols or the motion affects its rights under the underlying agreements or the safe harbor provisions of the Bankruptcy Code entitling them to enforce their remedies; and two, that the Debtors will not trade in the prime account without Jefferies' consent, and if that consent is sought and not obtained, only subject to court order.

The Debtor has agreed to include language in the order to address Jefferies' concern, and at the conclusion of my presentation I'll submit to Your Honor an order and a redline containing that language.

THE COURT: Okay.

MR. POMERANTZ: The second objection -- or not objection, Your Honor -- the second statement was filed by a group of Issuers of CLO obligations.

THE COURT: Uh-huh.

MR. POMERANTZ: And they were concerned that certain aspects of the operating protocols which require notice to the

Committee prior to the Debtor being able to take certain actions could conflict with the provisions of the underlying agreements which might require the Debtor to take action on a more expedited basis.

Neither the Issuers or the Debtor are aware of any potential transactions that will arise prior to the next hearing before Your Honor on January 21st. We understand -- we were not party to these discussions between the Committee and the Issuers yesterday, but we understand the way it's been resolved is that the Issuers will withdraw their objection as it relates to going forward today, subject to being able to come back to the Court on the 21st and revisit the issue if additional changes are not made acceptable to them to resolve their issues and concerns.

THE COURT: Okay.

MR. POMERANTZ: But I think all parties acknowledge that over the next 12 days this is a theoretical issue rather than a practical issue.

THE COURT: Okay.

MR. POMERANTZ: This brings us, Your Honor, to the United States Trustee's opposition, which is really the only true objection to the motion that has been filed. No creditor has filed an objection, no investor has filed an objection, and no governmental agency -- which the U.S. Trustee in its objection purports to be pursuing their interests -- has filed

an objection, either.

As Your Honor probably recalls, at the December 19th hearing the Trustee indicated its intent to oppose any agreement between the Debtor and the Committee that would involve corporate governance and to file its own motion for the appointment of the trustee. That motion is currently scheduled for hearing on January 21st. We had asked the U.S. Trustee to reserve judgment on the Committee's and Debtor's agreement until after we had come to an agreement and after we had presented it to the Trustee, in hopes that it would address their concerns. However, as the Court told us -- as the U.S. Trustee told us and Your Honor at the December 19th hearing, there was nothing short of appointment of a trustee that would satisfy the Trustee.

The comments really didn't make sense to us, and I believe it perplexed Your Honor, but here we are.

At its core, Your Honor, the U.S. Trustee's objection is really a request that the Court substitute its business judgment for that of the Debtor and the Committee, the Committee who represents the substantial majority of all claims in this case, when both of them have decided that agreeing to certain changes in corporate governance, among other things, is preferable to the uncertain, costly, and time-consuming litigation over a trustee, and also the uncertainty, even if a trustee was appointed, on how the case

would be administered.

To the contrary, under the corporate governance proposal, we have three highly-qualified individuals who are poised to take over management of the Debtor, and each bring with them various skills that one trustee would not have.

The Trustee has filed its motion for appointment of a trustee, and I'm sure on the 21st will argue that the Code requires it. However, that's not the issue before Your Honor today. It's not whether a trustee is appropriate. It's whether the motion and the term sheet is a sound exercise of the Debtor's business judgment under Section 363, and, importantly, a reasonable compromise of the pending disputes between the Debtor and the Committee.

The Trustee's objection raises three general points, none of which have any merit. First, the Trustee argues that there is a lack of disclosure of significant matters. The first aspect that the Trustee raises to, or points to, is the absence of identification of the third board member and the absence of disclosure of the compensation that the board members will receive, which will be backstopped by the Debtor.

As I described before, Your Honor, the identity of the third member of the board was a fluid process which was only resolved earlier this week, and the Debtor did not believe that it was appropriate to reach agreement on director compensation until all board members could provide input.

Last night, we filed a reply to the Trustee's objection in which we disclosed the identity of the third board member, and we'll also disclose the proposed compensation to be provided to them, which essentially is as follows. Each member of the board will receive $60,000 a month for the first three months of the case, $50,000 a month for the next three months of the case, and the presumption thereafter would be $30,000 a month. However, people recognize that this case will look a lot differently six months from now, and while the presumption is $30,000, the Debtor, the independent board members, and the Committee will sit down, see how the case looks, and decide whether any modifications are appropriate.

The amount of compensation, which at first blush may seem significant, really reflects the significant amount of work that the Debtor, the Committee, and the independent directors anticipate will be required from them not only to get up to speed about the case, but to effectively manage this complex Debtor's business operations. The directors have heard from the Debtor and the Committee of all the issues, of all the concerns, and this is not an enviable task that they are undertaking. The compensation they are being provided thus far we believe is appropriate under the circumstances and commensurate with the work that they are going to be expected to complete.

If they are successful and they are able to achieve a

consensual restructuring here, the million and a half or so that will be spent on them will be best million and a half dollars I think spent in this case.

Your Honor, we also have updated corporate governance documents which --

(Pause.)

MR. POMERANTZ: Your Honor, may I approach with the updated corporate governance documents?

THE COURT: You may. Okay.

MR. POMERANTZ: As I will discuss in a moment, Your Honor, there is really no need for the Court to approve the corporate governance documents, as they have been executed by Strand, which is not a debtor before this Court. However, there are a couple of matters in those documents that I want to bring to the Court's attention that do impact on the Debtor.

THE COURT: Okay.

MR. POMERANTZ: First, as is typical for board members, Strand has agreed to indemnify the independent directors to the full extent permitted by law. The independent directors have requested that the Debtors backstop Strand's agreement, and the Debtor and the Committee agree, and the documents so provide.

Strand has also committed to obtain directors and officers coverage for the independent directors. It has been located,

it's in the process of being finalized and bound, and the Debtor will pay the cost of that coverage.

The independent directors have also asked for language in the order approving the settlement that requires a party seeking to assert a claim against the independent directors relating to their role as an independent director to demonstrate to this Court that a claim is colorable before filing the claim and providing the Court with jurisdiction over any such claim. This is language that's similar in other similar types of cases.

THE COURT: Uh-huh.

MR. POMERANTZ: That will be reflected in the order.

Next, the Trustee objects to the failure of the Debtor to identify who the potential chief executive officer of the Debtor will be. And essentially, she's arguing that you have to identify that CEO now; it has to be subject to court approval. However, there's no requirement that any company retain a CEO. It's not a corporate law requirement. And the fact that the board reserves the right to retain a CEO in the future is consistent with corporate law and is not a basis to deny the motion. And in any event, normally, the retention of a CEO is not a subject that is brought to the Court's attention for Court approval.

So the lack of any clarity over the identity of the CEO is a reflection of the fact that this independent board does not

know if a CEO is required. They will come in, they are going to interview all the employees, they're going to sit down with the CRO, they're going to sit down with counsel, they're going to sit down with the Committee, and ultimately they will decide if a CEO is to be retained. And if a CEO is to be retained, they will go through the process of identifying who that CEO is. But again, it's not a reason to deny the motion.

The Trustee has also argued that because the Committee is not granted standing to pursue claims against current employees, as opposed to former employees, that there might be some statute of limitations concerns with respect to claims against those employees. The argument doesn't really make sense to us. In the standard case, the Debtor retains causes of action. And the Committee can investigate causes of action. And at some point during the case, a Committee could come in and could demand that the Debtor prosecute them, and if the Debtor unreasonably refuses, could seek standing before the Court.

In this case, the Debtors agreed up front that the Committee has the standing to prosecute certain claims against insiders that are not employees of the Debtor, which obviates the need for standing. So we've gone one step more. But the Trustee is arguing that that leaves a void for the claims that are not subject to the agreement on standing.

However, the term sheet provides that the board is going

to make determinations on what employees should remain, what employees should not remain. To the extent the board terminates any employees and there are claims against them, then basically the Committee will have the ability to bring those claims.

To the extent that those people aren't terminated, we have no doubt that the Committee, in the course of its investigation, will determine whether claims should be brought against those people, and at some point in time may ask the Debtor to prosecute those claims or ultimately seek standing.

In any event, these things are not being swept under the rug. There's no real legitimate concern that there's any statute of limitations issue that will prevent those claims from being prosecuted.

I am very much aware and have no doubt that the Committee is going to be laser-focused on claims, and any concern that statute of limitations is going to lapse I think is not well-taken.

The Trustee next argues that the Court does not have the jurisdiction to implement the corporate governance matters, and for that reason the motion should be denied. They -- she argues that because Strand is not a debtor, that the Court has no authority to appoint --

MS. LAMBERT: Your Honor, I object. The United States Trustee is a he. I am not the United States Trustee,

and the attacks *ad hominem* are inappropriate.

THE COURT: All right. Well, clarification, the U.S. Trustee is the guy in Washington. But anyway, you may proceed.

MR. POMERANTZ: I apologize to Ms. Lambert.

MS. LAMBERT: Actually, he's downstairs right now. Bill Neary.

MR. POMERANTZ: I apologize to --

THE COURT: Oh, well, I thought you meant the big guy in Washington. But anyway, you may proceed.

MR. POMERANTZ: I apologize to Ms. Lambert and no offense was meant.

THE COURT: Okay.

MR. POMERANTZ: So, the U.S. Trustee argues that because Strand is not a debtor that the Court has no authority to appointment the independent directors and limit Mr. Dondero's right to remove the independent directors. The Debtor is not really seeking authority to appoint -- to have court authority for the appointment of the directors at Strand. Again, as I mentioned before, that authority exists outside of bankruptcy. Strand is not a debtor. Strand could appoint anyone it wants to carry out its responsibility as the general partner of the Debtor, and it's exercising its corporate authority to do so by installing a board at Strand.

Nor is the Debtor seeking court authority for Strand to

enter into the corporate governance documents. Other than the couple of items I mentioned before, Your Honor, Strand can enter into these documents without authority from this Court. The only court authority that was required: Debtor to backstop the indemnification obligations, Debtor to pay compensation to the board members, and Debtor to pay for the D&O policy.

With respect to the Court's right to limit Mr. Dondero's ability to terminate the independent directors, the term sheet contemplates the Court approving a stipulation which limits Mr. Dondero's ability to terminate the independent directors, and if he does in fact seek to terminate the appointment of the independent directors, he would be in violation of court order. But even more importantly, Your Honor, if he decided to terminate the independent directors without the Committee's consent and without the Debtor's consent, I wouldn't imagine it would take anyone very long to come back before Your Honor and ask Your Honor to very quickly appoint a trustee.

Accordingly, Your Honor, I think the argument of lack of jurisdiction over Strand is a red herring and should be denied.

Lastly, Your Honor, the Trustee makes a curious argument that a trustee is needed to protect all investors and governmental authorities. The Trustee argues that this case demands transparency which can only be accomplished by a

Chapter 11 trustee.

One thing I think the Debtor and the Committee and the U.S. Trustee will agree on, this case does demand transparency. And we believe we've installed a corporate governance structure, an operating protocol structure, a document preservation structure, that does just that, provides transparency that this Debtor has not been subject to and which is quite different from the case that was before Your Honor before.

So we believe that what the Debtor and the Committee have done is not only in the interests of the Debtor, the creditors, but investors and all governmental entities.

And no investor or governmental entity has had any concerns or any problems with what is being done. They haven't filed any objection. The U.S. Trustee apparently is proceeding by proxy asserting those interests.

Second, nothing in the term sheet or any of the documents limits the rights of investors or of governmental entities to seek a trustee, to seek documents, or to do anything they would -- that they would be entitled to do under the Bankruptcy Code.

In any event, Your Honor, the fact that the Trustee believes that a trustee is more appropriate, again, is an argument that they can make at the January 21st hearing. It's not a basis for denial of this motion.

In conclusion, Your Honor, the only economic stakeholders in this case believe that proceeding with the transactions contemplated by the term sheet is in the best interest of the estate, will maximize their ability to achieve a consensual restructuring, and move this case through the system as quickly and efficiently as possible. The term sheet is a valid exercise of the Debtor's business judgment under 363 and an appropriate compromise of controversy, and the Trustee's objections are really nothing more than a rehash of its request for an appointment of a trustee.

For all these reasons, Your Honor, we request that the Court overrule the U.S. Trustee's objection and approve the motion.

THE COURT: All right. Well, before I hear from our objectors, is there any friendly commentary? Mr. Clemente, I figured you might want to address this.

MR. CLEMENTE: I do, Your Honor. And good morning.

THE COURT: Good morning.

OPENING STATEMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

MR. CLEMENTE: For the record, Matthew Clemente from Sidley Austin on behalf of the Official committee of Unsecured Creditors. I do have some comments that I would like to make, Your Honor, some, so please bear with me. I will try and be brief.

THE COURT: Okay.

MR. CLEMENTE: I think as late as 1:00 o'clock in the morning I wasn't sure that I would be in front of you with this settlement fully in place in a manner that was satisfactory to my Committee. As I mentioned to you in my prior appearances in front of you, every provision was important to the Committee, and they all work together. As Your Honor can imagine, there was a lot of negotiation that took place, including late in the day and early morning, to come to that conclusion.

Some comments on our perspective as a committee, Your Honor. As an initial matter, we were absolutely not okay with the governance structure that was in place when the petition was filed. As we detailed in our objections to the CRO motion and the protocol motion back when the case was in Delaware, the Committee has very real and identifiable concerns about the Debtor's ability to dispatch its fiduciary duty. And the Committee very seriously contemplated moving for a Chapter 11 trustee daily. That conversation is something that the Committee continues to -- continued to engage in, Your Honor. So it's something that they considered very, very carefully.

That was the lens through which the Committee was approaching negotiations over the settlement agreement and the independent director structure. That's how they viewed it. That's the backdrop against which they came to it.

The Committee had two primary goals that it had sought to achieve with the settlement agreement. The first was to ensure that Mr. Dondero does not remain in a position of management authority or control in any fashion with the Debtor. Goal number two was to ensure that the value of the Debtor's estate is preserved and maximized. Those two goals needed to work together.

The Committee believes that the carefully-crafted settlement agreement achieves these objectives in a manner that is more beneficial to the estate than a potential Chapter 11 trustee and a related fight over its appointment at this time.

The lynchpin of the settlement, Your Honor, is the appointment of the three independent directors. And as Mr. Pomerantz outlined for you, that was the subject of intense discussion, negotiation, debate among the Committee and with the Debtor. But we believe that Mr. Seery, Mr. Dubel, and Judge Nelms are fully independent, highly qualified, and bring relevant and complementary skillsets to this board. Mr. Pomerantz referred to that, but we believe that the three directors all bring unique talents and attributes that will allow them to function effectively as a board and provide the appropriate oversight and direction that we believe is necessary here.

However, regardless of how independent or highly skilled

they may be, they would be of no use if they weren't bestowed with the appropriate power. So that was another point that was very important to the Committee, and we believe that the settlement does this. The settlement makes clear that the independent directors are granted exclusive control over the Debtor, including over all employees. That's absolutely critical to the Committee.

The settlement also provides that the CRO and the Debtor's professionals shall report and serve at the direction of the independent directors. That is also very important.

And let me be clear, Your Honor, because I think you may have raised this at a prior hearing: This is not a board that we expect to work at 50,000 feet, as demonstrated by the compensation structure that Mr. Pomerantz outlined for you. This will be a board that's hands-on, members of which will be on the ground, at the Debtor, with a strong presence and a clear message of who is in charge. That is critical for this Committee.

Additionally, as Mr. Pomerantz mentioned, the new board, in consultation with the Committee, is empowered to determine whether a CEO should be retained. It's possible that one of the independent directors could be that CEO, Your Honor. But we wanted to make clear that that was an important part of the structure, should the board determine that that was the way it wanted to go.

So, in sum, Your Honor, we believe that the independent board has the clear authority and the skillset that's necessary to take control and will be actively and aggressively doing so.

But let me be clear, rest assured, Your Honor, this is not going to be a board that answers to the Committee in that sense. I think that we will all be moving together directionally, but it's very possible that I will be in front of Your Honor arguing against a decision that this independent board made. So I want to assure Your Honor that although the Committee was very active and in fact picked Mr. Seery and Mr. Dubel, and then Mr. Pomerantz detailed how the third director was picked, we understand who their duty -- what their duty is and we also understand that they're not a rubberstamp for the Committee, Your Honor. And so I wanted to make that point to you to assure Your Honor that that's not the structure that's being set up here, nor are they the type of individuals that would allow that to happen.

Additionally, Your Honor, the settlement grants the Committee standing to pursue estate causes of action against the related parties. That was very important to us, Your Honor.

And in addition to that, the settlement provides the Committee access to privileged documents and sets forth a discovery protocol that will assist the Committee in its

investigation.

The Committee strongly believes that Mr. Dondero's repeated past behavior, that there are many questionable transactions that will need to be thoroughly investigated and pursued. And so having those causes of action with the economic party in interest related to those causes of action, the Committee and its constituencies, we thought was very important and very critical.

Granting standing, Your Honor, as I mentioned, avoids any issues regarding who will be controlling those claims.

I'll touch on this in a moment, but Mr. Pomerantz talked about Mr. Dondero remaining in name as an employee. Let me assure Your Honor that that is not a backdoor around the Committee's ability to investigate and immediately pursue claims against him should that be the course that we choose to take. So he's not part of that carve-out for current employees. That's not at all happening. That would never be something that my Committee would be comfortable with. So I wanted to make clear to Your Honor that that's not something that's happening with sort of this late edition of Mr. Dondero's continuing on in name as an employee.

Your Honor, the settlement also lays out a very detailed set of operating protocols which we do believe are appropriate and provides the Committee with transparency, which I've been expressing to Your Honor we've needed since this case has

started.

Finally, as we point out in our reply and as would always be the case, should new facts develop or the situation demand it, the Committee reserves the right to seek a Chapter 11 trustee, as does any other party in interest, to the extent it may be appropriate at that time.

In short, Your Honor, the Committee very carefully and diligently weighed the independent director option versus the Chapter 11 trustee option. The Committee had very clear goals in mind, as I expressed to you, and determined that those goals could be achieved in a value-maximizing manner through the independent director structure.

The negotiations were very intense, and it was only after the Committee determined that each piece of the settlement was to its satisfaction did it ultimately conclude that the settlement maximizes value for all stakeholders while at the same time protecting those stakeholders from exposure to continuing insider dealing, breaches of duty, and mismanagement.

Therefore, the Committee believes approving the settlement is in the best interest of the estate, and therefore it believes it should be approved.

I do want to offer a word about Mr. Dondero continuing as an employee. As Your Honor was aware, the term sheet as originally filed provided that Mr. Dondero would, among other

things, resign as an employee of the Debtor. Mid to late afternoon yesterday, Mr. Ellington called me and said that the Debtor was now of the view that Mr. Dondero should remain on as an employee in that capacity for the benefit of the estate. The Committee was, very appropriately, very skeptical of this, as well as the sort of last-minute offer, last-minute, you know, addition, however you want to view it -- some might argue retrade -- that Mr. Dondero was to leave the Debtor, period. That was our view. That was the way that the term sheet was initially structured. And under no circumstances was the Committee going to allow Mr. Dondero to have any control over this Debtor.

Your Honor, the Committee doesn't know what, if any, the consequences are of removing Mr. Dondero as an employee. And we're not conceding at all that there are any value lost by removing Mr. Dondero as an employee. Instead, what we're doing is we're staying true to our structure with the independent directors and we're empowering them to decide. And so it's consistent with, you know, our goals of having the independent director structure in place. And under the settlement as now constructed, even with this late addition or adjustment, Mr. Dondero would remain as an employee in name only, subject in all respects to the direction, oversight, and removal by the independent board. And importantly, should they decide to do that, Mr. Dondero shall resign. And he

shall receive no compensation.

So he will not be in control of this Debtor. The independent directors are. And he's not going to be empowered to make decisions on behalf of the Debtor. Instead, we're empowering our independent directors to make those decisions and determinations on behalf of the Debtor.

I wanted -- I thought it was important that I provide that perspective to Your Honor, as this is something that came in at a very, very late hour.

Overall, Your Honor, for the reasons I have stated and the reasons in our reply, the Committee, as a fiduciary of all creditors in this case, believes that the settlement is in the best interests of the creditors and should be approved. And at this time, it's the better alternative than the cost, delay, and uncertainty resulting from a Chapter 11 trustee fight and the potential appointment of a Chapter 11 trustee.

It is time to put the governance issues behind us, Your Honor, and to move forward to determine how to maximize value for the creditors and how to get them paid.

Your Honor, just regarding the specific resolutions of objections that Mr. Pomerantz put on the record, I agree with how Mr. Pomerantz characterized those, and the Committee is supportive of those resolutions as well.

Those are all my remarks, Your Honor, but I am happy to answer any questions or address any concerns Your Honor may

have.

THE COURT: Okay. Two follow-up questions. First, I know I asked you this at a previous hearing and you told me, but your Committee, as I recall, is very well constituted. Just remind me of the members.

MR. CLEMENTE: Yes.

THE COURT: You have a representative from the Redeemer Committee, --

MR. CLEMENTE: Yes, Your Honor.

THE COURT: -- which is a $140 million or so arbitration award?

MR. CLEMENTE: Yes, Your Honor.

THE COURT: Okay. And who else is on the Committee? Is an Acis representative?

MR. CLEMENTE: Acis is on the Committee, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: Meta-e Discovery, who is a trade vendor of the Debtor, is on the Committee. And UBS Securities, who is also --

THE COURT: Okay.

MR. CLEMENTE: -- a litigation claimant, is on the Committee.

It was the U.S. Trustee in Delaware's parting gift to me to name a four-member committee, Your Honor.

(Laughter.)

THE COURT: Okay. Makes it awkward at times. And then back to the Dondero subject.

MR. CLEMENTE: Yes, Your Honor.

THE COURT: I mean, again, both Mr. Pomerantz and you clarified that the proposal now is the new board will decide if he stays on, Mr. Pomerantz said as a portfolio manager.

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: Am I -- I mean, I'm hearing that correctly?

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: So, right now, whatever officer positions he has, he's technically not resigning? Or --

MR. CLEMENTE: He is resigning as an officer of the company, Your Honor.

THE COURT: Okay. He's resigning? So the board will just decide, is he going to be a portfolio manager or some -- whatever the employee title is?

MR. CLEMENTE: Or they could decide that he's not necessary.

THE COURT: Or not necessary? In any event, no compensation?

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: And as you can see, the term sheet provides that Mr. Dondero shall not cause any related entity

to terminate any agreements with the Debtor as well. That was language that was added last night as well.

THE COURT: All right. So they're going to make the decision, does he help preserve value by staying in some capacity or not?

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: That, cutting through it, that is the way that ultimately the Committee views it.

THE COURT: Okay.

MR. CLEMENTE: And if there's an opportunity -- and I'm not conceding that there is. I'm not conceding that he preserves any value.

THE COURT: Uh-huh.

MR. CLEMENTE: But we wanted to give the option to our independent directors to make that determination. Because if there's an opportunity to preserve value, that's what we're trying to achieve.

THE COURT: Okay. And I don't even know if you've thought through this. Would there be some sort of notice filed on record in the case if --

MR. CLEMENTE: If --

THE COURT: -- if the decision is made to --

MR. CLEMENTE: To -- to --

THE COURT: -- hire him or keep him as a portfolio

manager?

MR. CLEMENTE: So, I think the default under the term sheet, as revised, is he stays in that capacity in terms of name. The independent directors will -- they're subject to his control and direction, and they could decide to remove him.

THE COURT: Uh-huh.

MR. CLEMENTE: Perhaps if Your Honor --

THE COURT: Okay.

MR. CLEMENTE: We could provide notice if they make the determination to remove him, but I think the default is that, you know, he's in that -- he's remaining as that employee name currently. So that's the current default.

THE COURT: Okay. All right. Thank you.

MR. CLEMENTE: Thank you very much, Your Honor.

THE COURT: Well, Ms. Patel, you're getting up so I'll hear -- I don't know who all has been in the loop over this overnight development.

OPENING STATEMENT ON BEHALF OF ACIS CAPITAL MANAGEMENT

MS. PATEL: Your Honor, Acis has been in the loop as a member of the Committee. And I will be very brief with respect to Acis's individual comments. And I just want to be clear: Obviously, I'm here as counsel for Acis, and so this is Acis's individual position. Mr. Clemente aptly and very ably handled the Committee's overall position with respect to

this.

But Your Honor, I just want to, on behalf of Acis, make sure that, because of these developments, that's really -- I really had hoped to have zero role today, but I want to make sure that we're -- Acis is on record with respect to our position. And obviously, given Your Honor's knowledge and oversight of the long history of Acis's bankruptcy case and seeing some of the events that transpired there, I'm sure that this will all, against that backdrop, make an awful lot of sense.

But, you know, it's this continued role for Mr. Dondero that is of concern. You know, this issue even being raised within like the last 48 hours by Mr. Ellington, the timing of it just creates an issue. I mean, did this -- how could this possibly have come out of left field when this is such a huge part of what the Debtor does in its ordinary course of business, is serve as a portfolio manager, and these are contracts that have been negotiated, generally speaking, internally by Highland. So the fact that if Mr. Dondero were to exit the structure and there would be some potential ramifications to that, I've got to wonder how much of a surprise could that really have been to Highland folks.

But I just wanted to highlight, in connection with the term sheet -- this is the preliminary term sheet that was handed up Your Honor, and I believe Your Honor has a redline

version of it as well --

THE COURT: Uh-huh.

MS. PATEL: -- on Page 2, with respect to the role of Mr. James Dondero, there's various provisions in there. And I guess I would be remiss, Your Honor, if I didn't say, at least out of the gate, Acis obviously supports the implementation of this independent board of directors. We believe all the candidates are very capable and are -- we put our reliance upon them.

Obviously, we don't concede any issues. We'll see what we're going to do. But certainly, for the time being, we do support the entry of this agreement of the settlement -- or, I'm sorry, approval of the settlement agreement by the Court that lets the independent board be put into place.

But what I'll focus the Court on, on Page 2 under the role of Mr. James Dondero, it goes through various provisions as to what he'll resign to -- positions he'll resign from and that he will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title. And then it goes on to provide as to who he'll report to and how he will be governed, which includes by the independent board, he will receive no compensation, and that he will be subject to at all times the supervision, direction, and authority of the independent directors.

Again, we have faith that the independent directors will oversee this and will govern his role accordingly. However, given Acis's history with how transactions have transpired at Highland, we remain highly cautious with respect to what happens next.

And to that end, Your Honor, the very last sentence there on Page 2, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor," is a key provision of this that keeps Acis, as a Committee member, on board with this agreement. I wanted to highlight that and note that, in the last less than 48 hours, in the last 12 hours, or maybe a little bit more than that, call it 18 to be safe, that's where -- that's a provision that's been -- that's where we've ended up. It's all of these issues have been going at lightning speed, but I did want to just, for the record and so everybody is clear, that is an important piece of this agreement to -- for Acis.

And as Your Honor knows, this Debtor, Highland, is wont to try to terminate agreements and to try -- in an attempt to try and transfer valuable contracts away and valuable revenue stream away from an entity to an alternate entity. And that's really the heart of our concern, Your Honor.

So, with that, I just wanted to be clear and be on record as to Acis's position. Thank you.

THE COURT: Thank you. All right.

MR. POMERANTZ: Your Honor, if I briefly may respond to the issues with Mr. Dondero while they are fresh in Your Honor's mind?

THE COURT: Okay. Okay.

MR. POMERANTZ: Your Honor, look, we appreciate the timing of this coming to the attention of the Committee as being less than optimal. As Your Honor can appreciate, this case that's been filed three months ago, a lot of people are looking very carefully at what's happening to the Debtor. Investors are looking. There was a transfer of venue. There have been a lot of reports about potential trustee motions. And we believe a lot of parties are waiting to see the outcome of this hearing and the trustee hearing to determine whether they will determine to continue to do business with the Debtor.

It's not only an issue of contractual rights. It's also an issue of whether investors feel comfortable on who is managing, who is managing their investments.

This issue of Mr. Dondero's continuing role has been something that at the Debtor we've continued to grapple with over the last several weeks. It's always been our thought that we should do nothing that would unduly harm the company from an economic standpoint. I think the Committee shares that. That if it's determined by an independent board -- and don't take current Debtor professionals, don't take current

Debtor employees' word for it -- but if they determine that there's an economic benefit by keeping him on to preserve material revenue stream, they should be able to make that determination. I think that's really at the core here. And I think the Committee got ultimately comfortable with it because it will be an independent board, the majority of the members identified and chosen by them and accepted by the Debtor.

So, again, we apologize to the parties and the Court for bringing this on late. It wasn't my intent to come here and present modified versions of the term sheet that hadn't been filed. But that's where we are, and that's why it has come up, and that's why it's an extremely important issue, because preserving whatever revenue we can for the Debtor is important.

Now, at the end of the day, the board may either decide that he doesn't preserve the revenue, or the negatives from keeping him involved with the company outweigh any benefits. And that's a decision they will have to make, and it'll be their province to make. So I just wanted to give Your Honor that perspective.

THE COURT: Okay.

MR. DAUGHERTY: Your Honor, may I approach?

THE COURT: Mr. Daugherty? You may.

OPENING STATEMENT ON BEHALF OF PATRICK DAUGHERTY

MR. DAUGHERTY: I apologize. I was not planning to

address the Court at all today. I would have had my attorney here for it. But I just ask a little bit of indulgence to represent myself *pro se* for this issue.

This is the first I've heard that Mr. Dondero would stay with the company. I think it's an awful idea. There's a litany of reasons for that.

By the way, I'm completely in support of this -- of this board that's been chosen. I have every confidence that they'll be able to make good decisions eventually. But they're stepping into this thing new. Obviously, I've been through this in your court with *Acis* and other matters, and I have deep, deep concerns about Mr. Dondero continuing in that role, simply because of the influence it has on the rest of the organization and the message that it sends, both internally and externally, of where the company goes from here.

So I just wanted to let you know my thoughts. I wasn't planning to make them. I haven't filed anything. But that's where I stand.

THE COURT: All right. Thank you, Mr. Daugherty.

All right. Before we hear from the U.S. Trustee, who I know is going to have a lot to say, let me just circle back briefly to Jefferies counsel and the CLO Issuers' counsel. You heard the representations of Mr. Pomerantz earlier about, well, first, in the case of Jefferies, that the Debtor has

agreed to language to address your concerns. Do you want to weigh in on that and confirm that you're content that you're going to have language to work out your concerns?

OPENING STATEMENT ON BEHALF OF JEFFERIES, LLC

MR. MAXCY: Thank you, Your Honor. Patrick Maxcy for Jefferies.

No, I don't have anything additional to add to what Mr. Pomerantz said. The language that we have worked out will speak for itself and will be included in the order.

THE COURT: All right. Thank you.

And counsel for the CLO and CDO Issuers, do you confirm that you would be in agreement to basically withdraw your objections for now, but perhaps come back and make argument on the 21st if you have not worked out language with the Committee that you think works?

OPENING STATEMENT ON BEHALF OF THE ISSUER GROUP

MR. BENTLEY: James Bentley from Schulte Roth for the Issuers, Your Honor.

I believe the deal that Mr. Pomerantz and Mr. Clemente and I have discussed was adjourning our objection to the 21st, --

THE COURT: Okay.

MR. BENTLEY: -- rather than withdrawing it.

THE COURT: Okay.

MR. BENTLEY: We're -- we believe we will be able to

come up with language acceptable to the Issuers, but we would like to reserve the right to come back to the Court on our limited objection if we cannot, given that our issue is really -- really only relates to the 25 Issuers we represent.

THE COURT: Okay. Thank you very much.

All right. Ms. Lambert?

OPENING STATEMENT ON BEHALF OF THE UNITED STATES TRUSTEE

MS. LAMBERT: May it please the Court. As the Debtor acknowledges, the motion that they are settling, the issues that they are settling, are the issues that the U.S. Trustee has raised in his motion to appoint a Chapter 11 trustee. As a matter of statutory construction, Section 1104 does not contemplate settlement of these issues. 1112, in contrast, has a provision that if the Court finds and determines that there is cause to convert a case, there are unusual circumstances and the Court can find a reasonable justification for the wrongdoing or the error that occurred that led to cause -- for example, administrative defects in 1112, not filing monthly operating reports -- and that can be cured. The Court has to make a finding that those -- these defects can be cured within a reasonable period of time. Section 1104 contains no analog to his.

If the Court finds cause to direct the appointment of a Chapter 11 trustee, then the Court is supposed to appoint a Chapter 11 trustee. And *Trailer Ferry* and *AWECO* both stand

for the proposition that, on today's day, we're supposed to have evidence about what the management issues are that led to this agreement. There's been no evidence. There's been no allegations in the motion for settlement. And so the U.S. Trustee is prepared to put that evidence on.

And Your Honor, one aspect of this is that the arbitration agreement has been sealed. And there are people on the phone. I don't know who's on the phone. The U.S. Trustee has opposed the sealing of the arbitration -- not arbitration agreement, the arbitration judgment -- has opposed the sealing of that. And then they referenced a confidentiality order as the basis to seal it. The U.S. Trustee also opposed that confidentiality motion, which was filed subsequently to the motion to seal.

There is no confidentiality order. An interim order was entered sealing the arbitration award, but -- and the U.S. Trustee has honored that by redacting all of the pleadings that we filed relating to that, but it's important today for the U.S. Trustee to be able to discuss it in argument, and it is here -- and we have it prepared to be admitted into an exhibit.

So, to proceed with my argument, Your Honor, I need some clarification about what I can say.

THE COURT: You want clarification from me on what you can say?

MS. LAMBERT: Well, I mean, either that or we need to clear the room.

THE COURT: I've read the arbitration award.

MS. LAMBERT: Right.

THE COURT: It's in my brain.

MS. LAMBERT: Right. Okay.

THE COURT: Uh-huh.

MS. LAMBERT: And so one of the arguments here today is that the U.S. Trustee is representing the SEC and representing other Government agencies and things. No. Obviously, that is not the U.S. Trustee --

THE COURT: I didn't hear that.

MS. LAMBERT: Okay. The -- one of the positions has been, in the papers, is, well, that we don't have standing to raise their issues. And that's true.

THE COURT: Okay.

MS. LAMBERT: But the problem is that the U.S. Trustee has been constrained from discussing those issues with the SEC. The arbitration award is very relevant to the SEC's oversight. I anticipate the evidence today will be that the SEC, after the financial crisis of 2008, imposed restrictions on this Debtor on breach of fiduciary duty issues. I anticipate that the arbitration findings would be very relevant to whether those issues are ongoing or not.

THE COURT: Okay. Let me weigh in. I view the legal

standard that this Court has to weigh today as being: Is the Debtor proposing something that is reflective of sound business judgment, reasonable business judgment? And to the extent this is a compromise of controversies with the Committee, is this fair and equitable and in the best interest of the estate?

And as Mr. Pomerantz has said, you know, a lot of this maybe doesn't even need Court approval. But to the extent there are aspects of this that are appropriate to seek Court approval on, you know, this is my task. I have to look at what's presented, and is this reflective of sound business judgment? Is this fair and equitable? Is it in the best interest?

So, assuming there are tons of bad facts here reflected in the arbitration award, reflected in other evidence, bad facts that might justify a trustee, a Chapter 11 trustee, is this nevertheless, what's proposed today, a reasonable compromise of, you know, the trustee arguments the Committee could make or, you know, is this a reasonable framework for going forward? Okay?

So I guess what I'm saying is I'm confused about, you know, do I need to look at the arbitration award? Do we need to have evidence of all of that? I can assume that there are terrible facts out there that might justify a trustee, but I'm looking at what's proposed. Is this a fair and equitable way

to resolve the disputes? Is it sound business judgment? Frankly, is it a pragmatic solution here to preserve value? So that's the legal standard I have in my mind here.

MS. LAMBERT: Yes, Your Honor.

THE COURT: Okay.

MS. LAMBERT: The standard is whether it is fair and equitable to resolve the issues in the Chapter 11 trustee motion, and it is the U.S. Trustee's position that they are not resolved by this. And how are they not resolved? Number one, they're not resolved because the problems that led to the breach of fiduciary duty issues and findings are more pervasive, both based on this Court' finding in the *Acis* case and in the arbitration court's finding in Mr. Dondero. Other officers are implicated.

THE COURT: But how --

MS. LAMBERT: Other employees are implicated.

THE COURT: Okay. I feel like maybe we're talking at each other, not getting each other. I've got a proposed solution here to totally change the playing field, if you will. Bring in incredibly qualified people to --

MS. LAMBERT: Those people --

THE COURT: -- to change out the, you know, the person that you say breached fiduciary duties, the, you know, mismanagement, whatever bad labels we have here, but bring in a clean slate.

MS. LAMBERT: No, Your Honor, because employees remain at the Debtor who are problematic. The board that is appointed owes a fiduciary duty to whom? Strand. Dondero. He's still the board -- he is the sole stockholder. Yes. In addition, --

THE COURT: And they won't be taking directions from him.

MS. LAMBERT: In addition, --

THE COURT: The term sheet is they won't be taking directions from him.

MS. LAMBERT: Your Honor, there is no evidence before the Court today that Mr. Dondero has entered a stipulation. This is part of the problem. This continues --

THE COURT: Well, if he doesn't, in five minutes the Committee is going to be filing their trustee motion, right?

MS. LAMBERT: Well, then we haven't saved any time or any money. This is the whole issue. They have to put on evidence that this is a resolution of issues. We're going to have the motion to appoint a Chapter 11 trustee either way.

THE COURT: All right. Well, we did have the evidence of Mr. Sharp. Would you like to cross-examine him at this point?

MS. LAMBERT: Your Honor, I would like to put the U.S. Trustee's exhibits into evidence and then cross-examine him.

THE COURT: All right. Your exhibits?

MR. POMERANTZ: Your Honor, we would object to any exhibits. The Trustee has not filed an exhibit list.

MS. LAMBERT: Your Honor, this matter was set on an expedited basis and the Court does not require exhibit and witnesses lists when a matter is filed on an expedited basis. It's impossible, when a response is filed at 5:00 o'clock the evening before and supplements are made in the morning of the hearing, for the U.S. Trustee to put on a witness and exhibit list.

MR. POMERANTZ: Your Honor, we were here on the 19th. We set out a briefing schedule. And maybe it was a couple days short of normal notice. Ms. Lambert agreed to issue discovery by a certain date, and she at no point said that because there was 13 days' notice as opposed to longer period that she couldn't comply and provide a witness list.

We provided with a witness list. We provided an exhibit list. The Trustee's effort and attempt to now submit exhibits and rely on maybe there were some changes this morning, that just doesn't cut it, and that's not fair and that's not due process.

THE COURT: Okay. I sustain the objection. The exhibits won't be admitted since there was no exhibit list.

MS. LAMBERT: Your Honor, I do not have an exhibit list from them. And they --

THE COURT: Well, they haven't offered any.

MS. LAMBERT: They put on new exhibits this morning. The exhibits that the U.S. Trustee has are all things that they are familiar with.

THE COURT: Let me back up. They didn't introduce any exhibits. They --

MS. LAMBERT: But they introduced the declaration, they introduced the supplements to the agreement that were drafted this morning, they've introduced the new corporate resolutions, all of which they handed me this morning.

THE COURT: All right. Well, the declaration of Mr. Sharp, it's two pages long. It is, I don't think, any kind of surprise information.

MS. LAMBERT: Your Honor, --

THE COURT: I'll allow you to cross-examine him.

MS. LAMBERT: -- the U.S. Trustee's exhibits are no surprise, either. The *Acis* opinion is no surprise to anybody in this courtroom.

THE COURT: Okay. Well, what are your exhibits?

MS. LAMBERT: The --

THE COURT: I probably should have asked.

MS. LAMBERT: The exhibits are the *Acis* opinion, the arbitration awards or the determinations, both the partial and the final, and the SEC's original judgment. There are four exhibits.

THE COURT: All right. Well, Mr. Pomerantz, what would you like to say? One of them I have obviously seen, since I wrote it.

MR. POMERANTZ: Yes, you've written it. You wrote it.

(Laughter.)

MR. POMERANTZ: Your Honor, I think this is a tempest in a teapot. The Committee's brief that it filed in opposition to the CRO retention, the ordinary course protocols, and the cash management motion had a litany of description of the Redeemer litigation, of the SEC litigation. There are plenty of bad facts out here. Okay? We have an interim order to seal. There was no hearing set today for our final hearing.

The Trustee has objected to that order, and I suspect that will be heard on the 21st. We don't think it's appropriate to introduce the Redeemer award. However, we have read the redacted provisions or portion of the U.S. Trustee's brief, and we have no problem if the U.S. Trustee limits its argument to the redacted portion in presenting that to the Court.

In other words, we don't believe that the few sentences that were redacted need to be redacted.

However, to the extent they intend to submit the arbitration award, we don't think it's appropriate, we don't think it's necessary, we think Your Honor hit it right, that

the issues today are not whether there's mismanagement at the Debtor. Okay?

The U.S. Trustee's position is, notwithstanding this new structure, it doesn't work. She has a trustee motion on. She can argue on the 21st that it doesn't work. Nobody is prejudicing her right to do so.

We think it's prejudicial, it's unfair, it's procedurally improper to submit the Redeemer arbitration award and to allow the Trustee to do anything other than describe exactly what she has in her pleading.

THE COURT: Okay. I sustain the objection to those exhibits. Again, I've read them. They're in my brain. I wrote one of them. But I will allow you to cross-examine Mr. Sharp. So, Mr. Sharp, would you please come to the witness stand? Please raise your right hand.

BRADLEY SHARP, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Please be seated.

MS. LAMBERT: To clarify, Your Honor, has the Court considered the *Acis* opinion and the arbitration opinions based on judicial notice?

THE COURT: And we're doing a lot of hair-splitting here. I'm just letting you know I -- the facts are in my brain. You can't extract them from my brain. Okay?

MS. LAMBERT: Okay.

THE COURT: I know there have been a lot of bad

things, arguably bad things. But to me, the real issue here today is whether this framework that has been heavily negotiated with the Committee reflects reasonable business judgment on the part of the Debtor, is a fair and equitable resolution of the Committee's, you know, arguments in favor of a trustee, and whether this makes, you know, sense going forward to allow this Debtor to go forward without a trustee. Okay?

So I really think that the evidence you want is not terribly relevant. We technically aren't here on a trustee motion today. We're here on whether a new board and the terms, the protocols suggested, reflect reasonable business judgment and reflect a fair compromise of arguments the Committee has raised. All right? So I don't know how much more clear I can make that. I guess the technical answer is I'm not taking judicial notice of those things for purposes of today.

All right. You may proceed.

CROSS-EXAMINATION

BY MS. LAMBERT:

Q Mr. Strand, can you state your name for --

A Sorry. Bradley Sharp, S-H-A-R-P.

Q Sharp. Mr. -- oh, sorry.

A No relation to Strand.

Q All right. Strand is the general partner of the Debtor,

right?
A That is correct.
Q And there has been no change in the board of the Debtor except Mr. Dondero's resignation; is that right?
A Well, it's a little different, because the -- Strand is the general partner of the Debtor.
Q Yes.
A So the new board will be acting and in control of the Debtor.
Q Yes. And there is -- Strand is a non-debtor, correct?
A That is correct.
Q And the stock of the non-debtor, Strand, is owned by Dondero?
A Mr. Dondero owns Strand Advisors.
Q In its entirety?
A That is correct.
Q So the board will owe a fiduciary duty to Mr. -- to Mr. Dondero?
A The board will have a fiduciary duty to the Debtor and to Strand Advisors.
Q All right.
A Their duty is to the entity.
Q The -- Strand, as the general partner, as an entity, owes a fiduciary duty to the Debtor, right?
MR. MORRIS: Objection to the extent it calls for a

legal conclusion.

THE COURT: Sustained.

BY MS. LAMBERT:

Q Do you know?

A As a lay person. I'm not an attorney.

Q Okay. So you don't know what the fiduciary roles of the board will be; is that right?

A Well, the fiduciary board will be acting -- you know, looking at it from my perspective as the chief restructuring officer, the new board will be acting as the Debtor-in-Possession. And, you know, they will be directing the Debtor-in-Possession. You know, the Debtor-in-Possession has duties to all parties in interest, and they will be directing the Debtor. They will be directing me as CRO.

Q And, in addition, there may be a CEO, right?

A That is contemplated, correct.

Q It is contemplated? It --

A It is -- it is an option that the board has if they think a CEO is necessary.

Q But you don't know whether a CEO is going to be appointed or not?

A That's up to the board.

Q And you don't know what the compensation for that individual might be, right?

A Again, that's up to the board.

Q Mr. Dondero is going to be an employee of the Debtor, right?
A That's correct.
Q And Mr. Dondero started the Debtor, correct?
A I believe so.
Q And he also started Strand, right?
A I believe that's correct.
Q And he is also in control of a number of entities that the Debtor does business with; is that right?
A That is correct.
Q Mr. Ellington is going to remain on with the Debtor?
A That -- Mr. Ellington is an employee. All employees are now subject to the board.
Q Okay. And Mr. Ellington's role with the Debtor is what?
A He is general counsel with the Debtor.
Q And there are other in-house attorneys with the Debtor, right?
A That's correct.
Q And who else is there currently?
A I don't have the list in front of me, you know, the employee list. As of now, because obviously this is still -- hasn't been effected, so the board has not made any decisions with respect to any employees going forward.
Q And the CFO remains the same?
A Yeah, that is, again, as of now. I don't know what the

board is going to do, if anything.
Q Do you have any anticipation of what you would recommend to the board regarding the CFO?
A You know, I have many recommendations I have not made to the board yet. I just met them this morning.
Q Are you aware that historically this Court has found that the lawyers provided bad advice to the Debtor?
MR. MORRIS: Objection to the form of the question.
THE COURT: Sustained.
BY MS. LAMBERT:
Q Do you have any knowledge about whether there have been findings that the law firm gave erroneous advice to the Debtor? Or, I mean, the in-house counsel gave erroneous advice.
MR. MORRIS: Objection to the form of the question.
THE COURT: Sustained.
MS. LAMBERT: Your Honor, I'm asking for the foundation.
THE COURT: Rephrase.
BY MS. LAMBERT:
Q Do you -- are you aware of any concerns about the in-house counsel?
A Yes.
Q What is your knowledge?
A I have read the rulings from this Court.

Q And what is your understanding of those rulings?
A I don't recall specifically. I read that early on when I was first employed. But there have been concerns with respect to, you know, management of the Debtor.
Q As the CRO, have you made any recommendations to change employees to date?
A As of now, I don't have a -- the board. You know, the board has just been employed. We have not made recommendations up to this point. We are still -- obviously, have been evaluating our position and what needs to happen. I think it's important for the Debtor at this time, a little stability would be a good thing for -- until we develop the direction going forward.
Q Are you familiar with the compensation terms for the directors?
A Yes.
Q And the directors are employees of Strand but paid by the Debtor; is that right?
A Oh, I'm not sure they're employees of Strand, but they are paid by the Debtor, their compensation. That's correct.
Q And yet the compensation is technically through Strand, right?
A They -- they are. They have to act through the general partner of the Debtor because of the corporate structure.
Q One of the portions of the agreement is that the Committee

acquires litigation claims. Are you familiar with that?
A I am.
Q Have you parsed out which litigation claims those might be at this point?
A I think the agreement says they have litigation claims against insiders and related parties. So I don't know what those individual claims are. I don't know what exists.
Q Are you aware that the Committee obtains the attorney-client privilege and work product privilege?
A Yeah. Subject to the terms of those agreements, correct.
Q Have you gone through the documents and determined which ones would fall on -- which attorney files would fall on which side?
A Not as of yet.
Q Have you been taking direction from Mr. Dondero?
A We've had -- I've had limited interaction with Mr. Dondero since my retention. You know, we have been complying with the protocols that we had been negotiating with the Committee and providing information to the Committee. We have been, as a result of those protocols, instructing management of the company on compliance with those protocols. So they have brought to us transactions that they would like to do. We have reviewed those transactions and compared it to the proposed protocols and have been enforcing those. So if management has asked to do a transaction that does not meet

within those protocols, we have been declining the transaction. And that -- you know, the company has agreed with that decision and accepted that decision.

Q When you say management, who are you -- to whom are you referring?

A You know, the whole management team at the company. In-house counsel. The CFO. You know, I've had limited interaction with Mr. Dondero. One interaction was he did question one of my decisions that I made. We discussed it and he accepted my conclusion.

Q You're at the Debtor every day?

A My team is.

Q You are not?

A I have had some travel restrictions due to a medical issue, but I have three of my team there every day.

Q Is Mr. Dondero there every day?

A I don't know. I don't think so. In the few days I'm there, I've not seen him.

Q Is Mr. Ellington there every day?

A No.

Q Who on the management team is there every day?

A You know, our primary interaction is with Isaac Leventon, Frank Waterhouse, the CFO. You know, primary interaction, you know, with David Klos, who is the controller, in dealing with the financial issues.

Obviously, we spend a lot -- my team spends a lot of time with the head of compliance.

Q Were you surprised by this addition that Mr. Dondero would remain as an employee?

A I can't say I was surprised. It is an issue that we struggle with, given the nature of this company's business. You know, I see the change in the language and, you know, as CRO, I am comfortable with it.

Q So, as CRO, if Mr. Dondero is necessary now, you recognize that he was necessary three weeks ago?

A I'm not saying that he's necessary. I'm saying that it is important for the board to be able to make that decision.

Q And it wasn't important when the settlement was filed?

A It was the -- it was a struggle at the time. I was concerned at the time it was filed the unintended consequences of Mr. Dondero resigning completely and disappearing, because there are a significant number of funds that the Debtor deals with related parties that are controlled by Mr. Dondero, and I was worried about the financial impact with it. I knew this issue was important to the Committee. And if that's something that the Debtor agreed to and the Committee agreed to, so be it.

You know, I think the last-minute compromise is acceptable and appropriate. I think the language as negotiated is going to be very helpful to the Debtor. And I think, then, it's up

to the board to make the decision, with full knowledge on what's the best avenue forward.

Q And the language as negotiated was added because, in the past, there have been problems with Mr. Dondero changing or terminating agreements with related entities, right?

A There was that -- I've seen that -- issues raised in the *Acis* case.

MS. LAMBERT: No further questions.

THE COURT: All right. Any redirect?

MR. POMERANTZ: Not from the Debtor.

THE COURT: Anyone have examination? No? All right. Thank you, Mr. Sharp. You're excused.

THE WITNESS: Thank you.

(The witness steps down.)

THE COURT: All right. Are we going to have any other, I guess, witnesses, evidence?

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: No, Your Honor. I just had a couple points. One, Ms. Lambert mentioned that she hadn't seen a copy of the stipulation referred to, which was prohibiting Mr. Dondero from terminating the board. There's a good reason for her not having seen it. I hadn't provided it to her. It just came this morning, right before the hearing. I have one signed copy. I have other copies that I could represent, even though they're unsigned, are the same, so I would like to

provide Your Honor. I'll keep the signed copy but provide you with an unsigned copy, but it's the same, and also give one to the U.S. Trustee.

THE COURT: But you've got a signature of Mr. Dondero on that?

MR. POMERANTZ: Yes, I do.

THE COURT: Okay.

MR. POMERANTZ: May I approach?

THE COURT: You may. Thank you.

MR. POMERANTZ: Your Honor, maybe for the record it would be appropriate for me to show Your Honor the signature, so you could say that you've seen it?

THE COURT: Yes. Yes.

MR. POMERANTZ: May I approach again?

THE COURT: You may. (Pause.) Okay. Thank you. The record will reflect I've seen Mr. Dondero's signature.

MR. POMERANTZ: Your Honor, one of the threads that Ms. Lambert said to Your Honor is that there were employees still remaining at the Debtor and that those employees may have been involved in some wrongdoing.

I submit, Your Honor, if Your Honor appointed a Chapter 11 trustee today, what would a Chapter 11 trustee do? A Chapter 11 trustee wouldn't terminate every employee at the Debtor. A Chapter 11 trustee, if he or she was doing what they should do, would go down to the company, would interview members of

the company, senior management, and decide who should stay on and who should not stay on.

That, I submit, Your Honor, is exactly what this board will do. So the concept of there being something different done, if you have a board here or not, I don't think makes sense.

And lastly, Your Honor, Ms. Lambert expressed the issue as whether it's fair and equitable to resolve the U.S. Trustee issues in this way. I don't think that's the standard. The only fair and equitable I understand is in plan confirmation. I think Your Honor said it straight, which is: Is this a valid exercise of the Debtor's business judgment and is it an appropriate compromise of controversy? That is the standard. And, again, we have always acknowledged that, notwithstanding how Your Honor rules today, the Trustee reserves the right to come back to court and argue a trustee is appropriate on the 21st.

We believe, Your Honor, that many of the cases, in this circuit and elsewhere, look to the continuing management of the company and whether management issues have been addressed as a significant factor in determining whether a trustee is appointed. And it'll come as no surprise, of course, if Your Honor grants our motion today, this will be a lynchpin of our opposition to the trustee motion.

But, again, those issues are for another day, and we

believe that we have satisfied our standard, and we request that Your Honor approve the motion.

THE COURT: All right. Other closing arguments?

CLOSING ARGUMENT ON BEHALF OF THE UNITED STATES TRUSTEE

MS. LAMBERT: Yes, Your Honor. As the Debtor acknowledges, the Court has no jurisdiction over Strand. This is a complicated structure. A trustee avoids all of the complications involved in the Court exercising jurisdiction over an entity that it doesn't have jurisdiction over.

To enter a stock stipulation related to a non-debtor is highly irregular, and Mr. Dondero is the person behind that. It has happened in cases where people have been in these kinds of structures, like that FSLIC used to put in these kinds of structures -- there's published opinion, the *Gaubert* case -- where the person continued to exercise control even though they had a stock trust.

The Court needs a person beholden to the Court. The evidence is that, historically, this Debtor has entered into things that breached its fiduciary duty and resulted in self-dealing and liability for the Debtor. The evidence is that these go beyond Mr. Dondero and the Court does not have jurisdiction over his stock. The Court does not have jurisdiction over Strand. The board members of Strand are not employees of the Court, they're employees of Strand, a non-debtor. These members have a fiduciary duty to Strand.

Yes, Strand is the general partner of this Debtor and has a fiduciary duty, but all these fiduciary duties intermix in ways that result in conflicts for this case. These conflicts are unnecessary. The Court could just appoint a trustee who only owes a fiduciary duty to the members and creditors of this case, as well as the next (inaudible).

There is no evidence that this is cheaper. There is no evidence that this is a total resolution, because issues are left open, such as whether or not a CEO is going to be appointed, how much that person is going to cost.

Finally, Your Honor, the sealing has constrained the ability of some of the parties to understand what's going on in this case. And that is material to the argument about who is here, because we don't know who -- that all the people who would have participated in this discussion had an opportunity to participate in it.

Yes, the creditors have a fiduciary duty, and I believe that they represented to the best of their ability, but they are not charged with the issues that others are charged with, such as the SEC.

There is no evidence that the officers are disinterested. Rather, the new officers are going to be conflicted by the nature of their position. There's no evidence that it's cheaper. And a trustee, if appointed, could be appointed on an hourly basis. This is a Chapter 11 trustee.

They argue that the trustee would not have the knowledge, and yet they've been able to find three candidates to serve for the board who are qualified. So there's no evidence that it would not be better to have a trustee for that reason as well.

The evidence is that, historically, the Redeemer Committee was set up to prevent these kinds of transactions and have oversight. Historically, the evidence is it did not work. For this reason, the statute provides a solution, and the Court should impose it. The Court should deny this motion as not being in the interest of the estate, as not being a sound exercise of discretion, because it's really the discretion of Strand, not the Debtor, and it will remain the discretion of Strand, not the Debtor.

Thank you.

THE COURT: All right. Anyone else have comments?

MR. POMERANTZ: Your Honor, just a couple of minor points.

THE COURT: Okay.

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Ms. Lambert started by saying the Court doesn't have jurisdiction over Strand. I know I just handed her the stipulation, but the last paragraph of the stipulation specifically says that the parties stipulate and agree that the Court shall have exclusive jurisdiction over

all matters arising from or related to the interpretation and implementation of this stipulation and the adjudication of any parties breaching the stipulation.

So the Court does have jurisdiction now that the stipulation has been signed, assuming that the Court enters it, so I think that addresses that issue.

Your Honor, the evidence of the disinterestedness of the members of the board, we've provided their *curriculum vitaes*. We've made representations that they have no connections with the Debtor or any of the parties in interest. We don't think that, just because they become appointed and become a director of Strand, that that renders them disinterested [sic], and we think that the Trustee's arguments that being at a different level creates different duties is just not -- is not accurate. I don't think that the Committee would have had any appetite for this type of structure had they believed that each of these board members wouldn't feel that their fiduciary duty was to the Debtor's estate. And they all are seasoned restructuring people from different aspects, all understand their fiduciary duties well, and all are prepared to carry them out.

Lastly, the Trustee points to the historic issues, and specifically mentioned the Redeemer Committee and that structure didn't work. Well, I think it speaks volumes, Your Honor, that not only the Redeemer Committee, are they on the

Committee and the Committee has supported this motion, but the Redeemer Committee hasn't come to Your Honor and said that, notwithstanding that structure that may or may not have been effective, this structure is ineffective.

And at the end, Your Honor, the Trustee is trying to replace the business judgment of the Debtor. The Debtor is entitled to deference of the judgment, again, focusing on the correct standard. And, again, the Trustee will have her day in -- his day in court in connection with the ultimate trustee motion on the 21st.

Thank you, Your Honor.

THE COURT: Anyone else?

All right. Well, the Court is going to note a few things as part of its ruling, obviously. The new proposed independent board members for Strand, Strand obviously being the general partner of the Debtor, Highland -- Mr. James Seery, Mr. John Dubel, and retired Judge Russ Nelms -- are highly-qualified individuals with respect to the industry. Some of them with respect to restructuring. Certainly, in the case of retired Judge Nelms, with regard to fiduciary duties and the Bankruptcy Code requirements.

These three individuals were chosen by the Creditors' Committee, whose constituency is broad, whose constituency is owed well over $100 million. And they were chosen by the Committee after literally months of negotiation. Obviously,

this bankruptcy was filed in October, and it appears to this Court, from the representations of counsel, that from the very beginning of the case -- the Committee was, I guess, appointed a week or two after the case was filed in October -- there's been haggling over corporate governance of this Debtor.

So we have highly-qualified individuals. We have individuals who were chosen by the well-constituted Creditors' Committee. And what has been proposed to the Court is that it is these independent directors that would have sole and exclusive management and control of the Debtor.

An interesting jurisdictional argument has been made, and it's one of those arguments that, frankly, you know, sounds good when you first hear it, but when you really drill down about the governance structure here, I mean, obviously, this Debtor is a limited partnership and it acts through a general partner. It's the general partner that controls the Debtor entity. And while Strand Advisors, Inc., the general partner, may not technically be in bankruptcy, it's the structure of these entities such that it controls the Debtor. So the jurisdictional argument, when you drill down, feels a little off.

Moreover, we have language in the stipulation where Strand is stipulating and consenting, if you will, to this Court's exercise of jurisdiction over it.

There are many things about the compromise here that have

very compelling appeal. Among them, certainly, the Committee that's negotiated this term sheet retains the right at any time to move for a Chapter 11 trustee if it believes there are grounds. The Committee is granted standing to pursue estate claims, certain estate claims right off the bat, without having to come back and ask the Court, without having to rely on the Debtor to pursue that. There are document production provisions, document preservation provisions, a shared privilege negotiated, that are very powerful tools for the Committee, and certainly operating protocols that have been negotiated regarding the Debtor's operations that are very powerful tools for the Committee.

I said many times during the *Acis* case -- those who were here will remember -- that the company, *Acis*, was not a great fit for Chapter 11. Lots of companies aren't great fits for Chapter 11, I suppose, but the kind of business it was was kind of tough to maneuver in Chapter 11. Human beings and their expertise create value. And while we had a Chapter 11 trustee, a stranger come in and take control over Acis, you know, there's great uncertainty whether that stranger is going to be able to preserve value and have the smooth transition into Chapter 11 that's really going to be the best fit.

Here, as I've said earlier, the legal standard I view as controlling here is 363 and whether what has been proposed reflects reasonable business judgment. Is there a sound

business justification for proposing the independent slate of directors at the GP level for the Debtor, the protocols, the negotiation with the Committee, the document sharing, the standing given to them? Does all of this reflect reasonable business judgment? And I find, quite clearly, it does. I find it to be a pragmatic solution to the Committee's concerns about existing management and control.

And I think I used the words "fair and equitable," not just Ms. Lambert, because it is also presented to the Court as a 9019 compromise of disputes with the Committee, and we traditionally use a fair and equitable and best interest of the estate analysis in this context. So, to the extent that applies, I do find this a fair and equitable way of resolving the disputes with the Committee, and I find this to be in the best interest of the estate. So I do approve this.

And by approving this motion, I'm approving the term sheet as it's been presented, the various terms therein, the exhibits thereto. I'm specifically approving the new independent directors, the document management and preservation process, the standing to the Committee over certain of the estate claims, the reporting requirements, the operating protocols, the whole bundle of provisions.

Now, there is one specific thing I want to say about the role of Mr. Dondero. When Ms. Patel got up and talked about the newest language that has been added to the term sheet, she

highlighted in particular the very last sentence on Page 2 of the term sheet, the sentence reading, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor." Her statement that that was important, it really resonated with me, because, you know, as I said earlier, I can't extract what I learned during the *Acis* case, it's in my brain, and we did have many moments during the *Acis* case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way.

So not only do I think that language is very important, but I am going to require that language to be put in the order. Okay? So we're not just going to have an order approving the term sheet that has that language. I want language specifically in the order. You know, you can figure out where the appropriate place to stick it in the order is, but I want specific language in here regarding Mr. Dondero's role. I also -- the language in there that his role as an employee of the Debtor will be subject at all times to the supervision, direction, and authority of the Debtors, I want that language in there as well. Let's go ahead and put the language in there that at any time, in any event, the

independent directors can determine he's no longer going to be retained. I want that in the order.

And I'm sure most of you can read my mind why, but I want it crystal clear that if he violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court. He needs to understand that. Mr. Ellington needs to understand that. You know, if there are any games behind the scene, not only do I expect the Committee is going to come in and highlight that to the Court and file a motion for a trustee or whatever, but we're going to have a contempt of court issue.

So, anybody want to respond to that?

MR. POMERANTZ: Your Honor, Jeff Pomerantz; Pachulski Stang Ziehl & Jones.

We hear Your Honor. What I thought I'd do now is I have a clean redline of the order, of course not including the provision you just requested, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- which we will go back and upload and hope to get an order signed by Your Honor today, if you're around. But to go over the other changes, the changes to Jefferies, the other language changes I discussed before. I gave a copy to Ms. Lambert and to the Committee. May I approach with a --

THE COURT: You may.

MR. POMERANTZ: Thank you.

THE COURT: Okay. All right. (Pause.) All right. The form of order looks fine to me. Obviously, you'll add the Dondero-related language, and we may have further wording tweaks negotiated with the CLO Issuers. But, again, I approve all of this. I didn't say on the record the compensation, but certainly I am approving that as reasonable. I expect these three directors are going to be working very, very hard. And so, as you said, not 50,000-foot level monitoring, actually rolling up sleeves on-site, so I think the compensation is reasonable.

MR. POMERANTZ: Thank you, Your Honor. We will submit an order shortly that includes Your Honor's language requested.

THE COURT: Okay.

MR. POMERANTZ: Are you around this afternoon?

THE COURT: I am around, --

MR. POMERANTZ: Okay.

THE COURT: -- so just pick up the phone or send an email to Traci, my courtroom deputy, --

MR. POMERANTZ: Yes.

THE COURT: -- so she can tell me, "It's in your queue to sign."

MR. POMERANTZ: She has been extremely helpful and responsive.

THE COURT: Good. I'm glad to hear that.

MR. POMERANTZ: Yes.

THE COURT: Now, as far as future scheduling, I did have her sitting by, listening, in case we needed to discuss anything. Obviously, we're going to have a kind of a carryover placeholder on the 21st as part of the trustee motion hearing for any remaining issues with the CLO Issuer. And, you know, that's just a placeholder if necessary to hear language controversies.

My courtroom deputy was concerned, because you have a lot of pending motions that have just sort of sat there pending because this was the big issue, right? She wants to make sure she sets anything you need a setting on. And I don't know if you want to discuss that today or go back as a group and --

MR. POMERANTZ: We're happy to -- I think, you know, I think that's appropriate to do. We had the motion to appoint the CRO.

THE COURT: Uh-huh.

MR. POMERANTZ: That was pending. That gets resolved by this motion. We will submit an order --

THE COURT: Okay.

MR. POMERANTZ: -- with the new agreement that was attached to the term sheet.

We had the cash management order which Judge Sontchi had issued an interim order. We will have a final order with

respect to that.

THE COURT: Okay.

MR. POMERANTZ: We will be withdrawing the motion to approve ordinary course protocols which was originally on for hearing.

THE COURT: Uh-huh.

MR. POMERANTZ: I think on the 21st we have currently set a motion to approve the retention or Mercer, which is the Debtor's compensation consultant, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- and an analog motion that was originally set for today with respect to insiders, non-insiders, but is on for non-insiders and insiders on the 21st, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- which is the motion to approve bonuses.

THE COURT: Uh-huh.

MR. POMERANTZ: Of course, the Debtor's new board is going to be wanting to very carefully review that. And we are going back and today having our first new board meeting with the board to start bringing them up to speed. But we presently intend, subject to, obviously, their direction, to go forward on the 21st.

We also have the retention of Lynn Pinker and Foley

Gardere, which had been filed and was brought on for hearing previously. It had been delayed, again, for the board to look at the issues. We expect to have that on for the 21st. And I believe, I believe that would be it.

MS. LAMBERT: No, Your Honor, the --

MR. POMERANTZ: No?

MS. LAMBERT: -- U.S. Trustee has objected to the motion to seal, which was the second item on the Wilmington Court's docket that got -- and it got transferred here. The U.S. Trustee has also objected to the motion for protective order. The issues overlap. We request that they be set as quickly as possible.

MR. POMERANTZ: We're happy to set both of those for the 21st as well.

THE COURT: All right. So I think what I'm going to ask you to do is just get on the phone, one of you, with Traci and just make sure she's clear on everything you need set on the 21st, and then you can do a big notice of hearing, just kind of listing all of these matters.

MR. POMERANTZ: Your Honor, with respect to the CRO motion -- order and the cash management order, I was wondering if it would be helpful for my colleague Mr. Demo to go over the amendments to those orders -- we would like those to be entered today -- to see if Your Honor has any questions.

THE COURT: All right. That would be good. Mr.

Clemente, did you have something first?

MR. CLEMENTE: Just very quickly, Your Honor. We had filed our retention applications for the Committee professionals and filed CNOs, and your office had indicated you wanted to get through today, which I totally understand, but I just wanted to make sure that Your Honor didn't lose sight of those. I don't believe there were any objections to those, but I think your intent was probably to deal with them after today, but I just wanted to --

THE COURT: All right. Yes, it was to get through today.

MR. CLEMENTE: Yes.

THE COURT: So, since you've had plenty of time run on those, you can submit orders and I'll get them signed in chambers.

MR. CLEMENTE: Thank you very much, Your Honor. Appreciate it.

THE COURT: Okay. Thank you. Counsel?

MR. DEMO: Good afternoon, Your Honor. Greg Demo, Pachulski Stang, on behalf of the Debtor. I'm happy to keep this as brief as possible, but I think walking through the cash management motion has the most changes.

THE COURT: Okay.

MR. DEMO: The biggest change there, and we had discussed this with the United Stated Trustee in Delaware, is

that in our initial motion we disclosed that the Debtor had bank accounts at BBVA and then also at NexBank. Those accounts have been moved to East West Bank, --

THE COURT: Okay.

MR. DEMO: -- which is a party to a depository agreement with the United Stated Trustee.

THE COURT: Okay.

MR. DEMO: The only exception to that is a certificate of deposit that is at NexBank. It's a relatively small amount of money. It's $135,000. But it also is pledged as collateral on a lease. So that has been -- proven problematic to move. The Trustee for Delaware did say that was okay. I would hope that the Trustee for Texas would agree with that. We did disclose it in the initial debtor interview.

But those are the bank accounts. The bank accounts at BBVA and NexBank, with the exception of that CD, were all closed as of yesterday.

THE COURT: Okay.

MR. DEMO: So now we are going to be using East West Bank for all operating accounts, all cash, going forward.

The other two accounts are the account at Jefferies, which is the prime brokerage account.

THE COURT: Uh-huh.

MR. DEMO: That account, we are keeping open.

Obviously, there have been conversations with Jefferies that are going to be reflected in the proposed order on the settlement, but we do propose to keep the Jefferies prime brokerage account open as well.

And then we filed a supplement for another prime brokerage account that we have at a prime broker called Maxim Group. That account has $30 million in securities in it, give or take, and then literally like $100 in cash. The Debtor considers that account more an investment than actual operating account, but we would like to keep that account open as well, just so it can continue holding those securities.

Jefferies and Maxim, neither of them are on the depository list, so we are requesting a waiver of 345(b) for those two accounts, and then also requesting a waiver of 345(b) with respect to the certificate of deposit at NexBank.

THE COURT: Okay.

MR. DEMO: That's where we're at at cash management. And I guess, sorry, one more thing. In the original cash management motion, we had a series of intercompany transactions that we disclosed, and we had gotten interim relief from the Delaware court to make those payments up to a hundred -- or, $1.7 million. We are below that account, and on a go-forward basis, all of those intercompany transactions are getting subsumed into the settlement motion and the operating protocols and all of that. But we are asking for

final relief on the intercompany transactions that we made under the interim order.

THE COURT: Okay. All right. Who wishes to be heard on this? I don't know how much discussion we've had outside the courtroom on this.

MS. LAMBERT: We haven't -- normally, a bond would be appropriate for the Jefferies and the other small account. The estate is at risk on the CD, but it's not that much money. It's not worth bonding. It'll be more expensive to bond it.

NexBank, as you know, Your Honor, is a bank where Mr. Dondero is the CEO. So that was part of the reason that NexBank was carved out. But the -- so I would like them to bid bonds on the Jefferies and the other account. And if we -- let's carry it on those issues so that we can see how expensive bonding it would be, and if it's cost-prohibitive, maybe we reconsider. But in the past, the bonds haven't been very expensive, relatively.

MR. DEMO: We're happy to discuss that with the U.S. Trustee. I mean, just for the record, the Jefferies account, you know, does support a margin loan. It's $80 million in securities. It's $30 million at Maxim. They're SIPC. I mean, it's Jefferies and, you know, another large prime broker. Again, we're happy to discuss it with the Trustee. I don't know that it's necessary, but we will discuss it.

THE COURT: Okay. Well, you all can discuss it, and

if you have an unopposed order, an agreed order, --

MR. DEMO: Uh-huh.

THE COURT: -- you can upload it and I'll sign it. Otherwise, if you need hearing time on the 21st, --

MR. DEMO: Okay.

THE COURT: -- we'll get it all figured out then and --

MR. DEMO: Okay. All right.

THE COURT: -- resolve it then.

MR. DEMO: Thank you, Your Honor. And then I guess the other motion is the CRO retention. This one should hopefully be pretty brief. We are just filing a new proposed order that attaches the engagement letter, as has been modified by all of the settlement discussions. I believe the Committee is on board with that, and it's consistent. It was one of the attachments that you approved this morning in connection with the settlement.

THE COURT: All right. Comments on that?

A VOICE: None, Your Honor.

THE COURT: Committee, you're good?

MS. LAMBERT: The U.S. Trustee had also objected to the CRO motion, but it's some of the same issues that the Committee raised. And the CRO, my understanding, is now not an employee of the board but totally overseen by the board, and with that, we can withdraw our objection.

THE COURT: All right. Very good. I'll sign your order on the CRO, then.

MR. DEMO: Okay. Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing else, I'll be on the lookout for your orders. And, again, if you could coordinate with Traci to make sure she's clear on everything you need set on the 21st.

MR. POMERANTZ: Thank you very much, Your Honor.

THE COURT: All right.

MR. CLEMENTE: Thank you, Your Honor.

MR. DEMO: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 11:54 a.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 **12/10/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

EXHIBIT 3

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

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

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

APPEARANCES:

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

DALLAS, TEXAS - FEBRUARY 19, 2020 - 9:43 A.M.

THE COURT: All right. Well, we have Highland matters. Let's get lawyer appearances, in the courtroom first.

MR. DEMO: Good morning, Your Honor. Greg Demo; Pachulski Stang Ziehl & Jones, on behalf of the Debtor. With me are Jeff Pomerantz and John Morris.

THE COURT: Okay. Good morning.

MR. POMERANTZ: Good morning.

MR. CLEMENTE: Good morning, Your Honor. Matthew Clemente and Juliana Hoffman from Sidley Austin on behalf of the Official Committee of Unsecured Creditors.

THE COURT: Good morning.

MS. HAYWARD: Good morning, Your Honor. Melissa Hayward and Zachery Annable also on behalf of the Debtor.

THE COURT: Good morning.

MS. LAMBERT: Lisa Lambert with the U.S. Department of Justice on behalf of the U.S. Trustee, William Neary.

THE COURT: Good morning.

MS. PATEL: Good morning, Your Honor. Rakhee Patel, Phil Lamberson, and Annemarie Chiarello of Winstead, P.C., and also Brian Shaw of Rogge Dunn Group, on behalf of Acis Capital Management, LP and Acis Capital Management, GP, LLC.

THE COURT: Thank you.

MR. PLATT: Good morning, Your Honor. Mark Platt

from Frost Brown Todd on behalf of the Redeemer Committee of the Highland Crusader Fund. I believe that at least Marc Hankin from Jenner & Block is on the line as well.

THE COURT: Okay. Thank you.

MS. ANDERSON: Good morning, Your Honor. Amy Anderson with Jones Walker on behalf of the Issuers. And I believe Mr. James Bentley with Schulte Roth is also on the phone.

And I apologize for interrupting the flow. I would ask if Mr. Bentley and I could be excused after the uncontested matters are taken up this morning, just to avoid --

THE COURT: Okay.

MS. ANDERSON: -- having us -- I don't want to re-interrupt later, if that is all right with Your Honor.

THE COURT: Okay. That's fine. Thank you.

MS. ANDERSON: Okay.

THE COURT: All right. That looks like all the courtroom appearances. On the phone, we heard that James Bentley is there. Do you want to appear, Mr. Bentley?

MR. BENTLEY: Yes, that's correct, Your Honor. Good morning.

THE COURT: All right.

MR. BENTLEY: Good morning, Your Honor. James Bentley; Schulte Roth & Zabel; for the Cayman Issuers.

THE COURT: All right. And someone else was there

for the Redeemer Fund. I can't remember. Was it Mr. Clubok you said, or anyone else on the phone?

MR. HANKIN: Marc Hankin from Jenner & Block, --

THE COURT: Oh, okay.

MR. HANKIN: -- Your Honor.

THE COURT: All right. Mr. Hankin. Anyone else on the phone who wants to appear may go ahead.

All right. I guess we're good to go. Well, I'll turn now -- Mr. Demo, are you going to start us off today?

MR. DEMO: Yes, Your Honor.

THE COURT: Someone delivered a wonderful notebook and an easy-to-follow agenda. I appreciate whosever hard work was behind that. It really helps us get prepared back in chambers. So, thank you.

MR. DEMO: And we're happy to do it, Your Honor, because, honestly, it helps us, I think, as much as it helps you.

THE COURT: Okay.

MR. DEMO: And we do have extra copies if anybody needs a copy of the agenda.

THE COURT: Okay.

MR. DEMO: Generally speaking, we'd kind of like to go in the order of the agenda, I think, with two exceptions. I know that Ms. Adams and Mr. Bentley have to move, so I thought maybe we could do their objection to the settlement

motion first.

THE COURT: Okay. So that's the carryover matter.

MR. DEMO: Correct, Your Honor.

THE COURT: We obviously have an order in place, but we kept it open to accommodate their issues.

MR. DEMO: Correct.

THE COURT: Okay.

MR. DEMO: And that's Item 7 on Page 7.

THE COURT: All right.

MR. DEMO: And I think this one -- and anybody can correct if I'm wrong -- will go pretty easily. We've come to an agreement with the Objecting Parties.

THE COURT: All right.

MR. DEMO: We are planning on submitting, under a notice, a revised copy of the operating protocols that were approved by this Court in connection with the settlement that addresses those Objectors' concerns. And then once that is filed, the Objecting Parties will withdraw their objection.

THE COURT: All right. Anyone wish to speak up on this matter?

All right. Well, as I recall, the concern had been that they didn't want the agreed-upon operating protocols with the Committee to somehow change contractual rights of the parties, and so --

MR. DEMO: That is correct, Your Honor. And we took

their language and we carved out a small universe of CLO Issuers, --

THE COURT: Okay.

MR. DEMO: -- exactly as they asked for.

THE COURT: All right. Well, again, I'll ask: Does anyone have any comment about this revised process?

All right. Well, that sounds perfectly fine to me, so we'll look for the revised copy of the operational procedures.

MR. DEMO: Okay. Great, Your Honor.

And then I guess the only other exception to the order of the agenda --

(Garbled phone noises.)

THE COURT: Is someone on the phone wishing to speak up? (no response) All right. I guess not.

MR. DEMO: Yeah. I guess the only other exception to the order in the agenda is the Foley Gardere retention application.

THE COURT: Okay.

MR. DEMO: We would like to do that last. It is a contested hearing and I think we are going to have some evidence on that.

THE COURT: All right. All right. Sounds fine.

MR. DEMO: Then, I guess, just going through the agenda in the order that it's written, the first one is the Lynn Pinker retention application. We had originally filed

that retention application back in October. We recently withdrew it. We're not going to go forward on it.

THE COURT: All right.

MR. DEMO: The second matter, and I guess the second two matters, hopefully, we can take at the same time. These are two uncontested matters. Certificates of no objection have been filed for both of them. The first is the foreign representative motion.

THE COURT: Yeah, and I will tell you, I don't know if it's shown up on PACER yet, --

MR. DEMO: Okay.

THE COURT: -- but I actually already signed an order on that, --

MR. DEMO: Okay.

THE COURT: -- as well as exclusivity.

MR. DEMO: Perfect.

THE COURT: But, you know, I saw the certificates of no objection, but perhaps we need to talk about it in case anyone wants to comment in any way.

MR. DEMO: If anybody does, I mean, if you've already entered them -- I know PACER was down, so I don't think we've seen it yet.

THE COURT: Okay.

MR. DEMO: But we're fine moving on if --

THE COURT: Well, yeah. The foreign representative

motion looked like a no-brainer, if you will.

MR. DEMO: Uh-huh.

THE COURT: It was filed way back in October, right?

MR. DEMO: Correct. Right.

THE COURT: And no one had ever objected. It's just that there are some foreign proceedings out there; --

MR. DEMO: Right. Right.

THE COURT: -- you wanted to make sure that there was a human being who had authority to act in those?

MR. DEMO: Correct.

THE COURT: All right. So, if no one has any comment, I did go ahead and sign the order approving that.

MR. DEMO: Okay.

THE COURT: Similarly, exclusivity. I signed an order on that yesterday. In probably nine out of ten cases, I would have had a hearing with evidence.

MR. DEMO: Uh-huh.

THE COURT: But, again, that one seemed like a no-brainer. We had no objections, and obviously you've been in court a lot, with a lot of things happening.

MR. DEMO: Yes.

THE COURT: So it seemed like a no-brainer to give more time on that. So, does anyone have anything they wanted to say about that? (no response) All right.

MR. DEMO: Okay.

THE COURT: So that is granted. I can't remember, off the top of my brain, what the extended time frame was. Do you want to say that on the record? Because I've just blanked out at the moment.

(Counsel confer.)

MR. DEMO: It's -- we extended it for four months, Your Honor.

THE COURT: Okay. All right. So that was June, June 12th as the deadline for filing a plan, and then the solicitation period would expire on August 11th, 2020. That's what I've approved.

MR. DEMO: Yes.

THE COURT: All right.

MR. DEMO: Okay. The next matter is the bar date motion. There was an automatic bar date set for April 8th --

THE COURT: Uh-huh.

MR. DEMO: -- in connection with the 341 notice. We just wanted to have procedures for filing claims approved by this Court.

THE COURT: Okay.

MR. DEMO: You know, we filed the motion. There are no objections. We did have some comments from the United States Trustee, which we've incorporated into a redlined order.

Something came up last night where, the way that it works

because we have a lot of investors, is that a lot of people get notice through their custodians and through the different administrators.

THE COURT: Uh-huh.

MR. DEMO: And so we worked that into the motion. The United States Trustee has asked for an extension of 45 days for those folks to file their claim. We're okay with that. We're going to work with her afterwards, and we will submit a revised form of order.

THE COURT: Okay. So, just to be clear, the proposed deadlines, as revised, would be what?

MR. DEMO: It depends on when the notice is actually able to be sent out.

THE COURT: Okay.

MR. DEMO: We need to work through some technical issues on that.

THE COURT: Okay. Ms. Lambert?

MS. LAMBERT: So, Judge Jernigan, I think the Court is familiar with this from when we solicit Equity Committees. It's the same issue here. You go to TD Ameritrade and then they send the notice to the direct holders, but also asked that they include correspondence to the TD Ameritrade or Merrill Lynch equivalents saying -- instructing them to send the notice of the bar date to their direct holders.

So we're going to agree on the phrasing of the letter.

I'm hopeful that we can attach that to the order so the Court can see what it looks like.

THE COURT: All right.

MR. DEMO: Okay. And we'll work through those issues, Your Honor, and have something to you as soon as possible.

THE COURT: All right. And you're also asking for bar dates, really, bar date for 503(b)(9) claims as well?

MR. DEMO: Yeah. We don't think we're going to have any.

THE COURT: Okay.

MR. DEMO: So it's really just out of an abundance of caution.

THE COURT: Okay. All right. Well, I'll look for that form of order --

MR. DEMO: Okay.

THE COURT: -- and be happy to sign it as you all have negotiated it.

MR. DEMO: Okay. And then skipping over Foley Gardere, there is one still outstanding objection on that, so we will hear that in due course.

THE COURT: Okay.

MR. DEMO: The next one is Item 6 on Page 6, and that's the PensionDanmark motion to lift the stay. We have an agreement in principle with PensionDanmark that the Committee

has signed off on. We're just going through and working through the paperwork. And so we would like to just push this to the next hearing date, with the expectation that we would get the paperwork filed in between then and we wouldn't have to have it set.

THE COURT: All right. So we will carry this to our next omnibus hearing date. I don't know if we have one automatically set at this point or --

MR DEMO: It's March 13th.

THE COURT: March--?

MR. DEMO: 12th.

MS. HAYWARD: 11th.

MR. DEMO: 11th. I'm sorry. I was in the ballpark.

THE COURT: Okay. So, carried to March 11th, as necessary.

MR. DEMO: Uh-huh.

THE COURT: All right.

MR. DEMO: And then I guess the next thing, skipping over the CLO Issuers' objection, which we already addressed, --

THE COURT: Uh-huh.

MR. DEMO: -- is the sealing conference motion.

THE COURT: Okay.

MR. DEMO: And I would turn this over to my colleague, John Morris.

THE COURT: All right.

MR. MORRIS: Good morning, Your Honor. John Morris, Pachulski Stang Ziehl & Jones.

THE COURT: Good morning.

MR. MORRIS: I hope that this doesn't take too much time. But following the last hearing that we had, the Court had rendered a ruling with respect to the Committee's sealing motion. And regrettably, the Debtor and the U.S. Trustee's Office were unable to agree on a form of order. And that led to kind of a back-and-forth about the scope of the protective order that had been entered.

So, because we couldn't come to an agreement, and because the Debtor had concerns about the interpretation and the position, frankly, that the U.S. Trustee was taking with respect to the protective order, we filed our motion for the entry of an order concerning the sealing motion and for a conference. And that was filed at Docket 397.

The Court subsequently entered the Debtor's proposed order on the sealing motion, on the Committee's sealing motion. So that's moot.

The only issue, to the extent there is an issue, and I'm not sure that there is, but to the extent that there is an issue, it was just the Debtor's desire to make clear on the record that the words of the protective order are clear and unambiguous and that they apply to any party who receives

documents in this bankruptcy case, whether it's in connection with a contested matter or an adversary proceeding, and that order applies both to documents previously received and to documents that will be received in the future.

We had asked the U.S. Trustee's Office to make -- just to agree that they would abide by the protective order. And I'm not casting aspersions, I'm not saying, you know, they're bad people or anything, but we never got the crystal-clear response that we needed and expected, frankly, that the order says what the order says and the U.S. Trustee's Office would, you know, would abide by it.

THE COURT: Okay. So, --

MR. MORRIS: So that's why we asked for this status conference.

THE COURT: So this is more than just the issue of the Redeemer Committee arbitration award --

MR. MORRIS: Correct.

THE COURT: -- that was the attachment to the --

MS. LAMBERT: No, Your Honor.

THE COURT: Wait. Oh, okay. Well, what I was about to say is I was understanding from your presentation that you thought this was about more than just the arbitration award, the Redeemer Committee arbitration award that had been attached to that Committee objection and that was subject to the motion to seal.

You think it is also about items marked Confidential that the U.S. Trustee received before the entry of the protective order?

MR. MORRIS: As it explicitly provides for. And I'll just say that the concerns arise from the written communications that we received, where the U.S. Trustee's Office specifically said that they would file matters unredacted and without seal. And we asked them to simply retract that statement, because the order says what the order says. And I think it's a fair concern that the Debtor has in this regard, and it was really a very simple request. Please, please, I mean, you can't file documents unredacted and without seal because there's a protective order in place.

THE COURT: Okay. Now, Ms. Lambert, you say -- what were you about to say?

MS. LAMBERT: First, Your Honor, I want to be clear that the U.S. Trustee -- everyone in the U.S. Trustee's Office intends to honor the Court's orders. There are many things that we debate hotly and that we feel animated about in terms of legal advocacy, but we intend to honor both the office and the individual that holds that office when the Court has made a ruling.

The issue that is presented to the Court is what is the effect of dismissing a motion to seal on the basis that it is moot? There's black-letter law that sealing should be for

limited time periods and things should be unsealed --

THE COURT: Okay. Can I stop you? Are you saying that you think the sole issue here is just the arbitration award?

MS. LAMBERT: Yes, Your Honor.

THE COURT: Okay. So, so --

MS. LAMBERT: And this is how it springs back to the protective order.

THE COURT: Okay. Let me --

MS. LAMBERT: The U.S. --

THE COURT: Let me stop you, because what about other documents besides the arbitration award that the U.S. Trustee might have received prior to the Court signing the protective order?

MS. LAMBERT: The U.S. Trustee did not receive any other items that --

THE COURT: Okay. So we are just talking about the arbitration?

MS. LAMBERT: We have not to this date received any other items than those items --

THE COURT: Okay.

MS. LAMBERT: -- that were subject to the motion to seal.

THE COURT: Okay.

MS. LAMBERT: And this is the U.S. Trustee's

position. The Court --

THE COURT: I will say that one of the Debtor's lawyers is shaking his head. I want to see if there's a disagreement about, did the U.S. Trustee receive more items? Was that --

MR. MORRIS: I would say, Your Honor, I don't know exactly what was delivered, because I'm, --

THE COURT: Okay.

MR. MORRIS: -- right, I'm part of a team. But I do know that we gave, for example, information about bonus -- about, you know, personnel bonus motions that is confidential.

MS. LAMBERT: But the issue about what was going to be filed unsealed was related to the items in the motion to seal and the U.S. Trustee's attendant motion for the appointment of a Chapter 11 Trustee, which had been redacted.

THE COURT: Okay. Let me -- I'm going to take a shot at making this go quicker. What I meant when I ruled that, well, the objection of the Committee is moot now because it was resolved by other orders; therefore, I think the motion to file under seal the arbitration award is moot because it was connected to the Committee's objection; you know, that was a quick, off-the-cuff comment. What I was trying to say is I didn't think this needed any more court time. There was no case in controversy anymore. I didn't know why I needed to resolve an objection to the motion to file under seal.

What I meant is it's going to be like it never even happened, right? And what I probably should have done is said, Committee, you want to make an oral motion to withdraw your objection and withdraw your motion to seal, you know, orally, I'll grant it orally and just remove it from the record, so to speak.

And I thought we were passing off to another day whether that arbitration award, if someone wanted to file it and file it publicly or disclose it, they could then file a motion later.

MR. MORRIS: Your Honor?

MS. LAMBERT: Here's the -- here's the --

MR. MORRIS: Your Honor, if I may?

THE COURT: Uh-huh.

MR. MORRIS: You've done exactly what you've said.

THE COURT: Okay.

MR. MORRIS: I don't think there is an issue now.

THE COURT: Okay.

MR. MORRIS: I've heard from the U.S. Trustee's Office what I asked for probably three times in writing, that they are going to abide by the terms of the protective order. With respect to the sealing order, Your Honor has entered an order. It declared the Committee's motion to seal moot, and it specifically provided that anybody who's received the awards has to treat them in accordance with the protective

order.

THE COURT: Yeah.

MR. MORRIS: Nobody's appealed that order.

THE COURT: Okay.

MR. MORRIS: It's now the -- it's -- whatever the U.S. Trustee's interpretation is of the law is kind of irrelevant at this point because the order has been entered and it hasn't been appealed.

THE COURT: Okay.

MS. LAMBERT: Here's the thing, Your Honor. The case law, *Omni Video*, similar things. There are two issues. Number one is whether the mootness of the underlying issue means that the pleadings should be unredacted, which is black letter that at some point pleadings should be unredacted and made available to the public. And the Court's ruling is that by replacing the management the Court has mooted anything that might be scandalous about that or that might be problematic about it, and therefore --

THE COURT: What is the it? I'm not following.

MS. LAMBERT: -- the arbitration award and the pleadings attendant were redacted, but the --

THE COURT: I haven't said anything about -- I mean, I denied a Chapter 11 trustee motion because I thought the new management was a correct way to go forward in this case.

MS. LAMBERT: Correct.

THE COURT: The arbitration award, what I meant was it's like it never happened now. And if I --

MS. LAMBERT: Right.

THE COURT: -- need to do an amended order saying the Committee has permission to withdraw the objection and withdraw the motion to seal, I'll --

MS. LAMBERT: That's --

THE COURT: -- I'll do that, --

MS. LAMBERT: But --

THE COURT: -- so there's nothing on the record to make public.

MS. LAMBERT: But withdrawing the motion, objection, does not delete it from the record, Your Honor.

THE COURT: Well, I'm going to make it so. I'm going to make it so. And then if, one day, you or someone else --

MS. LAMBERT: Your Honor, currently, --

THE COURT: -- wants to be relieved from the protective order and asks that it be publicly filed, I'll consider --

MS. LAMBERT: Your Honor?

THE COURT: -- the merits of that.

MS. LAMBERT: Your Honor, the thing is that the Committee, when it filed its original objection, did not redact. So this information has been in the public domain for months now. And the arbitration --

THE COURT: Wait. Okay. This all happened in Delaware, so I don't know their procedure. Are you saying it was on the public PACER?

MS. LAMBERT: They didn't redact.

MR. MORRIS: No. Your Honor, the Redeemer Award (inaudible). The order says what the order says. It's been entered. I mean, this is the concern, is that we have this never-ending debate. I've heard -- the Debtor has heard what it needed to hear, and that is the U.S. Trustee's Office will abide by the terms of the protective order.

With respect to the Committee's motion to seal, we're done with that.

MS. LAMBERT: There is no --

MR. MORRIS: An order has been entered.

MS. LAMBERT: There is no motion to seal. The normal effect of -- the dismissal of a motion to seal on the basis that it is moot is that everything attendant to that becomes unredacted and unsealed.

In addition, there's a separate issue that the Debtor gets to talk about what the amounts in the Redeemer awards were unilaterally, without -- and the Committee gets to talk about it unilaterally. They've mentioned what the findings were in four different spots in their objection that are not redacted. And the U.S. Trustee is the only one that's held to the motion to seal, which we have honored, but the --

THE COURT: I don't understand why we're having this discussion. For now, I've made it a moot issue, a dead issue. The objection to which the arbitration award was attached as an exhibit became moot. Maybe I'm not using the best legal description, but it was resolved. And I didn't feel the need for us to have a dispute about whether that motion to seal, which related to the objection --

MS. LAMBERT: The motion to seal --

THE COURT: -- was meritorious or not. If -- again, --

MS. LAMBERT: But the motion to --

THE COURT: -- to me, there's an easy fix. If you're -- if you think it's necessary, I'll grant the --

MR. MORRIS: Your Honor?

THE COURT: This seems like wasted energy, --

MS. LAMBERT: But --

THE COURT: -- granting the Committee authority to withdraw their objection and their motion to seal --

MS. LAMBERT: But, Your Honor, --

THE COURT: -- so that it's off the record.

MS. LAMBERT: -- the interim sealing order didn't impact just their objection. It impacted the U.S. Trustee's motion to dismiss. It impacted the evidence. The finding that these issues are moot because they're resolved means that the Court should unredact them because it's no longer

confidential. It's no longer a problem. If the evidence is --

THE COURT: Why are we having this discussion? Why is this important in this Chapter 11 case? The arbitration award may get in one day, and someone may ask me, and I may say yes, I may say no. It depends on what the legal arguments are.

MS. LAMBERT: It's --

THE COURT: Why is this relevant right now?

MS. LAMBERT: It's important to the public's perception, and the U.S. Trustee is charged with making the information about a case available to the public.

MR. MORRIS: Your Honor, there is no motion --

MS. LAMBERT: This -- these -- these arbitration --

MR. MORRIS: There's no relief that's been sought.

MS. LAMBERT: The arbitration awards have been discussed in the press, Your Honor. And the press --

THE COURT: Well, let me just say this. Okay? This was obviously -- there was an arbitration award. It was never confirmed with a judgment by a court. And I am presuming -- I don't need to decide today -- but I'm presuming that there is some legal argument that someone feels can be made about why that arbitration award is confidential. You know, it obviously --

MR. MORRIS: The Committee made that argument in

their motion.

THE COURT: Obviously, if there had been a judgment, it all would have been out in the world. And I will say I cannot remember ever being in a situation where someone wanted to keep an arbitration award confidential in a bankruptcy case. Maybe it happens. I'm just -- I've never seen it. So if there is a day where someone wants me to find this arbitration award can be made public, I may very well do it. I don't know. I'll hear the legal arguments. But I am just asking, why are we arguing about this today?

MS. LAMBERT: We're arguing about it today because it remains a point of interest and a point of information sharing to government creditors and other creditors that are involved in the case, as well as the public.

THE COURT: They're not in here, the SEC or whoever you're --

MS. LAMBERT: Well, how would they know to be in here?

THE COURT: Because maybe they've seen the press that you're talking about. All right. I don't know --

MR. MORRIS: Your Honor, we -- the Debtor's heard what --

THE COURT: The protective order governs. And my prior order with regard to the sealing motion I think made clear, but if it didn't, I'm going to say right now: As far

as I'm concerned, the arbitration award, nothing gets unsealed on the Court's docket, and no one will file it or disclose it without bringing a motion, and we'll have a legal argument and evidence or whatever we need and I'll rule on the issue.

MS. LAMBERT: So, Your Honor, my understanding is that the Court is striking the objection to the CRO that the Committee filed and striking the U.S. Trustee's motion to dismiss, which was redacted, and striking the evidence, and those will not be on the docket available to the public at all.

THE COURT: That's not what I'm doing. I don't -- I don't even know -- I don't understand why you're saying that.

MS. LAMBERT: Well, you can't just withdraw the objection. The objection had the exhibits attached to it. The issue that the U.S. Trustee -- I'm sorry, but I'm always charged with this issue -- is trying to unseal documents and trying to determine the proper date for unsealing them. They attached to the arbitration award, like a motion for summary judgment. That's the practice in Delaware. And so the issue is, at what point will that become unsealed? It's a higher standard --

THE COURT: The answer is no, without an order from this Court.

MS. LAMBERT: It is a higher standard than for confidentiality. And in addition, --

THE COURT: All right. If you want to file a motion and we set it for hearing and we have briefing, we'll do that. But, for now, there's -- there are two orders that I will tell you on the record what they mean is, right now, the arbitration award is not to be publicly disclosed. Not by the Court on the docket system. Not by any person.

If someone wants to publicly disclose it, they can file a motion and we'll talk about whether it's protected or not.

MR. MORRIS: Thank you.

THE COURT: Whether there are grounds, legal grounds, to protect it.

MR. MORRIS: Thank you, Your Honor.

THE COURT: I've told you I'm skeptical. I'm skeptical. But, you know, we'll see. Okay?

MS. LAMBERT: Okay. Your Honor, the FJC publication is very clear that the Court should be trying, when issues are moot, to unseal items. And this is why our advocacy is this way. And I will move to unseal it.

THE COURT: All right.

MR. DEMO: For the record, Your Honor, again, Greg Demo; Pachulski Stang Ziehl & Jones; for the Debtor.

Before we move on to the Foley retention, two quick housekeeping matters.

THE COURT: Uh-huh.

MR. DEMO: We would like to set the next omnibus

hearing date on April 22nd. At that date, we would do the quarterly fee applications and whatever else comes up onto the docket.

THE COURT: All right. Have you run that by Traci Ellison yet?

MR. DEMO: We have not.

THE COURT: Okay.

MR. DEMO: We've talked to the Committee about it, though.

THE COURT: So I will call her right now.

MR. DEMO: And then, I guess, Your Honor, before you do that, we are actually asking for a hearing date on March 4th at 1:30 as well. We're going to have an expedited motion that we'll be filing, I think, this week. So if you're going to check with her, I guess it might make sense to check on both of those dates.

THE COURT: Okay.

(Court confers with Clerk telephonically.)

THE COURT: Okay. We can give you April 22nd, as you requested, at 9:30.

MR. DEMO: Okay. Thank you.

THE COURT: Okay. So that's going to be an omnibus.

(Court confers with Clerk telephonically.)

THE COURT: All right. We can give you March 4th at 1:30.

How about a preview of what we're going to -- what are we going to be seeing?

MR. DEMO: And, Your Honor, I guess we had also reserved March 2nd, and we can release that date.

THE COURT: What? I'm sorry.

MR. DEMO: We had previously reserved March 2nd at 9:30 for the expedited motion, which I'll describe briefly in a second. We don't need the March 2nd date.

THE COURT: So, okay.

MR. DEMO: Yeah.

THE COURT: All right. So I'll tell Traci that one --

MR. DEMO: Yeah. Okay. Perfect. Thank you.

THE COURT: -- is off. Okay. What is this going to be?

MR. DEMO: The expedited motion, we obviously run a series of investment funds. From time to time, those funds, either through liquidation or just through normal proceeds generation, make distributions out to their investors.

Under the protocols, distributions out to what are related, called related entities under the protocols, which include Mr. Dondero, entities owned by Mr. Dondero, and numerous other categories, those entities cannot receive their distributions from those investment vehicles if the Committee objects to those distributions unless we come to the Court and

we get Your Honor's approval.

That issue has come up. We are hoping to make those distributions to these related entities. The Committee has said that they will object, but they've also agreed to the motion to expedite.

THE COURT: All right.

MR. DEMO: So that's the issue that's going to be in front of Your Honor on March 4th.

THE COURT: All right. When are you going to file the motion?

MR. DEMO: We are hoping to file it, I think, by Friday.

THE COURT: Okay. So that would be -- what are we at now, the 19th?

MR. DEMO: Yeah.

THE COURT: Okay. So that'd be --

MR. DEMO: Yeah. And obviously, --

THE COURT: -- a couple weeks.

MR. DEMO: -- yeah, we'll endeavor to get it filed as soon as possible.

THE COURT: Okay.

MR. DEMO: And then I guess the last item, Your Honor, is the Foley Gardere retention application.

THE COURT: Okay.

MR. DEMO: And, you know, this should be a relatively

simple retention application. You know, we'll get into it a little bit more. There are two objections that were originally filed, one by the Committee and one by Acis. Yesterday morning, the Committee withdrew their objection, so the only objection to the Foley Gardere retention application is by Acis.

In the courtroom with me are Holland O'Neil with Foley Gardere -- she's the partner in charge of that representation -- and then also The Honorable Russell Nelms, who's a member of the Independent Board of Directors of Strand Advisors, the party that manages the Debtor. And I should be remiss if I didn't mention that the two other independent directors, James Seery and John Dubel, are also in the courtroom, --

THE COURT: Okay.

MR. DEMO: -- as is the Debtor's chief restructuring officer.

And as I said, Your Honor, really, the only thing, the only substantive thing we're here this morning on is this retention application. The retention application is under Section 327 of the Bankruptcy Code, and it's to represent the Debtor in three matters related to the Acis bankruptcy and the resulting litigation.

Judge Nelms is going to be testifying in support of the Foley retention this afternoon.

THE COURT: Okay.

MR. DEMO: We filed the retention application on October 29th, along with the retention application of Lynn Pinker. As I mentioned earlier, the Lynn Pinker retention application was withdrawn. Two objections were filed to the Foley retention: One by the Committee, one by Acis.

The Committee -- or, sorry, the Debtor addressed those two objections in an omnibus reply that we filed on November 21st. The primary response to those objections was providing additional disclosure to this Court concerning the parties being represented by Foley, the proceedings in which Foley was going to represent those parties, and the allocation of fees, of Foley's fees, across those parties.

The reply disclosed, and Judge Nelms will also testify, that the Debtor had originally intended to engage Foley on four matters, not three. The first matters is general matters just relating to the Acis bankruptcy, status conferences, proof of claim issues. The second matter is the appeal to the Fifth Circuit of the confirmation order. The third matter was the appeal, again to the Fifth Circuit, of the entry of the involuntary petition. And then the fourth matter was the appeal of Winstead's retention as counsel to both Mr. Terry, who is a pre-petition creditor of Acis, and Robert [sic] Phelan as the Chapter 11 trustee.

The two appeals, the appeal of the confirmation order and the appeal of the involuntary petition, have been fully

briefed to the Fifth Circuit, and some of that briefing was done, by necessity, post-petition, because of the drag in time between when we filed the retention and now. And the Fifth Circuit has actually set both of those appeals for oral argument. They've been consolidated for purposes of oral argument, and both of the appeals are set for March 30th, so about six weeks away.

Now, it's an understatement to say a lot has happened in this case since we filed the reply on November 21st. One of the most major things in this case, as the Court knows, is the appointment of the Board of Directors. The Board of Directors was appointed on January 9th and it oversees the management of the Debtor. Judge Nelms is in this courtroom and will be testifying as to what the Board did to familiarize itself with the Acis litigation and with Foley's retention. And you'll hear from Judge Nelms that the Board had extensive conversation with the Debtor's employees, including the Debtor's internal legal team, Ms. O'Neil with Foley Gardere, attorneys from Pachulski regarding the status of the Acis litigation and the bankruptcy and Foley's retention.

You'll also hear that Judge Nelms reached out directly to Josh Terry, the major party in the Acis litigation, and that Judge Nelms met with both Josh Terry and Ms. Patel to discuss the status of the Acis litigation.

And then finally you'll hear, as part of that diligence,

that the Board analyzed the economic benefit of proceeding with Foley's retention in all three of those matters that I mentioned and also conducted their own diligence on the claims that are being raised in those matters.

As a result of that diligence, and I'll discuss the explicit reasons later, the Board determined that it is in the best interest of the Debtor and its estate to proceed with Foley's retention with respect to the three matters I mentioned earlier: the Acis general bankruptcy, the appeal of the confirmation order, and the appeal of the involuntary petition.

The Debtor has also asked for Foley's assistance on certain ancillary matters, like including about disclosures of the Acis litigation, including what needs to go on the schedules and things like that.

As a result of this diligence, however, the Board decided to drop the Winstead appeal. So Acis -- I'm sorry, Foley is not going to be retained to challenge Winstead's retention in that proceeding. And assuming that Foley is retained, Foley will prepare the papers to withdraw that objection as soon as possible.

As a quick aside, though, you know, Foley was directed by the Debtor to continue with the Winstead matter post-petition. Incurred about $25,000 of fees. And we believe that Foley was working in good faith on that. So although we're not going to

proceed with the Winstead matter, we would still ask that Foley be entitled to file a fee application for those fees. The Committee has agreed with this, and we have a form of proposed order with the Committee that contemplates Foley's payment or Foley's receiving payment for the Winstead fees of $25,000.

THE COURT: Wait. You're talking about, if I approve their retention, rolling that into the retention order?

MR. DEMO: We are, Your Honor.

THE COURT: Okay.

MR. DEMO: No?

THE COURT: That's a no-go, I'll tell you right now.

MR. DEMO: Okay.

THE COURT: I mean, --

MR. DEMO: And we can, we can deal with that.

THE COURT: Yeah.

MR. DEMO: But I --

THE COURT: I'm not going to say yes or no to any fees I haven't seen.

MR. DEMO: Okay. And -- well, I'm sorry. What's going to be rolled into the order is their ability to file for those fees. Everybody would still have the right to object to those fees. You would have the right to say yes or no on those fees. The only thing that we would be asking for is that they would be able to apply for those fees and that the

fact that they weren't retained on that matter specifically would not be a basis for an objection to those fees. So it's a little bit different.

THE COURT: Okay.

MR. DEMO: We're not trying to cut off anybody's right to object to those fees.

THE COURT: Okay. But I don't want to put some imprimatur on their ability to ask for them.

MR. DEMO: Okay.

THE COURT: Okay? So, you know, it's just another day.

MR. DEMO: Yeah.

THE COURT: If they ask for that in a fee app -- if I approve their retention and they ask for it in a fee app, we'll --

MR. DEMO: Okay. Understood, Your Honor.

THE COURT: -- decide whether it's meritorious or not.

MR. DEMO: Okay.

THE COURT: Okay.

MR. DEMO: And then I guess, just moving on, you know, as you'll hear from Judge Nelms, all of the elements of 227(e), you know, have been met. You know, first, Foley is being retained for a special purpose. Nobody has objected on that basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

going to be used to satisfy the obligations under the management agreement. The balance of that is going to be used to satisfy that $8 million claim.

That means that, you know, if our math is right -- and obviously, the numbers are not static -- that there's not going to be any contributions or any distributions to the upstream equity, to Mr. Dondero or Mr. Okada, for about four years. After that four years, 85 percent of the revenue is still going to go to Highland Capital Management, the Debtor, under those advisory agreements.

So for that reason, we do believe, and Judge Nelms will testify, that the true economic beneficiary of the Neutra appeal of the involuntary petition is actually Highland Capital Management.

THE COURT: I don't want to jump ahead too much, but are we going to talk today about mootness as a potential issue with both of these appeals? I mean, you know, I have to say it's very compelling to me that you tell me all the briefing has been done --

MR. DEMO: Uh-huh.

THE COURT: -- and oral argument is set in March, so -- but is mootness a --

MR. DEMO: We don't --

THE COURT: Was there ever a motion to dismiss for mootness or --

MR. DEMO: Not that I'm aware of, Your Honor.

THE COURT: Okay.

MR. DEMO: And all the briefing has been done.

THE COURT: Okay.

MR. DEMO: Again, oral argument is set. And as far as I know, nobody has raised that issue.

THE COURT: Okay.

MR. DEMO: So I think that we're still proceeding as to whether --

THE COURT: And, again, I'm leaping ahead, but I'm just -- you know, you went through the scenario --

MR. DEMO: Uh-huh.

THE COURT: -- to show that, you know, Dondero and -- if the involuntary was reversed, you know, no money would ever get there. But you're painting a picture, to me, that, again, it feels a little farfetched. But the evidence will either, you know, bear it out or not.

MR. DEMO: Again, the evidence, you know, I think, will bear it out.

And I think what's important also is, when you're thinking about this, is to think of the actual universe of post-petition fees that Foley is going to incur for those services, for the briefing of the two appeals and then for the bankruptcy services, versus the actual economic gain that the Debtor could and hopefully will get if those appeals are

successful.

THE COURT: Okay.

MR. DEMO: So, Foley --

THE COURT: And hopefully the evidence will really go to this.

MR. DEMO: Yes.

THE COURT: I'm trying to think of -- I'm trying to decide what life looks like --

MR. DEMO: Right.

THE COURT: -- if there is a successful reversal.

MR. DEMO: Right.

THE COURT: And I'm not at all clear. So the evidence and argument will hopefully make me clear.

MR. DEMO: Yes. And, honestly, Your Honor knows the facts and circumstances --

THE COURT: Right.

MR. DEMO: -- better than me and probably better than anyone.

THE COURT: Uh-huh.

MR. DEMO: But I think what's --

THE COURT: I mean, we've had -- we had terminated contracts --

MR. DEMO: Right.

THE COURT: -- with Highland. We have a Reorganized Debtor now, which, you know, --

MR. DEMO: Right.

THE COURT: -- has new contractual arrangements.

MR. DEMO: Right.

THE COURT: I just, I'm not sure how that all goes away if there's a reversal. So I'm --

MR. DEMO: Right.

THE COURT: I'm really wanting to drill down on the benefit --

MR. DEMO: Okay. And --

THE COURT: -- to Highland.

MR. DEMO: And we can do that. But I think --

THE COURT: Okay.

MR. DEMO: -- it's helpful to talk about --

THE COURT: Uh-huh.

MR. DEMO: -- the universe of fees first and then talk about the related benefit for that.

Foley Gardere has helpfully filed two post-petition fee applications. Those fee applications disclose that, on all three of these matters, Foley has billed about $330,000. We believe that Foley was probably going to bill, up through the end of oral argument, about $500,000.

And then, you know, again -- and not getting too deep into it, because I do think this is something that's better for testimony because I think it goes to, you know, what the Board believes is the economic benefit to the estate -- but if the

Neutra appeal is successful, if the confirmation order appeal is successful, then the post-petition fees that are going to accrue or we believe are going to accrue to Highland Capital Management under those contracts are tens of millions of dollars a year.

The post-petition and gap period and pre-petition fees that we believe that Acis owes to Highland are $8 million a year. And then there's the go-forward fees.

So we believe that, for spending $500,000, the benefits to the estate are actually going to be in the tens of millions of dollars. So, you know, even though, you know, reasonable minds can differ as to the merits -- and, again, we'll put on some testimony about that, although there's obviously privilege issues and things like that -- the actual economic benefit to the estate is $500,000 versus the possible benefit of $50 million, possibly more dollars, plus the removal of a substantial portion of Acis's proof of claim, which is -- I think it says not less than $75 million. So you're looking at, if we're successful, fees into the estate --

THE COURT: Well, that's a different issue, though. Isn't that --

MR. DEMO: It is, but it --

THE COURT: Isn't that the Acis adversary proceeding component?

MR. DEMO: Yes.

THE COURT: So, --

MR. DEMO: But if the -- if the -- and, again, I don't want to get too far into this --

THE COURT: Uh-huh.

MR. DEMO: -- because I don't want to get into, you know, legal arguments that are going to be on appeal.

THE COURT: Uh-huh.

MR. DEMO: But what we believe is that, and what Judge Nelms will testify to and what you'll hear, is that if the confirmation order and the involuntary petition are erased, especially the involuntary petition, and we go back to status quo ante, the benefit to the estate is going to be in the tens of millions of dollars, at a minimum, plus the possible diminution, to a large extent, of a proof of claim that is not less than $75 million, and we've heard numbers of up to $300 million.

So you're looking to spend $500,000 on these two matters for a benefit to the estate that's going to be astronomically more than that. So the benefit to the estate versus the money that is going out of the estate, especially since everything has been briefed and set for oral argument, I guess, personally, I find it difficult to not see that benefit and not to see that spending that half a million dollars to possibly get back $50-plus million, I just don't see how that's not a benefit to the estate and how that does not

warrant the retention of Foley Gardere in the limited matters that we're honestly asking them to be retained for.

THE COURT: All right.

MR. DEMO: Okay.

THE COURT: I'll hear other opening statements on this.

MR. LAMBERSON: Good morning, Your Honor. Phillip Lamberson on behalf of Acis Capital Management.

First of all, let me start off with outlining exactly what our limited objection relates to. We are not objecting to the Debtor retaining Foley Gardere to handle the litigation matters for the Debtor. So, for example, the Acis litigation, anything related to the Acis bankruptcy, that's fine. We don't have any objection to that.

THE COURT: So the mega-adversary proceeding against Highland and affiliates that is stayed, --

MR. LAMBERSON: Uh-huh.

THE COURT: -- I have a giant Report and Recommendation on my desk that was ready to go about the time the Highland bankruptcy was filed -- but it's stayed: You would have no objection to Gardere defending Highland --

MR. LAMBERSON: Correct.

THE COURT: -- in that if ever a motion to lift stay is filed and that goes forward?

MR. LAMBERSON: Correct.

THE COURT: Okay.

MR. LAMBERSON: And, for example, I believe counsel mentioned this: To the extent that there's a status conference in the Acis case or something like that, we don't have any issue with Foley representing the Debtor as it relates to that.

We don't have any objection to the representation of the Debtor as it relates to the Debtor's appeal of the confirmation order. We don't have any objection to Neutra's retention of Foley at all. In fact, we don't have any basis to object to Neutra's retention of Foley Gardere. Neutra is not a debtor.

We fully expect and anticipate that we'll be opposite Foley Gardere in the appeal which is going to be argued at the end of next month, as well as any matters in front of this Court.

What we do object to is the Debtor agreeing -- frankly, pre-agreeing -- to pay Foley Gardere for litigation costs incurred by non-debtors, and, specifically, Neutra. And as counsel outlined, and the reply filed by the Debtors is very clear on this point, Neutra is not a subsidiary of the Debtor. Neutra is ultimately owned one hundred percent by Mr. Dondero and Mr. Okada.

So why, why are we objecting? There's a couple of reasons. Number one, this is obviously an extremely unusual

request. It's not really a --

THE COURT: Okay. Let me just make sure I heard you correct. The only thing that Acis is objecting to is the Debtor paying fees for Gardere -- Foley Gardere's representation of Neutra?

MR. LAMBERSON: Correct.

THE COURT: Okay. So, --

MR. LAMBERSON: Right. And let me --

THE COURT: -- you don't have a problem with Foley representing the Debtor in these appeal -- well, the Debtor isn't an appellant in the involuntary appeal, right? Or no?

MR. LAMBERSON: It is -- no. So, the Debtor is an appellant in the --

THE COURT: The confirmation order.

MR. LAMBERSON: -- confirmation order appeal.

THE COURT: Uh-huh.

MR. LAMBERSON: It's one of two appellants.

THE COURT: Uh-huh.

MR. LAMBERSON: The other one is Neutra.

THE COURT: Uh-huh.

MR. LAMBERSON: Neutra is the only appellant in the confirmation order -- I'm sorry, in the order for relief appeal.

THE COURT: Okay. So you don't have any problem with Foley's retention; it's just you don't want the Debtor to pay

Neutra's legal fees?

MR. LAMBERSON: Correct.

THE COURT: And there needs to be some allocation in the confirmation appeal between Neutra and the Debtor, and it needs to all be paid by Neutra, --

MR. LAMBERSON: Correct.

THE COURT: -- not the Debtor? Okay.

MR. LAMBERSON: Yeah. That's exactly correct, Your Honor.

THE COURT: Okay. Just --

MR. LAMBERSON: So I wanted to be clear on that, --

THE COURT: Okay.

MR. LAMBERSON: -- that we're not -- we understand that they're --

THE COURT: Okay.

MR. LAMBERSON: -- going to be our opponents going forward, and we're fine with that.

THE COURT: Uh-huh.

MR. LAMBERSON: I actually like Mrs. O'Neil.

So, why are we objecting? So, there's a couple of reasons. One is procedural and one is really more substantive. So, this is obviously a strange request under Section 327. 327 is to approve counsel for the Debtor, for the estate. And this request doesn't really fit.

So, for example, you engage Foley Gardere. You agree that

the Debtor is going to pay fees under 330. Okay. Well, how do we apply 330 in this situation, right? What constitutes reasonable and necessary as it relates to the Debtor when the work wasn't done for the Debtor? What constitutes a determination of whether it was beneficial to the Debtor when, again, the work wasn't done for the Debtor?

There's other issues, obviously. Who controls Neutra? It's not controlled by the Debtor. The Debtor doesn't own any of Neutra. Who is making litigation decisions for Neutra? All we know is that the Debtor is paying the freight for whatever Neutra decides to do going forward.

The other issue, Your Honor, and this is probably the broader issue, is this decision evidences a continuation of a failed litigation strategy that precipitated this bankruptcy in the first place. Right? So, we all heard that the reason Highland Capital Management had to file bankruptcy is because they couldn't pay the Crusader judgment. Right? They had a $190 million judgment, or about to be judgment against them, and they couldn't pay it.

So let's look at the Committee. Right? We have a Committee with four members on it. Three of them are litigants. Three of them are in active litigation against the Debtor.

If you look at the Top 20 List in this case, of the Top 10, only one of them is not a litigation creditor, and that's

-- I'm trying to -- is an insider creditor. The rest of the Top 10 are either litigation adversaries or they're law firms that were paid to fight the litigation adversaries.

So why is the Debtor continuing its strategy of fighting every last issue, and using various instrumentalities to do it, and then paying the freight for all of it? That's exactly how we got to where we are today in this case.

So, let me address also the benefit from the Neutra appeal. And, Your Honor, I think that's definitely an area that we need to probe. Because, like you, I don't get it. I think what they're outlining is sort of a fantasyland where money is going to rain from the sky when they win this appeal, or if they win this appeal. And obviously, their reply goes on for pages about the benefit to the Debtor.

So, just using basic odds of winning -- and I'm not going to go to the substance of this appeal, which I think is probably worse than the basic odds -- there's a 90 percent chance that the Fifth Circuit just affirms the -- Judge Fitzwater's ruling. Right? I mean, there's a 90 percent chance that what the Debtor gets out of this is an affirmance that says, "You lose." Right?

But even if it's reversed, --

THE COURT: What are you basing that on? Because Fitzwater affirmed 90 percent of the time?

MR. LAMBERSON: Well, so, actually, Judge -- and Ms.

Chiarello can probably address this more specifically -- Judge Fitzwater actually gets affirmed, I think, more than 90 percent of the time, --

THE COURT: Probably, yes.

MR. LAMBERSON: -- but the general reversal rate at the Fifth Circuit is about ten percent. So, and that obviously includes things like 1983 appeals and things like that.

But even if it is reversed, which I think we'd all agree is fairly unlikely, again, money isn't just going to start raining down on Highland Capital. So what's most likely going to happen if the Fifth Circuit decides to reverse -- and let me, let me point out one issue, Your Honor. The only issue on appeal, I should say the only -- there are various issues on appeal, and I'll just click through them. So, one of them is whether Neutra has standing to appeal. Right? Whether they qualify under the person aggrieved standard that the Fifth Circuit uses. That's obviously a gating issue. And, by the way, that's the basis of Judge Fitzwater's ruling affirming this Court's ruling, which was basically Neutra doesn't have standing to appeal the order for relief. They're not the Debtor.

So the first issue is whether Neutra is a person aggrieved. Okay?

The second issue, and this is the substantive bankruptcy

issue, the only substantive bankruptcy issue, is whether the order for relief should have been arbitrated. Right? So that's the next issue. That would be, frankly, the issue that the Fifth Circuit would have to reverse on, is that well, yes, this should have been arbitrated. Right? The order for relief should have been arbitrated.

And then the final issue that we raised on appeal is whether, even if Neutra has standing and even if there was some right to arbitration, whether Neutra, via the putative debtor, waived its right to arbitration by waiting until literally, and you'll remember this, literally the day before the order for relief file started, to raise its request for arbitration. Right?

So, assuming that they get some reversal, what's really likely to happen is that the Court, the Fifth Circuit is going to send it back to you on a remand and say, This is the standard you should have applied, you need to make this finding, or something like that, right? It's very unlikely the Fifth Circuit is going to say, We're going to reverse and we're just going to render, right, and this thing just goes away forever, particularly considering that the only live substantive issue is whether the order for relief should have been arbitrated, right?

But even if Neutra wins and its relief is wholly granted, well, what does that mean? That doesn't mean that the

involuntary goes away. It doesn't mean the order for relief permanently goes away. It means that we go arbitrate it. Right? That's what they asked for, is that we go arbitrate it. So now we go arbitrate it. Right?

So, basically, if you break it down, if, in the unlikely event Neutra wins on appeal, it doesn't mean the bankruptcy permanently goes away. What it means is we have more litigation. Right? And that's what normally happens when there's a reversal on appeal, right? You relitigate the issues that were litigated in the first place.

So this concept -- you're exactly right, Your Honor. This sounds like fantasyland. This concept that money is just going to fall out of the sky and onto Highland because Neutra got a reversal is just not going to happen.

There's some other problems here, obviously. Counsel just spent a lot of time talking about how all of Acis's funds are going to get paid to Highland. Well, that completely misses the point that Josh Terry has an eight, probably somewhere in the neighborhood of maybe $12 million judgment now against Acis. They're just going to ignore that? They're just going to ignore the fact that their largest creditor has a judgment against them and is just hanging out there? That's going to have some impact on what happens to all that cash flow.

And then, finally -- and we'll talk about this in more substance when we get to the testimony -- as you recall, this

was the entire basis of the Acis case: Mr. Dondero and Highland Capital were aggressively trying to liquidate Acis when we showed up in your Court asking for relief. So what makes anybody think that that isn't going to continue happening if there's not a bankruptcy anymore? Right?

And Your Honor will recall that you had to twice enjoin Dondero affiliates, HCLOF, from liquidating the PMAs and Acis's assets during the bankruptcy. Right? So the concept that if they win on appeal and there is no bankruptcy, everything just goes away and we're not in this Court at all, that Acis is going to have all of these valuable PMAs and cash flow and it's all going to go to the benefit of Highland, is completely contrary to what happened during the Acis case and what precipitated the Acis case.

One other issue that we raised in the objection and in the Debtor's omnibus reply is what we call the DAF litigation, which is litigation filed in the Southern District of New York. And Your Honor, I think you probably remember that from the pleadings. I do want to point out that -- so this, this is a serious issue for Acis. And the reason is because, contrary to what was stated in the reply -- admittedly, this happened after the reply -- but contrary to what happened -- was stated in the reply, that litigation has now been expanded to include Acis and Mr. Terry and Brigade, and with basically the same allegations of CLO mismanagement that were raised in

this Court during the confirmation hearing.

So this is a very significant matter to us. We are very concerned that this Debtor is involved in that and is promoting it in some way. And we want Your Honor to be aware of that litigation and the actions that are taken challenging your rulings in a court that's miles and miles away from here.

Thank you, Your Honor.

THE COURT: All right. Mr. Morris, are you ready to call your witness?

MR. MORRIS: Yes, I am, Your Honor. The Debtor calls Russell Nelms.

THE COURT: All right.

MR. MORRIS: Your Honor, I have some exhibit binders. May I hand up?

THE COURT: You may. All right. Well, odd as it is, I suppose I in this context need to swear you in.

RUSSELL NELMS, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Please be seated.

MR. MORRIS: John Morris for Pachulski Stang Ziehl & Jones on behalf of the Debtor, Your Honor.

Before we get to the testimony, the Debtor has put on its exhibit list nine specific documents that are in the binder before you, and the Debtor moves for the introduction of those documents into evidence.

THE COURT: All right. Any objection?

MR. LAMBERSON: No objections, Your Honor.

THE COURT: Exhibits 1 through 9 are admitted.

(Debtor's Exhibits 1 through 9 are received into evidence.)

MR. MORRIS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Nelms, do you currently have a relationship to the Debtor?

A I do.

Q And what is that relationship?

A I am one of three independent directors of the Debtor.

Q And when were you appointed?

A January the 9th of this year.

Q Did you just listen to the opening statement on behalf of Acis?

A I did.

Q And did you hear the reference to the DAF litigation?

A I did.

Q And did you hear the allegation that the Debtor somehow was involved in the prosecution of the DAF litigation?

A I heard that, yes.

Q Okay. Did there come a time last week that the Board learned of the possibility of a filing with respect to the DAF litigation?

A We learned about the filing of the DAF litigation sometime within the last two weeks.

Q And what did the Board do in response to learning that information?

A Well, first of all, I -- we met with Ms. Patel and her client, Josh Terry. They expressed their concerns about the DAF litigation. And so the Board used its influence to encourage the trustee of the DAF, Grant Scott, to dismiss that litigation, and we have gotten Mr. Scott's commitment to dismiss the litigation.

There's a little bit of an issue there concerning about whether some of the claims can -- they may need to be dismissed without -- the preference is, of course, to dismiss them without prejudice, but there are some issues about that. But I'm told by Mr. Scott that he's going to dismiss the litigation.

Q Let's go back in time before this was filed. Did the Board express its view as to whether there should be a filing at all?

A It was really a very brief thing. This was probably a couple weeks or so ago, kind of late in the day at the end of a long, long day, one of those long days we've been having. Someone brought into a board meeting I guess a copy of this new DAF complaint. It had not been filed at that time. They showed it to Mr. Dubel. He looked at it and just kind of

asked what it was. There was a brief explanation of what it was. And Mr. Dubel said, Tell them not to file this. He goes, This is only going to cause us problems. And that's the last we heard of it before it was filed.

Q And what law firm filed that complaint?

A That was filed by the Lynn Pinker firm.

Q And after the Board learned that Lynn Pinker filed this, in spite of the Board's instructions, did the Board take any steps with respect to Lynn Pinker?

A Well, of course, we -- one of the matters that previously was before the Court was the Lynn Pinker application to be retained in this case. And I'll just say that it was -- it was a factor that went into our deliberations concerning our decision not to go forward with the Lynn Pinker litigation.

Q So, I just want to make sure I have this right. So the Board, upon learning of a possible filing, gave instructions not to do so; is that right?

A It did.

Q And upon learning that it was filed, it became one of the factors that the Board relied upon in determining not to pursue the Lynn Pinker retention; is that right?

A That's correct.

Q And you personally reached out to Mr. Terry and Ms. Patel to discuss the issue; is that right?

A Mr. Seery and I did, the two of us.

Q And you used whatever influence you had to try to reach an agreement for the withdrawal of that complaint without prejudice; is that right?
A That's correct.
Q Okay. Now, let's get back to the issues that are relevant to the actual motion. Are you aware that the Debtor has sought the Court's approval to retain Foley Gardere as special counsel?
A I am.
Q And have you reviewed the court filings with respect to that motion?
A Yes, I have.
Q Okay. Can you describe for the Court generally the matters for which the Debtor seeks to retain Foley Gardere?
A There are three matters, essentially. One is an appeal in the Fifth Circuit which concerns the entry of the order for relief in the involuntary petition itself. The second is an appeal in the Fifth Circuit that concerns the confirmation of the Acis plan. And the third matter is the assertion of, prosecution of a proof of claim that Highland Capital Management would have in the Acis bankruptcy.
Q Okay. And are these the special purposes for which the Debtor seeks to retain Foley?
A Yes.
Q Do you know whether there are matters that were part of

the original motion but which the Debtor no longer seeks to pursue?

A One of the matters that was pending when we took office was an appeal, and I believe it was still in the District Court, and that related to an alleged conflict of interest by the Winstead firm. And so there was an objection to their fees and an appeal concerning payment of Winstead fees. And the Board has decided not to go forward with that appeal.

Q Okay. So the Board -- did you hear the opening from Acis's counsel that charged that the Debtor was just doing more scorched-earth litigation tactics? Did you hear that charge?

A I heard that, yes.

Q Okay. But yet the Board has instructed Foley not to pursue the Winstead matter; is that right?

A That's correct.

Q And just again, for the record, why did the Board make that decision?

A The Board made that decision because we just thought it was in the best interest of the Debtor and this estate not to do that.

Q And did the Debtor see any benefit to pursuing that particular litigation?

A You know, there -- a benefit could be articulated, but we decided not to pursue it.

Q Okay. So, that, plus the Neutra appeal, are two -- I mean, I apologize, withdrawn. That, plus the DAF matter, are two examples where the Board exercised its judgment not to pursue pending litigation; is that fair?
A That's correct.
Q Okay. Is the Board supportive of the Debtor's application to retain Foley for the three matters you have described?
A It is.
Q And without revealing privileged communications, can you describe generally the diligence that the Board conducted to reach that decision?
A Well, we met with some of the people that work at Highland. We met with the Debtor's attorneys, the Pachulski firm. We did have a couple of meetings with Ms. Patel and Mr. Terry. Some of us have reviewed the pleadings, some more than others. And, well, we may have done other things, but those are the ones that come to mind right now.
Q I don't know if you mentioned it, but did you confer with Ms. O'Neil?
A Oh, yes, we did. We talked with Ms. O'Neil about it.
Q Okay. And what was the purpose of the diligence that you just described for the Court?
A Well, ultimately, what we as a board were trying to do was to conduct kind of a cost-benefit analysis to the estate: How much will this potentially cost us? What's the potential

upside of pursuing it? And based upon that cost-benefit analysis, we thought that this was the best thing to do.

Q Okay. Let's just focus on a couple of very narrow 327(e) issues. Is the Debtor seeking to retain Foley to act as general bankruptcy counsel?

A No.

Q And which firm serves as general bankruptcy counsel?

A That would be the Pachulski firm.

Q Okay. And do you know whether Foley Gardere represented the Debtor's interest in each of the three matters that you've described?

A It has been representing the Debtor previously.

Q Okay. So let's talk about those three matters. The first one I believe you said was with respect to the representation of the Debtor in connection with an $8 million claim that it has against Acis; is that right?

A That's correct.

Q And is that the claim -- is that the subject of a formal proof of claim?

A Yes.

Q Okay.

A It is a claim filed in the Acis case.

Q I've placed before you an exhibit binder, and I would ask you to turn first to Exhibit 4.

A Okay.

Q And is that one of the proofs of claim that the Debtor has filed against Acis?
A It is.
Q And you'll see that attached to the proof of claim a few pages in there's a document called the Third Amended and Restated Sub-Advisory Agreement. Do you see that?
A Yes.
Q Do you know what that document is? Generally?
A Well, generally, I know what this document is.
Q All right. And what's your general understanding of the document?
A This is an advisory agreement that -- the only thing that I know, I can tell you, really, about this agreement is it gives rise to and generates fees that would inure to the benefit of the Debtor.
Q Okay. And a few pages past that, you'll see something called a Fourth Amended and Restated Shared Services Agreement. Do you see that?
A Yes.
Q Is it your understanding that that was another source of revenue that the Debtor generated when it had this agreement in place with Acis?
A Yes.
Q Okay. Do you have an understanding as to, you know, ballpark, what the annual fees were that the Debtor received

pursuant to these agreements prior to the Acis bankruptcy?
A Well, I think, prior to the bankruptcy, it was more, and perhaps significantly more, than it is today. It may have been in the $12 million range per annum. I think it's less than that today.
Q Okay. And can you turn to Exhibit 5, please? Is that another proof of claim that was filed in the bankruptcy case, the Acis bankruptcy case?
A Yes. This is a little bit different. This is an application for an administrative expense claim. The prior proof of claim that we looked at related to a pre-petition claim that the Debtor had, then a gap period claim that the Debtor had, and this is post-petition. So this is an administrative claim. It's basically for the same services, but just different time periods.
Q Okay. And who was responsible for preparing Exhibits 4, 5, and 6?
A Ms. O'Neil and the Foley firm.
Q Okay. And has the Board reached a conclusion that it's in the Debtor's best interest to retain Foley on a post-petition basis to prosecute these claims?
A It has.
Q And why -- what's the justification for that? Why did the Board reach that decision?
A Well, we believe it's in the best interest of the Debtor.

Obviously, a couple of things there. I realize we may have a very long road ahead of us with respect to these things. But the overall aspirational goal is to have an income stream that's associated with these agreements. The goal is to have an amount of money out there that's available to pay our pre-petition claims, the gap claims, the administrative claims, while at the same time acknowledging that this company has the obligation to satisfy and fulfill Mr. Terry's claim as well.

Q All right. Let's just focus for the moment on the three proofs of claim. The aggregate amount is approximately $8 million. Do I have that right?

A Yes, that's right.

Q And from the Board's perspective, is the -- are those claims an asset of the estate?

A They are.

Q And does the Board want to retain Foley for the purpose of trying to recover that asset?

A It does.

Q And has the Board concluded that Foley is familiar with these particular claims?

A Foley is familiar with these claims, yes.

Q And -- okay. Let's move on, then, to the second task for which the Debtor seeks approval to retain Foley, and that is with respect to the confirmation order. That's one of the tasks, right?

A It is.
Q Okay. And this is one of the Fifth Circuit arguments that's scheduled for six weeks from now; is that right?
A That's correct.
Q Okay. And has Foley represented the Debtor throughout the proceedings that are leading up to this oral argument?
A It has.
Q And did Foley prepare all of the briefing in connection with the arguments?
A It did prepare the briefing. It did that, in some respects, along with Lynn Pinker.
Q Okay. Did you personally review the Debtor's briefs that were filed in connection with the appeal?
A I have reviewed those.
Q Okay. Have you reviewed every single piece of the record on appeal?
A I would doubt that I have.
Q Okay. Do you have a general understanding of the nature of the appeal? Of -- and this would --
A Are we talking now about the confirmation appeal?
Q Yes. Just the confirmation. Yeah.
Q Well, the appeal has basically two broad elements, and the first is an argument that the plan was not brought in good faith. Section 1129(a)(3). And that goes back to the arbitration issue. Generally speaking, that because -- the

allegation is that because Mr. Terry refused to arbitrate, then the plan was tainted by that lack of good faith. And the second issue, broad issue that's involved in that appeal has to do with, oh, the injunction, the breadth and scope of the injunction, which the Debtor contends is -- was improper.

Q And if the Fifth Circuit reverses the underlying decision, has the Board made a determination of the possible benefits that the Debtor may receive?

A Well, there's two aspects of that appeal. One would be a narrower decision. I suppose, if it's just related to the injunction, it's -- it's hard to quantify exactly what that would mean.

Q Okay.

A The bigger issue, of course, has to do with the arbitration. And if the -- theoretically, at least, the arbitration, if the Fifth Circuit agreed on the issue of arbitration, then the argument would be that we would -- that in the arbitra... well, it is true to say that -- well, I think I'm kind of getting ahead of myself here.

Q You are, just a bit. Let's just focus on the confirmation appeal. That's been consolidated for oral argument purposes --

A It has.

Q -- with the appeal of the involuntary; is that right?

A That's correct.

Q Okay. And just to sum up this piece of it, did Foley represent the Debtor with respect to all of the underlying proceedings?

A It did.

Q And why does the Board believe it's in the Debtor's best interest to retain Foley to conduct the oral argument and to finish up this proceeding?

A Well, first of all, I think the Court would agree with me that Foley is a very competent law firm. It's competent to do the work that they've been charged to do.

Second, pretty much all the work on the appeal is already in the can. The only thing that's left to be done at this point in time is to make the oral argument. Obviously, if we didn't go forward with the Foley firm, we'd have to find somebody who could make the argument. So, we would -- but we would lose the benefit of Foley's experience that they have in the case so far.

I think there will be a cost element that would be associated with bringing somebody new up to speed with respect to this.

So, those, generally speaking, are the benefits that we see.

Q Okay. Let's turn then, finally, to the Neutra appeal. Do you have a general understanding of that matter for which the Debtor seeks to retain Foley?

A Yeah. The Neutra appeal, what happened in Neutra is that Neutra, to my understanding, moved to intervene in the involuntary proceeding. I think that intervention was denied. And so that appeal has to do with the fact that Neutra contends that it should have been permitted to intervene, that the matter of collections should have been arbitrated.

I think that one of the issues in there is this -- in that appeal is who decides on the issue of arbitrability. Is it this Court, or is it the arbitrators themselves?

So, those are the issues that are present in the Neutra appeal.

Q Okay. Is the Debtor named a party to the appeal?

A The Debtor is not a named party in the Neutra appeal.

Q But the Board nevertheless wants to retain Foley on a post-petition basis to prosecute that appeal; is that right?

A That's correct.

Q And why is that?

A Well, I think both -- we recognize and I think the Fifth Circuit recognizes as well that these two things, that these two appeals kind of go hand-in-glove. The 1129(a)(3) argument basically is dependent upon the arbitration issue, which is fleshed out in the Neutra appeal.

And so, at the end of the day, the way that the Board sees this is that the Debtor is the most immediate beneficiary of the economic benefit of the Neutra appeal. We see the

possibility of an income stream there. We see the possibility of the ability to pay our claims in the Acis case. And I think -- one of the things I think that is of particular focus when it comes to all of this litigation is the fact that, as I understand it, Mr. Terry started out with an $8 million claim, and I think he bid $1 million of that claim for the interest that he got in Acis, which reduced it, say, to $7 million. And I think Mr. Terry's interest now over time I believe it's been reduced to somewhere between $4 to $6 million. So that's, that's a claim.

But in this case, Mr. Terry has filed a proof of claim for $70 million. And my understanding from our visit with Mr. Terry and his counsel is that that claim could get up to $300 million. And so, as a board, we look at that and what we're concerned about is the migration, the alleged migration of a tremendous amount of value from Highland down to Acis. So, at the end of the day, it doesn't really matter who you regard as the ultimate equity owner of Acis, whether it's Mr. Terry or whether it's Mr. Dondero: The migration of that value downstream to Acis is of no real benefit to Highland Capital at all.

Q Is this one of the issues that the Board discussed with the Committee last week in connection with this motion?

A Yes. It is.

Q Okay. And let's just go back to the income stream for a

second. The income stream that the Board is hoping it will get if the decision is reversed, is that income stream derived from the two agreements that we just looked at?

A It is.

Q So those are the two very agreements that the Board would look to have reinstated if it were to succeed on the appeal; is that right?

A Yes.

Q Now, does the Board know exactly the form of relief the Fifth Circuit is going to grant?

A I have no earthly idea.

Q Right? But has the Board made a determination that the outcome of Neutra obtaining control of Acis is one possibility?

A It's certainly a possibility.

Q And is that the potential benefit that the Board focused on in deciding to pursue this motion?

A Yes. I mean, I'm glad to adopt the percentages that Mr. Terry's counsel has mentioned today. I guess if the cost-benefit analysis is that we're going to pay a couple hundred thousand dollars here to get to the end of the road, and the benefit is millions of dollars, well, even if our chances are only ten percent, I think that's a shot worth taking.

Q Thank you very much. If the Fifth Circuit reversed, because this is a point that was also made in the Acis

opening, what would happen to Mr. Terry's claim? Or what's your understanding or what's the Board's view as to whether or not it would intend to satisfy Mr. Terry's claim?

A I know, speaking on my behalf, that I'd -- the claim that Mr. Terry got through arbitration I regard as a valid claim. I think it's one that would have to be addressed no matter who is in charge of paying the obligations of Neutra.

Q Has the Board concluded that it's in the Debtor's best interest to retain Foley for the purpose of prosecuting the Neutra appeal, or at least in issuing the oral argument?

A Yes.

Q Okay. And when is the argument scheduled for?

A March the 30th.

Q And is the fact that that's all that's left with respect to this aspect of the engagement a factor that the Board took into account in its decision?

A Yes.

Q Has the Board reached a decision as to who the real economic party in interest is with respect to the Neutra appeal?

A Yes. We believe ultimately that our Debtor would bear the most economic interest in the outcome. And, really, because of the amount of the obligations that are owed, both to Mr. Terry, to Highland Capital, by the time that you have this kind of runoff of all the revenue streams, I'm not really sure

that there would be anything left for either Mr. Dondero or Mr. Okada.

Q So, --

A That's -- that's a view from 50,000 feet, not even 30,000 feet.

Q Okay. Well, let's talk about the specific benefits, potential benefits, if it's reversed on appeal. Does the Board believe it's possible that the two contracts get reinstated?

A It is possible.

Q And is that a motivating factor in supporting this motion?

A It is.

Q What would happen to the $8 million claim that the Debtor has against Acis right now in the Acis bankruptcy? Does the Board have a view as to what would happen to that?

A It would be our aspiration to collect that claim on behalf of our client, which is Highland Capital Management.

Q And would -- is it the Board's expectation that if it was in that position it would get paid hundred-cent dollars, rather than at least a portion of it as a general unsecured claim?

A Again, that would be our aspiration.

Q Uh-huh. What would happen to the adversary proceeding? Do you have an understanding as to what would happen in the adversary proceeding with respect to Mr. Terry if the Fifth

Circuit reverses and Neutra regains control of Acis?
A Well, I'm assuming -- I'm assuming that that adversary proceeding would go away.
Q Okay. And would that -- is that a potential benefit to the estate?
A That would be a benefit to the estate if it did.
Q And do all of the factors that we just discussed go into the cost-benefit analysis that the Board did in deciding to pursue only these three very limited aspects of the engagement?
A Yes.
Q Okay. Has the Board considered the potential harm to the Debtor if the motion is denied?
A We have.
Q And have -- can you share with the Court the issues that the Board has identified as potentially being adverse if the motion is denied?
A It's really just the other -- the flip side of the coin of benefit, which is added expense, loss of the experience that the Foley firm has, perhaps delay of time in finding somebody else, bringing them up to speed, not just with respect to the two appeals but with respect to the proof of claim. And there may be others that I'm not thinking of right now.
Q Did the Board consider the potential loss of the institutional knowledge that Foley has and the potential

adverse impact it would have on the quality of the oral argument?

A It did.

Q Okay. So, two of the three matters that the Debtor seeks to retain Foley for are appeals to the Fifth Circuit; is that right?

A Yes.

Q And did those matters originate in this courtroom?

A They did.

Q And you were colleagues with Judge Jernigan at one time, weren't you?

A Yes. We were bench colleagues for twelve years.

Q And do you believe Judge Jernigan is a good judge?

A I do.

Q Do you believe she's a fair judge?

A I do.

Q Do you believe she tries to get it right every single time?

A I know she tries to get it right every time.

Q So then why is the Board seeking to prosecute these appeals of Judge Jernigan's decision?

A Well, it's in the best interest of our client to do that. And I have not -- I have to say there's always a little bit of discomfort that comes with something like this, but I do know this from my time on the bench, and that is that when you take

the job that Judge Jernigan has, you take it with full understanding of how the system works. And in the system, half the people lose at any one given time. And when you lose, you tend to be disappointed in the result, and the result of that is that you get the right to go to the next court and have someone say that the judge got it wrong.

So those of us that take the bench understand that that's the system, and I don't think -- for the most part, we're not threatened by that. And so I, you know, as uncomfortable as this may -- this may put -- a position it may put me in from time to time, I think that -- I think Judge Jernigan understands the roles that we all play in this system. And so --

Q Just, okay, just to summarize: If the motion is granted, what's the absolute worst-case scenario here for the Debtor?

A I'm sorry. Would you say that again?

Q If the motion is granted and the Debtor is allowed to retain Foley for the three tasks which you have described, do you have an understanding as to what -- what's the worst that could happen? They'd have to pay Foley's fees, right?

A We'd have to pay -- well, subject to Judge Jernigan's approval, --

Q Right.

A -- those fees would be paid.

Q And subject to everybody's opportunity to object, right?

A Right.
Q But if the fees were paid at a hundred percent, nobody objected and Judge Jernigan approved of them, what's the maximum exposure that the Debtor has from this?
A I think Foley has about $311,000, I believe, right now in time. And I think they would probably have about maybe another $100,000 more. And I know -- I hate to scoff at the notion that $400,000 is a lot of -- is not a lot of money. But, you know, in the grand scheme of things in this case, it's -- I won't say it's a rounding error, but it's not a lot of money.
Q And forget about, I mean, not forget about, but in addition to its relative size to the overall case, how does that compare to the relative economic benefit that the Debtor believes it will recover if the appeal is successful?
A Well, I think the cost is -- the cost is less than half a million, and the potential benefits are in the millions.
MR. MORRIS: Okay. Just one moment, Your Honor, if I may?
THE COURT: Okay.
(Pause.)
MR. MORRIS: All right. Just a few more questions, Your Honor.
THE COURT: Okay.
BY MR. MORRIS:

Q Mr. Nelms, did Neutra pay a portion of the fees, Foley's fees prior to the petition date in connection with an April litigation? Do you know?
A If they did, I'm not aware of it.
Q Okay. Do you know what would happen to the appeal if there was no funding for the appeal?
A Well, I think I know what the result of the appellant not showing up for an appellant argument would be.
Q And what would that be?
A Well, I think that would be a pretty quick resolution.
Q Do you think the case would be dismissed, the appeal would be dismissed?
A I think so.
Q And would that be the loss of a potential material benefit and asset of the Debtor's estate?
A It would be.
Q Can you think of any way to ensure the appeal is prosecuted today other than making sure the Debtor funds it?
A I'll put it this way. I think the most certainty can be added to this case by having the Debtor fund this matter through the end of March.
Q And from --
A I think that's -- that's -- for the time being, that's the easiest, most simple path.
Q And you say for the time being. Has the Board reached an

agreement to never request, from Neutra or anybody else, contributions for the funding of this case?

A No. Ultimately, there is going to be at some point in this case a settling of accounts between the Debtor and Mr. Dondero, just as there are -- will be a settling of accounts between the Debtor and other parties in interest. We, as the Board, have just chosen not to have that fight today.

Q And why did the Board reach that decision?

A Because we just thought it was in the best interest of the Debtor to proceed that way.

Q And is that because you need this appeal argued on March 30th?

A It is.

Q And that's because of all of the potential benefits that you've identified; is that right?

A Right.

Q Okay.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: Okay. Cross?

MR. LAMBERSON: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. LAMBERSON:

Q Good morning, Mr. Nelms.

A Good morning.

Q How's it to be on that side of the bench?

A Not so fun.
Q It's not great, right?
MR. LAMBERSON: And Your Honor, we have an exhibit notebook, which we're not -- we're not going to use all these exhibits. We actually -- you'll notice that there are some empty tabs in here. We downsized the exhibits from the exhibit list, and I'm not going to use all these. So I'll just introduce them as I get to them.
THE COURT: Okay.
BY MR. LAMBERSON:
Q Let me pick up on your last point.
MS. CHIARELLO: Your Honor, may we approach? We have binders.
THE COURT: You may.
BY MR. LAMBERSON:
Q So, let me pick up on your last point, Mr. Nelms. So, who -- who owns Neutra?
A Well, if you follow the stream all the way up, it is owned 75 percent by Mr. Dondero and 25 percent by Mr. Okada.
Q Okay. And Mr. Dondero is one of the richest men in Dallas. Correct?
A I don't know.
Q Presumably? Mr. Okada is also one of the richest men in Dallas?
A I don't know. I haven't lived in Dallas in 17 years.

Q Okay. Fair enough. But they can't -- they can't pay the litigation costs for their own entity?
A Well, I don't know that they -- whether they can or whether they can't.
Q Right. So, are you familiar with an entity called Highland CLO Funding?
A Vaguely, yeah.
Q Okay. And Highland CLO Funding is one of the appellants in the appeal of the confirmation order, correct?
A That's correct.
Q Okay. And one of the issues on appeal is actually the plan injunction that's embedded in the confirmed plan, correct?
A That's correct.
Q Right. And is your understanding that that's really Highland CLO Funding's main appeal issue?
A I think it probably would be, yes.
Q Okay. And is there any reason that Highland CLO Funding can't pay Neutra's legal fees to have -- have another appellant in the Fifth Circuit?
A I don't know the answer to that question.
Q Okay. So, let me -- let me -- I'm going to try to keep this coordinated, but my notes are a little bit over the place, so I apologize in advance if I move around a little bit.

So, you had testified earlier that -- and I'm just trying to synopsize your testimony -- that you -- that the Board believes the primary benefit of paying Neutra's legal expenses related to the order for relief appeal and the confirmation appeal is the income stream that would be evidenced by the sub-advisory agreement, right?

A Yes.

Q Okay. And I'm -- when I say sub-advisory agreement, I'm talking about this is the attachment to the Debtor's Exhibit 4, which is the proof of claim.

A Right.

Q Right? And so it's your understanding that the way that works is Acis Capital Management, my client, is the portfolio manager for a bundle of CLOs, right?

A That's my understanding.

Q And that before the Acis bankruptcy, the sub-advisory agreement allowed Highland Capital Management to sub-advise those CLOs for a fee, correct?

A That's correct.

Q Okay. So, I'm going to focus on the confirmation appeal. So, you understand that the plan injunction prevents the liquidation of the CLOs and the Acis portfolio management agreement?

A That is my understanding.

Q Okay. And the reason that, frankly, we had to get the

plan injunction is because HCLOF three times tried to liquidate, redeem the CLOs, including twice in the bankruptcy case?

A I understand that was an issue. But -- I have a general understanding as to what you're saying, but not a specific understanding. But I'm not disagreeing with you.

Q Yeah. Okay. And so if the plan goes away, the plan injunction goes away, then is there any reason to think that HCLOF isn't going to liquidate the CLOs?

A I would not know.

Q And in that case, there's not going to be any cash flow under the portfolio management agreements or the sub-advisory agreements, right?

A If you're asking me if that's a possibility, I'd say it's certainly within the realm of possibilities.

Q Okay. So, staying on the confirmation appeal, so let's -- let's assume that, for whatever reason, the Fifth Circuit decides that the confirmation order needs to be reversed and they send it back down to Judge Jernigan and say, "Try again." Would you agree that that would effectively reactivate the Acis case?

A Well, I don't know, because, you know, one of the issues in the appeal is who gets to make the decision with respect to arbitrability. Because I know that it's the Appellants' position that the decision as to whether or not it should be

arbitrated, something such as collections, should they go to be decided by the arbitrator, --

Q Let me stop you, just to be clear. I'm talking about the confirmation appeal, the appeal of the confirmation order.

A Uh-huh.

Q Right? Okay. I'm not talking about the order for relief appeal.

A I may be conflating the two, so I'm sorry.

Q Yeah, yeah, and I -- and it's -- yeah, it's -- but it is confusing. But I'm talking about the confirmation appeal. So the appeal of the Court's confirmation order confirming the -- I think was the third amended plan. Okay? So, I'm focusing on that appeal only. If the Fifth Circuit says, "Nope. Try again," then you would agree with me that that effectively reactivates the Acis Chapter 11 case?

A Well, I think it depends. If you -- would you like me to explain why I think it depends?

Q Yeah. Go ahead. I don't -- because, I mean, honestly, I'm not exactly sure what happened, so I would actually -- I would like your opinion.

A Well, given that the first issue in the confirmation appeal is the issue of good faith, and the foundation of that pretty much is the whole arbitration issue, if the Fifth Circuit were to reverse on that basis, then I don't necessarily know that it would go back to the Bankruptcy

Court.

If it was reversed just on the narrower issue with respect to the injunction, and maybe whether the injunction was too broad or something like that, --

Q Uh-huh.

A -- and that was the only basis for reversal, I would agree with you it would go back to Bankruptcy Court.

Q Okay. So there's some possibility that a result of the confirmation appeal is that the Acis Chapter 11 case is reactivated and we're back in front of Judge Jernigan on that case, too?

A That would be a possibility.

Q Okay. And then you'd get to talk with Mr. Phelan, right? That would be fun.

A Right.

Q So, so how much money did Highland Capital spend in the Acis bankruptcy case?

A I don't know.

Q Was it -- it was millions and millions, right?

A I don't know, but I'm -- I'm assuming it exceeded a million.

Q Okay. Well, aren't there -- aren't there claims of unpaid fees just in the Top 20 list, which we'll point to here in a minute, in the millions of dollars that relate to the attorneys that represented Highland in the bankruptcy -- in

the Acis bankruptcy case?
A I don't know.
Q Okay. So, why, you know, assuming that a result of the confirmation appeal is that the Acis bankruptcy case is reactivated, how is that in Highland's best interest? And I'm not talking about Neutra, and I'm not talking about HCLOF. I'm talking about Highland.
A Well, the -- what would be in our best interest would be to once again control the sub-advisory agreement and to generate revenues for the benefit of this estate. Use those -- that revenue stream both to address any claims that Highland might have, as well as Mr. Terry. That would be the benefit as we see it.
Q Right. But by the time of the confirmation order, --
A But if your question is, oh, but you're going to be involved in a lot of other litigation and so how does that benefit, then I guess my answer to that is it's a -- my answer is a "Yes, but," and but may exceed the scope of your question, so I won't --
Q Okay.
A -- I won't give you the but answer unless you want me to do it.
Q That's fine. I just -- if we go back, if we go back to where we were before confirmation, I mean, I'm not talking about the order for relief, I'm talking about confirmation,

the sub-advisory agreement had been terminated. Highland had been fired and Brigade was managing everything.

A Right.

Q So, there wouldn't be any cash flow going to Highland based on the -- just the reversal of the confirmation order.

A Well, what would have to happen, of course, is that Neutra would have to -- would have to appoint us as -- would have to allow us to come in under the sub-advisory agreement to perform those services.

Q Right. Except that there's a trustee, right? Robin Phelan was in charge of everything.

A Well, you're assuming there's still a bankruptcy.

Q Right. Yeah. Well, I am. I mean, again -- and maybe I'm being simplistic about this, but if the confirmation order is reversed, --

THE COURT: Counsel is standing. Do you have an objection?

MR. MORRIS: Yeah. I do, Your Honor, to this whole line of hypothetical questions. We do understand, I think everybody understands, that we don't know if the appeal will be granted. I think we do all understand that we don't know what the form of relief, the exact form of relief will be. But the testimony here is that the Board has decided that one possible form of relief is that -- is that Neutra will regain control of Acis and get these contracts reinstated, get the

adversary proceeding dismissed, and get paid on its $8 million claim.

If there's questions about that, I think it's relevant, but I don't know why we're spending a lot of time on hypotheticals with a fact witness.

THE COURT: But the --

MR. MORRIS: Not an expert witness.

THE COURT: The business judgment of the Board of the Debtor is at issue here, correct?

MR. MORRIS: Correct. Absolutely.

THE COURT: Don't these hypotheticals go to, is reasonable business judgment being exercised here?

MR. MORRIS: I think he has to lay a foundation and say, Is this -- is this a hypothetical you considered? Is this a hypothetical that you considered? Because we're just -- this is like expert testimony almost. There is no evidence that any of these factors were considered. And at the end of the day, there is no dispute that the scenario that the Board is saying is worth the investment, basically, is also a possibility.

THE COURT: Okay. I overrule the objection.

MR. LAMBERSON: Okay.

THE COURT: You can proceed.

MR. LAMBERSON: And Your Honor, I'm just about done.

THE COURT: Okay.

BY MR. LAMBERSON:

Q So, okay. So, we -- but we can agree that -- okay. Let me -- let me hopefully do this. Okay. So, I mean, I think that's fine for the confirmation appeal, so now I want to talk about the order for relief appeal. Right? So this is the appeal of the order for relief or the -- and I stated this earlier to the Court, but the sole substantive issue in that appeal is whether this Court should have compelled the order for relief to arbitration. Is that right?

A The sole substantive issue? I think, if you paint with a broad brush, yeah. I would agree with you, yes.

Q Okay. Well, and again, I'm not trying to --

A I know. So, --

Q I'm not trying to trap anybody. The three issues --

A And I'm not trying to be evasive, either.

Q Yeah.

A Yeah.

Q Are the standing issue, which, in my mind, isn't really a substantive issue. And then there's the issue about the arbitration of the order for relief. And then, finally, as I mentioned, we've raised a waiver argument that basically, if they had a right to arbitrate, which we think they don't, they waited too long to raise it. Right? Those are the three issues. Correct?

A That's correct.

Q Okay. So, let me ask you. And I'm not going to -- I'm not going to hold this against you at the Fifth Circuit level, but, I mean, do you -- do you think an order for relief is subject to arbitration?

MR. MORRIS: Objection, Your Honor. Calls for a legal conclusion.

THE COURT: Overruled.

MR. LAMBERSON: Sure it does.

THE COURT: Overruled.

THE WITNESS: I think the -- I think it's a -- I think there's a colorable argument.

BY MR. LAMBERSON:

Q Uh-huh.

MR. MORRIS: Objection withdrawn.

BY MR. LAMBERSON:

Q So you don't think *National Gypsum* and *Gandy* would apply to an involuntary petition and order for relief?

A Well, I'll put it this way. I guess they'll apply if the Fifth Circuit tells us they do.

Q Right.

A That's as much as I can tell you.

Q Okay. So, so if that ruling is reversed, right, as I mentioned earlier -- and let me ask you, actually, another thing. So, how often, when you were a judge, how often were -- I shouldn't say how often -- how many times were your

rulings reversed? Just roughly?
A Was I reversed?
Q Yeah.
A I think six.
Q Not very many claims, right?
A No.
Q So how many times was there a reverse and a render?
A I'm sorry. Say again?
Q How many times was there a reverse and a render, where nothing came back to you, that basically the higher court just said, It's done?
A Well, it was rendered every time except on one occasion, and that --
Q Uh-huh.
A -- *Stern v. Marshall* had just been decided, and so -- gosh, I can't remember the district judge.
Q Okay.
A One of the judges reversed but sent it back to me to reconsider it under the light of the ruling in *Stern v. Marshall*, a jurisdictional issue. So, in all those instances, it was rendered.
Q Okay. So there was nothing -- there was no issue that came back to you? The case was just resolved?
A No. No issue came back to me.
Q Okay.

A No, you know what, there was a second one. I think the second one was *In re Mirant*. *Commerzbank versus* -- *MCAR v. Commerzbank*. That came back as well.
Q Right. Okay. So, again, but focusing on the order for relief appeal, one possibility is that the Fifth Circuit says, okay, this may be subject to arbitration, and sends it back to Judge Jernigan to make additional findings, apply a different standard, right? That's possible, right?
A That's possible.
Q Okay. So, in that case, nothing necessarily came out of the appeal, right? Like you're just basically back in front of her on the same issues?
A Well, I -- that may very well be the case, but --
Q Okay. Well, let's assume that the Fifth Circuit does reverse and render. Wouldn't -- isn't what they would render would be a -- compelling this case to arbitration? Right? Not that the bankruptcy goes away, disappears. It would basically be, "Should have been arbitrated. Go arbitrate."
A It's a good question, what the effect of reversing it would be and sending it back, remanding it. They -- I mean, one of the things that they might decide is to say that the whole issue of arbitration should be decided by an arbitrator.
Q Uh-huh.
A That's a possibility.
Q Right. But in that situation, the bankruptcy doesn't go

away. It just moves to a different forum, right?
A No, I mean, you're probably right. That, in and of itself, would not eviscerate the bankruptcy filing.
Q Uh-huh.
A That's true.
Q And so, in that situation, the result is -- and this is -- that's, frankly, the best situation, is --
A But, of course, I mean -- can I go back to that? Just, I'm not sure about that. Because, after all, this was an involuntary petition.
Q Uh-huh.
A If it was a voluntary petition, then I would certainly agree with you wholeheartedly. Inasmuch as it was an involuntary petition, I'm not sure about the answer to that question.
Q Uh-huh. Okay.
A That's a good question.
Q But you would agree with me that a possible result of even a reversal of the order for relief appeal would just be more litigation?
A Yes. That's certainly a possibility.
Q Right. In this Court? Maybe in front of an arbitrator? Maybe both?
A Yes. That's possible.
Q Okay. All right. So, still focusing on the order for

relief appeal, but I want to go to this idea that, again, there's this cash flow stream that is going to be reinstated for the benefit of Highland Capital under the sub-advisory agreement. Okay?

A Right.

Q All right. So, before the Acis bankruptcy was filed, Dondero, and at that time, in control of Highland, were actually in the process of liquidating Acis, weren't they?

A Were they in the process of liquidating Acis?

Q Uh-huh.

A And I take it these are the transfers that were -- concerning your client that prompted the filing of the involuntary petition itself?

Q Correct.

A Is that what you're referring to as the --

Q Yes.

A -- liquidation?

Q Yes.

A Well, I certainly know that -- I understand those transfers were taking place. Now, whether you'd call that a liquidation or not, I don't know, but I know what you're referring to --

Q Okay.

A -- and I think the answer to your --

Q So, --

A Yeah.
Q Yeah. So there were a variety of transfers of assets away from Acis before --
A Right.
Q -- the Acis bankruptcy filing, right? And, actually, are you aware that there was actually an agreement between Highland CLO Management and Acis to transfer those PMAs to HCLOF Management?
A No, I'm not aware of that.
Q Okay. And as we talked about earlier, HCLOF repeatedly attempted to redeem the CLOs, even during the Acis bankruptcy, right?
A I read about that in Judge Jernigan's opinion, so I'm assuming that's the case.
Q Right. Okay. And then -- and, in fact, if HCLOF was successful, that would liquidate the CLOs and it would effectively terminate the Acis portfolio management agreements, right?
A I don't know.
Q Okay. But if that was the case, if the portfolio management agreements went away or no longer had assets to manage, then the sub-advisory agreement would have no income, right?
A If you're asking me if that's something within the realm of possibilities, I suppose so.

Q Okay. So, if, because of the appeal, the Acis bankruptcy -- because of the order for relief appeal, if the bankruptcy -- if the Acis bankruptcy just went entire away, just disappeared, right, so Mr. Dondero would be in control of Acis, not you, right?
A He would be in control. That's correct.
Q Okay. And so if he wanted to terminate the PMAs and enter new PMAs with Dondero Capital Management, you couldn't keep him from doing that, could you?
A Well, I -- no, I could not keep him from doing that.
Q Okay. Or if he wanted to terminate the sub-advisory agreement and enter into a different agreement, I mean, you couldn't keep him from doing that, either, could you?
A No, I couldn't.
Q Right. So what makes you think that Highland Capital Management, a debtor that he lost control of, just like Acis, would benefit from Acis's PMAs, when he was actively trying to take Acis's PMAs away from Acis?
A Well, I have -- I spoke to Mr. Dondero about this, and he -- I asked him the question, and he said that he would reinstate Highland under the sub-advisory agreement and the shared services agreement.
Q Okay. So, on that point, you did mention earlier that, as part of your -- as part of the Board's diligence, you talked with Mrs. O'Neil and you talked to Pachulski. Obviously,

you've analyzed the issues. I can tell you're familiar with all these, all of the pleadings. But you also talked with different Highland Capital employees about the litigation and the appeals, correct?

A I did.

Q Okay. Who did you talk with?

A Well, I have to say that the interaction with Highland employees was actually fairly abbreviated.

Q Uh-huh.

A We spoke very, very briefly about this with Isaac Leventon on the day that we were appointed. I don't know if the Court is aware of this or not, but we spoke about it very briefly, and then he was injured later that night and he really hasn't been back at the office since then. So, --

Q Oh.

A -- I would say, for the most part, I have relied mainly on Pachulski.

Q Okay. But you did indicate you talked to Mr. Dondero as well?

A I talked to him about this issue about reinstatement, yes.

MR. LAMBERSON: So, Your Honor, I'd like to turn to --

THE WITNESS: Oh, you don't have to call me Your Honor.

THE COURT: There are two Your Honors.

MR. LAMBERSON: Your Honors. How about that?
THE COURT: Okay.
THE WITNESS: Yeah, there's only one judge in the court today.
BY MR. LAMBERSON:
Q Could you turn to Exhibit 16, please? This is Acis's Exhibit 16. I'm sorry. Do you have that, Mr. Nelms?
A I do.
Q And could you identify Acis Exhibit 16?
A Yes. This is Official Form 204 in the current case, the one we're here for today.
Q Right. So it's the Top 20 List of Creditors for Highland Capital Management?
A Yes, that's correct.
Q Okay. And have you seen Exhibit 16 before?
A Pardon me?
Q Have you seen Exhibit 16 before, the Top 20 List?
A No, I have not seen it before.
Q Okay.
MR. LAMBERSON: Your Honor, we'd ask for the admission of Exhibit 16.
THE COURT: Any objection?
MR. MORRIS: Just on relevance grounds. Can we at least establish a foundation as to which element of 327(e) this goes to?

THE COURT: Response?

MR. LAMBERSON: Well, Your Honor, what I'm going to point out is that the top ten creditors, other than an insider creditor, are all litigation-based, and that the, as I pointed out in my opening, the origin of this case was a bad litigation strategy.

MR. MORRIS: No objection to the introduction of this exhibit for that limited purpose.

THE COURT: All right. It's admitted.

(Acis Capital Management GP, LLC's Exhibit 16 is received into evidence.)

BY MR. LAMBERSON:

Q All right. So, Mr. Nelms, you said you hadn't seen this before, but I think you'll probably be familiar with the information on it generally. So let's walk through this quickly. So, this is the Top 20 List of Creditors. The first creditor is Redeemer Committee, listed as litigation, do you see that, for about $190 million?

A Yes.

Q And that's the arbitration award that precipitated this filing, correct?

A It is.

Q Okay. So the next claim is Pat Daugherty, litigation claim. It's $11.7 million. Do you see that?

A Yes.

Q So, do you know what is Mr. Daugherty's history with Highland Capital? And try to keep it under five minutes.
A Yeah. Mr. Daugherty is a former employee. And I know he has some contractual disputes with the company based upon his separation.
Q Right. And he's a long-time litigant with Highland Capital, correct?
A He is, yes.
Q Yes. So the next one is CLO HoldCo. This is about $11.5 million. CLO HoldCo is an insider of the Debtor, correct? If you know.
A Is -- is it an insider? I don't know.
Q Okay. Well, Grant Scott, the party here, is Mr. Dondero's college roommate. Do you know that?
A That's my understanding, yes.
Q Okay. So, Creditor #4, McKool Smith, for two point -- roughly $2.1 million. Do you see this? This is for attorneys' fees incurred by Highland Capital, correct?
MR. MORRIS: Objection, Your Honor. I still fail to see how this is at all connected to any of the elements of 327(e) or the retention of Foley.
THE COURT: Okay. I overrule.
BY MR. LAMBERSON:
Q So, this is -- this -- these are fees incurred by Highland Capital, you know, a variety of venues, right, including this

one, state court fights against Mr. Terry, right?
A I thought -- McKool Smith, I thought they were involved in the Redeemer litigation, but they may be involved in other litigation as well.
Q Okay. Fair enough. And do you know, this claim is disputed by the Debtor, correct?
A Yes.
Q Okay. And do you know, obviously subject to the stay, but do you know if this claim is being arbitrated or has been sent to arbitration?
A No, I don't know any -- no, I don't know.
Q Okay. That's fair enough. So, then #5 -- I'll move it along here. Meta Discovery, Meta-e Discovery, they're a litigation vendor, right?
A I'm sorry, would you ask your question again?
Q Meta-e Discovery, the next creditor. They're a litigation vendor and they provide litigation support services?
A I don't know what they do.
Q Okay. Fair enough. Foley Gardere. Obviously, that's the law firm you all are seeking to have engaged. DLA Piper. This relates to fees incurred in connection with the Terry arbitration award, correct?
A I think so.
Q Okay. Reid Collins. These are fees related to the UBS lawsuit, correct?

A I don't know.
Q Okay. Josh and -- Joshua and Jennifer Terry. This is a litigation claim, right? This is -- this is an IRA claim, right?
A It is.
Q NWCC. This is also a litigation claim? In other words, a litigant fighting with Highland?
A I can only intuit that just because of the fact that it's a law firm.
Q Okay. Fair enough. So, out of the Top 20 -- or, out of the Top 10 Creditors, basically, they're all litigants or attorneys paid to fight litigants, with the exception of Dondero's college roommate. Right?
A With the exception of what?
Q Mr. Dondero's college roommate that has a claim based on some entity.
A Yes. They're -- they all have some nexus to litigation.
Q Okay. And let me just ask you: If you were able to completely set aside all of Highland Capital's litigation issues, right, just like -- just like the concept of the order for relief appeal makes the Acis bankruptcy go away forever, if you could snap your fingers and make all of Highland's litigation go away forever, would Highland have any financial problems at all?
A Well, I don't know that I know the answer to that, but I

-- but it's certainly to say that litigation up to this point has been the driving force behind its bankruptcy filing.

Q Okay. Fair enough. Okay. So, Mr. Nelms, would you turn -- could you turn to Acis Exhibit 27?

A Okay.

Q Do you have that?

A I do.

Q Okay. And can you identify Exhibit 27?

A Yes. My understanding is that this was the lawsuit that was filed by the DAF and CLO HoldCo in the Southern District of New York.

Q Okay. And so I had mentioned this in my opening, and I believe counsel had asked you about what we call the DAF litigation. Is this the complaint that's the basis of the DAF litigation?

A Yeah, that's my understanding. It is.

Q Okay. And I think you had testified earlier that the board was actually shown a copy of this complaint, was before it was filed, and --

A I wouldn't call it -- I'm sorry, go ahead, ask your question.

Q No, no, I -- that's fine.

A I wouldn't call it a board presentation. I just remember it being handed to Mr. Dubel and Mr. Dubel looking at it, asking what it was, and saying, Tell them not to do this.

Q Okay. Thank you. And -- but it's your understanding that the complaint was filed anyway?
A It is my understanding it was filed later.
Q Okay. And in fact, this has a file-stamp at the top, which I'm sure you're very familiar with. Correct? Has a PACER file-stamp at the top.
A Right.
Q Right.
MR. LAMBERSON: So, Your Honor, we'd ask for the admission of Exhibit 27.
THE COURT: Any objection?
MR. MORRIS: No objection.
THE COURT: Admitted.
(Acis Capital Management GP, LLC's Exhibit 27 is received into evidence.)
MR. LAMBERSON: And I'll be relatively quick.
BY MR. LAMBERSON:
Q I had mentioned in my opening that we -- I should say Acis was concerned that Highland Capital Management had some participation in this, and I probably should have been clearer in saying that Highland Capital Management employees had some participation in Exhibit 27. Has the Board done any investigation as to whether any Highland Capital employees were involved in the preparation of Exhibit 27 or the filing of Exhibit 27?

A No, we have not. At least, let me speak for myself. I haven't done that investigation.
Q Uh-huh. And your counsel had mentioned that -- I believe this is correct -- your counsel had mentioned that you all had reached out -- the Board, I should say -- reached out to Grant Scott, who's the -- who's in control of the DAF as well as CLO HoldCo, and, you know, had sort of convinced them that it probably -- to dismiss this lawsuit. Correct?
A Yes.
Q Okay. And but do you -- as far as you know, it hasn't been dismissed yet?
A It hasn't been dismissed. There's some kind of technical things there, and I don't know if you want to go into them or not, but it hasn't been dismissed, but I have a high degree of certainty that this is going to get dismissed.
Q Okay. Fair enough. And are you aware that there was already a press release issued related to this lawsuit that was picked up by various CLO publications?
A When you say "already," are you talking about a specific time?
Q Well, that -- I guess what's I'm getting at is are you aware that the filing of this lawsuit has already resulted in various articles in CLO journals, periodicals?
A I'm aware of it having appeared in one publication.
Q Okay. And so is it fair to say that the damage is already

done and that, you know, dismissal of these claims probably isn't really all that -- isn't really all that significant when they've already, you know, put it in the press?

A I don't know if the damage has already been done or not.

Q Okay.

MR. LAMBERSON: Give me just a second, Your Honor.

THE COURT: Okay.

(Pause.)

BY MR. LAMBERSON:

Q So, there is actually one other -- there is one point. And I told you in advance that I was afraid I might be jumping around a little bit, so I'm going to jump around a little bit. Let me go back to the order for relief appeal. So, this is the appeal of the Court's order for relief that started the Acis bankruptcy.

One of the things you testified about related -- on your direct testimony is one of the benefits, one of the potential benefits, understanding we don't know what's going to happen, of the order for relief appeal is that if the -- if that ruling was reversed and the Acis bankruptcy went away, then the adversary would go away, the adversary between Acis Capital Management and Highland Capital Management. Correct?

A Well, yes. In my opinion, the adversary opinion -- excuse me, the adversary proceeding would go away. Would a lawsuit under TUFTA be avoided altogether by Mr. Terry?

Q Right.
A I don't know that it would take that away.
Q Okay. And that's -- you actually anticipated my question, --
A Uh-huh.
Q -- which was: It's fair to say that, even if the adversary went away between Acis and Highland Capital Management, that the -- certain of the claims in the adversary -- for example, the fraudulent transfer claims or derivative claims -- would not necessarily go away because they could be asserted by Mr. Terry as a judgment creditor, correct?
A They could, but the consequences of asserting that claim outside of bankruptcy are vastly different than asserting them inside of a bankruptcy case.
Q Uh-huh. Right.
A At least potentially.
Q And just to close the thought here, are you aware that one of Acis's main arguments during the order for relief trial was that we didn't need an involuntary, that Mr. Terry could just go litigate all that stuff in state court?
A Yeah, I think so. I think I am aware of that. Yes.
Q Okay. So you'd agree with me that, even on your possible day on the order for relief appeal, that doesn't make the -- what I'll call the Terry litigation, right, the judgment litigation, go away?

A No. No. The reversal on appeal would not necessarily make the Terry litigation go away.
Q Okay. Thank you.
MR. LAMBERSON: That's all I have, Your Honor.
THE COURT: All right. Redirect?
MR. MORRIS: I just have a few questions, Your Honor.
THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. MORRIS:
Q Can you turn to Exhibit 16 in your binder, sir?
A Which one?
Q I guess it's the Acis exhibits.
A The Acis? Okay.
Q Yeah. The List of Top 20 Creditors.
A Okay.
Q You were taken through each and every one of those to make the point that they're largely litigation claims. Is that fair?
A Say again, please?
Q You were taken through many of those creditors to establish that --
A I was.
Q -- that the Debtor was involved in a lot of litigation; is that right?
A It was.

Q Okay. And the Board was appointed on January 9th; is that right?
A Yes.
Q Did the Board have anything to do with any of the claims that are set forth in Exhibit 16?
A No.
Q Did the Board authorize the filing of any suits that are related to any of the claims that are set forth in Exhibit 16?
A No.
Q Did the Board direct the defense of any suits that were commenced against Highland with respect to Exhibit 16?
A No.
Q Okay. Has the Board been trying to diminish and eliminate litigation where it thought it was in the Debtor's best interests?
A It has.
Q And is that, for example, why the Board decided not to pursue the Winstead matter?
A It is.
Q Is that why the Board has used its efforts to try to thwart the DAF litigation?
A Yes.
Q Does the Debtor control DAF?
A The Debtor does not control the DAF.
Q Okay. Did the Debtor authorize -- withdrawn. Did the

Board authorize the filing of the DAF complaint?
A It did not.
Q Did the Board know the DAF complaint was going to be filed?
A Well, I mean, I know Mr. Dubel was presented with a copy of the complaint. We had noticed that that document existed. But it came as somewhat of a surprise to us when it got filed.
Q It came as a surprise to you?
A It did.
Q Because that's not what was expected after Mr. Dubel said, Don't file it. Right?
A Right.
Q Okay. You were asked a bunch of questions on cross about different possibilities and results and potential orders from the Fifth Circuit on the assumption that the appeal was granted. Do you remember that?
A Yes.
Q And some of them were purported to be better or worse for the Debtor. Do you remember that?
A Yes.
Q If the appeal is not prosecuted, is there any chance that the contracts that the Board has focused on will be reinstated?
A No.
Q Is it fair to say that if the appeal is not prosecuted the

chances of the Debtor recovering the tens of millions of dollars of revenue will be exactly zero?

A Well, I don't know that it's exactly zero, but severely diminished.

Q Yeah. How about getting paid a hundred-cent dollars on the $8 million claim that's in the Acis litigation? If the appeal is not prosecuted, is there any chance that the Debtor is likely to recover hundred-cent dollars?

A Again, that possibility is severely diminished.

Q Uh-huh. How about with respect to terminating the adversary proceeding in the Acis litigation? If the appeal is not prosecuted, is there any possibility of that adversary proceeding just going away and being left with the arbitration that you've described?

A Again, a severely diminished possibility.

Q You mentioned that the $8 million fraudulent transfer as part of an arbitration would be very different outside of a bankruptcy case. Do you remember saying that?

A I do.

Q Can you explain to the Court why you believe it would be different outside of a bankruptcy case?

A Well, it actually goes to a case that started in my court. This was the *MCAR v. Commerzbank* case in *In re Mirant*, and the issue in that case, Mirant, when it filed its petition in bankruptcy, was insolvent, but by the time that its bankruptcy

concluded, Mirant was a solvent entity. And so all of its creditors were paid in full, but the trust that was established in the *Mirant* case brought some fraudulent transfer claims that were predicated on solvency, where these were constructively fraudulent as opposed to actual.

And so the question was, if all the creditors had been paid in full, is there standing to bring fraudulent transfer claims that would basically not benefit creditors but would go to equity?

I originally -- I ruled that there was no such -- that you couldn't bring such a cause of action, that the satisfaction of claims in full extinguished those claims. And I do recall that one of the interesting things about that case is that a lady named Elizabeth Warren wrote -- or proposed -- she submitted -- they submitted an expert opinion on her behalf, which I wouldn't let them file because I took the position that I was an expert, the expert in the Court.

And in any event, it turns out I wasn't the expert. I was reversed by Judge Means on that, who said that it's not limited. It went up to the Fifth Circuit, and the Fifth Circuit ruled the same thing.

So my takeaway from all of this is that, in a bankruptcy setting, as opposed to just a state court setting, that the potential recovery on account of fraudulent transfers is much broader, much more unlimited than it would be in the context

of a state court lawsuit.

So, now, there may be things that would distinguish that, but that's something to be -- that's something to be troubled about if you're a director of this company.

Q And are these the types of things that, without, you know, just divulging privileged communications, are these the type of experiences and perspectives that you've shared with the other board members in the context of considering the various motions, the various matters for which Foley's retention is sought?

A Yes.

Q Okay.

MR. MORRIS: Just one second, Your Honor.

THE COURT: Okay.

(Pause.)

MR. MORRIS: Nothing further, Your Honor.

THE COURT: All right. Any recross on that redirect?

MR. LAMBERSON: No, Your Honor.

THE COURT: All right. Thank you, Mr. Nelms.

(The witness steps down.)

THE COURT: Any other evidence from Highland?

MR. MORRIS: Your Honor, we have had admitted our exhibits. Among those exhibits are two declarations from Ms. O'Neil, and so she's available in the courtroom today if anybody wants to cross-examine on those issues.

THE COURT: All right. Well, I will accept those declarations as direct evidence. Any desire to cross-examine Ms. O'Neil?

MS. PATEL: Yes, Your Honor.

THE COURT: All right. Ms. O'Neil, we'll go ahead and swear you in on this today.

HOLLAND O'NEIL, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Please be seated.

CROSS-EXAMINATION

BY MS. PATEL:

Q Good afternoon, Ms. O'Neil.

A Good afternoon.

Q Ms. O'Neil, do you concurrently represent both Highland Capital Management and Neutra, which is a Cayman entity, correct?

A Yes.

Q Okay. There are other entities that you either represent or have represented that are kind of affiliated or within the Highland umbrella; is that correct?

A Yes.

Q Okay. And that includes, for example, CLO HoldCo was one such representation. Isn't that right?

A Previous. Previously.

Q Okay.

A Not currently.

Q Okay. So, and I believe you say that in your declaration, right, that you didn't -- that you no longer represent CLO HoldCo?

A Correct.

Q Okay. And when did that representation cease?

A It was -- it was very brief. I came into the case after the involuntary -- after the orders for relief were entered. And at that time, there had been the motion to intervene that included that entity, and it was determined to proceed with an appeal on that motion to intervene, or the denial of the motion to intervene, as well as the orders for relief. Actually, there was a compendium of orders that were appealed all at the same time.

And so, because that entity had also filed a motion to intervene, we had included that in the appeal. And at that time I was retained, but then by the time we kind of analyzed the issues, determined it was not necessary to proceed with that appeal, then I no longer represented that entity and disengaged.

Q Okay. But CLO -- to be clear, CLO HoldCo was actually an appellant for the order for relief appeal that we've been talking about today, correct?

A Initially, yes.

Q Okay. And it still remains an appellant; it just didn't file a brief in the involuntary appeal. Isn't that right?

A It has not filed any brief. And I would have to look at the record if it even filed a notice to the Fifth Circuit. It did -- was included in the notice to the District Court. I just honestly can't recall if it was included in the -- in any notice to the Fifth Circuit.

Q Okay. And did you ever withdraw from your representation of CLO HoldCo in the District Court appeal?

A What do you mean, withdraw?

Q Well, I mean, you entered an appearance.

A You mean file a notice with the -- with the Court?

Q Right.

A I can't recall.

Q Okay. Ms. O'Neil, with respect to Neutra, you understand and you've heard testimony, and I believe it's in the declarations in support of the retention papers for Foley, and if you need to look at that I can direct you to the exhibit book, but it's -- is it your understanding that ultimately Neutra is owned 75 percent by Mr. Dondero and 25 percent by Mr. Okada?

A Yes.

Q Okay. And Ms. O'Neil, in connection with your representation of Neutra, who are the human beings that you interact with? Who directs your services?

A At -- currently? Are you --

Q Just on behalf of Neutra.

A Predominantly, I get direction from Highland's in-house counsel.
Q Okay. And who would that be? Who are the people?
A The people are Mr. J.P. Sevilla, Mr. Isaac Leventon, Ms. Stephanie Vitiello. Those are the primary individuals that direct vis-à-vis Neutra.
Q Okay. Have you ever spoke with Mr. Dondero regarding your representation of Neutra?
A Yes.
Q Okay. And when was that? When was the last time?
A It has -- it's been a while. Certainly, it hasn't been since this bankruptcy was commenced. I think the last time I recall discussing that specifically is when we were together at the mediation during the course of the bankruptcy. And I'd have to look at my calendar. I can't recall exactly when that was.
Q Okay. And what about Mr. Okada? Have you -- when was the last time you spoke with Mr. Okada?
A I have never spoken with Mr. Okada.
Q During the course of your entire representation of Neutra, you've never spoken with Mr. Okada?
A That is correct.
Q Okay. And under -- do you have an understanding of under what authority Mr. Sevilla or Mr. Leventon or Ms. Vitiello would have to direct your legal services on behalf of Neutra?

A Generally, yes, through the direction from the owners of Neutra.
Q Okay. That would be Mr. Dondero and Mr. Okada?
A Correct.
Q Okay. And it's your understanding, then, that Mr. Dondero and Mr. Okada have directed Highland's legal department to direct your services?
A Yes. Previously, yes.
Q Okay. Do you have -- is there a contract between Neutra and Highland, or --
A I don't know.
Q Okay. Did you ever ask if there was one?
A No, I did not.
Q Okay. In connection with your representation of Neutra, do you bill separately for the Neutra representation?
A Since the bankruptcy was -- since the Highland bankruptcy was commenced, we set up a separate task code to track the fees being incurred on the Neutra appeal. Prior to the bankruptcy, we did not have a reason to do that.
Q Okay. So let's talk about prior to the bankruptcy. I believe in your declaration it was disclosed that there were approximately $2.1 million in billings relating to your representation of Highland, Neutra, and certain of the Highland Cayman entities: Highland CLO Management, Highland CLO Holdings, and HCF Advisor, amongst others. Right?

A That sounds about right. I might want to look at the declaration just to confirm on the number, but that sounds about right.
Q Okay. Well, your declaration can be found under Tab 10.
A Okay. (Pause.) And are you referring to Paragraph 16?
Q Well, if you look at Page -- at the bottom, you'll see that there's page numbers, and it says Page 15 of 48. And this would be your declaration.
A Oh, thank you. I was looking at the --
Q Uh-huh. Paragraph 3.
A -- at the application, that's all. Correct. Yes. Thank you.
Q Firm-earned fees of two point -- roughly $2.15 million, almost, correct?
A Yes.
Q Okay. And there's about $1.4 million of that that was unpaid from the pre-petition period, correct?
A Correct.
Q Okay. And is it your testimony that, of the $2.15 million in fees, that there was no apportionment between Highland, Neutra, and the Cayman defendants?
A Correct.
Q Okay. So, --
A Not -- not in my account -- not through my accounting processes. Obviously, the time entries, you could parse them

out, if need be.
Q Okay. But you didn't keep your time necessarily that way, where they were already apportioned and parsed?
A Not under separate task codes, --
Q Okay.
A -- as we have done post-bankruptcy.
Q So, in connection with the billings that would have represented that $2.15 million, were those bills submitted to Highland, to Neutra, to the Cayman defendants?
A They are submitted through an e-billing process that it goes through a Highland portal and -- in the aggregate. So they're submitted through that portal.
Q Okay. But the portal goes to Highland, correct?
A I do not know. I honestly -- our e-billing department handles it and I just know it goes through e-billing, an e-billing portal, and I don't know exactly. I'm assuming obviously it goes to Highland. They certainly get copies of it.
Q Okay. Did you or Foley ever submit a bill to Neutra?
A I mean, my understanding is that, going through the portal, we would go to the various parties that are affiliated with Highland.
Q Okay. But you've never directly sent a bill to Neutra for your representation of Neutra?
A As I said, it goes through e-billing, so that could be

interpreted to go directly to them if it goes through an e-billing process.

Q Okay. But I'm asking, have you ever --

A I'm -- maybe I'm being hyper-technical, but I'm just --

Q Right.

A It's being submitted through --

Q I understand, but I just -- here's where I want to just direct us, is: Have you ever addressed a bill to Neutra, Ltd. care of either Mr. Dondero, Mr. Okada, or its formal business address?

A As I indicated, post-petition, we have been segregating them under a different task code and indicating it's Neutra. Pre-petition, it was all under the same invoice.

Q That was submitted to Highland only?

A Submitted through the e-billing process.

Q To Highland only, right?

MR. LAMBERSON: Objection to the form of the question. This has been asked about four times. The witness is very clear.

THE COURT: Overruled. I think she's trying to get an exact answer to her question, and she feels like she's not getting it. So, overruled.

THE WITNESS: Okay. Then I apologize, Your Honor. I'm not -- I just don't know technically, once it goes through the e-billing, how it's distributed on the other side. I

just, I honestly --

THE COURT: I think the question is, to whom was the invoice directed?

THE WITNESS: In terms of the -- not where it was sent, but who it's directed to?

BY MS. PATEL:

Q Yes.

A It would have -- I believe it has the entities on it. It definitely has Highland on it for sure.

Q Okay. Does it have Neutra on it?

A Neutra is subject to the engagement letter, so it would be applicable to -- if our accounting department didn't technically put Neutra on it, that is not necessarily at any moment being -- as the engagement letter is -- was with all those parties. So I would have to look at the invoice, if it has all of the clients listed on there. I honestly -- I just can't remember right now.

Q Okay. Well, --

A We do have some post-petition invoices, and you'll see where they're segregated with Neutra.

Q You raise an interesting point. If Highland and Neutra and the other entities are all part of the engagement letter, is Neutra also liable for all of Highland's legal fees?

A I don't know the answer to that.

Q Okay. Is it your position that because Highland, Neutra,

and the Cayman defendants are all part of the engagement letter, that Highland is responsible for Neutra's legal fees?
A From my firm's standpoint?
Q Yes.
A I think the, you know, our perspective is that they were -- we were primarily working for Highland, so the beneficial work, and as I think the Court knows, most of the work here was on behalf of Highland Capital Management. And it's in our engagement letter to that effect, effectively.
Q Sitting here today, Ms. O'Neil, post-petition, who's calling the legal shots for purposes of Neutra?
A The -- well, where we have been is the process with the Fifth Circuit. The Fifth Circuit schedule was already set pre-petition, and we have just been complying with the pre-petition -- or, rather, that schedule, which has rolled post-petition. And so our direction pre-petition has just continued in terms of proceeding with the briefing. And so, again, going back to who it was pre-petition, it's the same legal team giving instructions on behalf of Neutra.
Q Okay. And if the question were to be posed, for example, whether the Neutra involuntary or the order for relief appeal should be dismissed, for example, who would call the legal shots on that? Who would make the decision on that?
A To dismiss the appeal?
Q Yeah.

A Not proceed with it up to this point? Despite where we are at this point, to just -- to just drop it?
Q Yes.
A It would be the owners of Neutra.
Q So that would be Mr. Dondero and Mr. Okada, right?
A Yes.
Q Okay. You -- Ms. O'Neil, were you in the courtroom when Mr. Demo or -- and Mr. Nelms -- when Mr. Demo made the opening statement and then when Mr. Nelms was testifying?
A Yes.
Q Okay. And you heard, again, the opening statement and then the testimony regarding the benefit to Highland of Highland paying for Neutra's legal fees in connection with the appeals, correct?
A I did hear that, yes.
Q Okay. All right. And can you, in your words, then, articulate, from your perspective as legal counsel to both entities, what the benefit is to Highland in this bankruptcy for Foley's representation of Neutra and Highland paying the bill for it?
A I just want to make sure I'm not, you know, getting onto attorney-client privileged discussions in terms of the benefit. I think I would agree with what has been stated in court today.
Q Okay. So, so, and just to kind of recap that, if I

understand it, it's that if Neutra is successful in its appeal of the involuntary orders for relief and also its appeal of the confirmation order, then everything goes back and Highland gets this revenue stream, correct, of about $12 million, plus it gets paid on an $8 million, approximately, purported claim. Right?

A That the -- the agreements would be reinstated, which would then yield approximately that type of revenue stream as -- pursuant to the sub-advisor and sub-management agreements that were in place.

Q Okay. And one of the entities -- and I know that the retention application doesn't actually go to, anymore, Foley's representation of the Cayman entities, but -- that's kind of been put to the side. But you do -- and you do represent Highland CLO Management, correct, which is a Cayman entity?

A Correct.

Q All right. And it's one of the defendants in the Acis adversary proceeding, right?

A And that is the only engagement that we have for that party, is in conjunction with that adversary proceeding, which is stayed. So nothing is going on with that right now.

Q Well, I understand that, but you --

A Okay.

Q My question was, you represent Highland CLO Management, correct?

A In that adversary proceeding.
Q Okay. So -- but you also represent it in connection with -- in -- generally with the bankruptcy as well, Acis's bankruptcy?
A There was no involvement until the adversary proceeding, until they were sued in the adversary proceeding.
Q Okay. And in the adversary proceeding, Highland CLO Management was sued for a few things, correct?
A In the adversary proceeding?
Q Yes.
A Yes.
Q Okay. Highland CLO Management, for example, received a $9.5 million note that Acis was previously the holder of and that was transferred after Mr. Terry's judgment, correct?
A Are you asking if that was an allegation in the adversary proceeding?
Q Sure.
A I --
Q Right.
A That sounds right. That's been stayed, and I would have to defer to the -- obviously, the second amended complaint and the allegations therein. So, --
Q Okay. And are you aware that your client, Highland CLO Management, was also sued because it was to receive the portfolio management agreements under which Acis represents --

or, I'm sorry, manages the Acis CLOs?
A That was -- that sounds like one of the allegations from that point in time.
Q Okay. So I guess let me -- let me ask you a slightly different way. Are you aware that there was a pre-petition agreement that was entered into and signed by Mr. Dondero that transferred the PMAs from Acis to Highland CLO Management?
A I cannot recall the -- all the evidence at the -- in conjunction with that at this time, but if that's one of your representations. I wasn't representing any of the parties at that time, but I do recall that there may have been some evidence presented in that regard. But I would have to look. It's been a long time. And that record is hundreds of thousands of pages. I would need to check back on that.
Q Okay. But if there were such an agreement, for example, that transferred the portfolio management agreements from Acis to another entity, a Cayman entity, can you agree with me, then, that Mr. Dondero's ownership interest in Neutra would really be of no import anymore because there wouldn't be a $12 million revenue stream anymore, would there, if Acis wasn't the portfolio manager of the Acis CLOs?
A I don't agree with the premi... at the end, when you said, if Acis isn't the CLO manager, then there would be no revenue stream from the CLOs if it's not reinstated as the -- as the manager.

Q Okay. So you agree that if Acis isn't the portfolio manager of the Acis CLOs, there's no $12 million revenue stream potential to Highland by virtue of Highland coming back in as the sub-advisor and shared services provider, right?
A Okay. Now, the -- no, I don't know that that's necessarily the case.
Q Well, why not?
A It could be appointed to be the sub-advisor, sub-manager for -- through a different entity.
Q Okay. So it would basically be -- but, again, going back, it would be through a different entity. Again, Mr. Dondero's ownership of Neutra would be of no import then, right?
A Perhaps I'm not understanding your question.
Q Well, --
A I -- it's a hypothetical, and I --
Q If Acis -- if Acis didn't have these portfolio management agreements, it doesn't matter if Mr. Dondero wins the Neutra appeal or not, right? Because he wouldn't have control of the Acis entity within which to redirect, through Acis, the sub-advisory and the shared services agreements, correct?
A He could direct it through another entity, as I think it's been well-discussed that Highland had -- Highland had the personnel to manage the CLOs. In fact, Mr. Terry was a Highland employee when he managed the CLOs. So he could certainly direct that management through another entity, even

if it wasn't Acis. But vis-à-vis Neutra, Neutra would be -- well, before the confirmation of the plan, Neutra owned Acis. So, vis-à-vis through Neutra, I believe your statement would be correct.

Q Okay. Ms. O'Neil, also as sort of a participant during the Acis bankruptcy cases --

MS. PATEL: And Your Honor, I know you're intimately familiar with all of these.

BY MS. PATEL:

Q But Ms. O'Neil, do you recall the multiple attempts during the bankruptcy case to effectuate what was called an optional redemption, which sought to liquidate the Acis CLOs?

A By HCLOF, I believe there were two instances, yes.

Q Okay. HCLOF executed those optional redemptions, correct? Mr. Bill Scott, one of the independent directors? Is that right?

A I believe the evidence was presented before the Court --

Q Okay.

A -- in that regard.

Q And during the course of the -- all of those proceedings with the optional redemptions, Highland was the ultimate advisor to HCLOF, was it not?

A I'm not sure I understand what you mean by the ultimate advisor.

Q Well, the technical contractual advisor was an entity by

the name of Highland HCF Advisor, right? Is the portfolio manager for Highland CLO Funding?

A It has been a while since I looked at that org chart or those issues, so I do not recall off the top of my head.

Q Okay. Well, you said that you interacted, for example, with Neutra -- on your Neutra issues with JP Sevilla, Mr. Leventon, and Stephanie Vitiello, correct?

A Yes.

Q Okay. Wasn't it really, from a legal perspective, at least, Mr. Sevilla, Mr. Leventon, who were all advising Highland CLO Funding as well?

A I don't know the answer. You'd have to inquire of them.

Q So, is it your testimony, then, that Highland had nothing to do with the optional redemption notices that were issued during the course of the Acis bankruptcy cases?

A I'm not sure that I understand the relevance of that as to whether Highland had any -- had nothing to do with it. I think they were certainly involved and were aware. But they weren't the -- independently making those determinations.

Q Okay.

A As you know, Ms. Patel, there were directors that were involved. They testified before this Court. There -- HCLOF was represented by counsel as well. King & Spalding. So there were multiple parties involved.

Q Okay. So is it, again, your testimony that Highland had

nothing to do with the optional redemption notices that were issued during the Acis bankruptcy case?

MR. MORRIS: Objection, Your Honor. It may be me, but I don't understand what this has to do with the Foley retention application.

THE COURT: Okay. We do seem like we're getting a little far afield. What's your response to that?

MS. PATEL: Your Honor, the contention has been made that if these bankruptcy appeals are somehow granted or in the District Court and this Court are reversed, --

THE COURT: Uh-huh.

MS. PATEL: -- that these cases are going to come back and that suddenly, magically, there's going to be a $12 million revenue stream flowing out of Acis back into Highland, and they're going to be able to collect on an $8 million objected-to claim.

I'm just trying to get to how likely is that really to happen. I mean, given the course -- and again, I know Your Honor was a viewer of all of this -- of the multiple attempts to try to liquidate these assets, --

THE COURT: Okay. I'll allow the question, but it'll be the end of the line of questioning. Okay?

MS. PATEL: Understood. And Your Honor, just additionally, it's -- that's part of the appeal that Foley is handling on the confirmation appeal. As Mr. Nelms said, it's

also based on the plan injunction.

THE COURT: All right. She can answer the question, but then we move on to another area.

MS. PATEL: Okay.

BY MS. PATEL:

Q So is it your testimony, Ms. O'Neil, that Highland had absolutely nothing to do with the optional redemptions --

A I did not --

Q -- during the bankruptcy case?

A That is not what I said.

Q Okay. So, -- and I get it. Highland CLO Funding is a different entity, and the Bankruptcy Court made findings with respect to the fact that it is controlled in every way by Highland. Do you recall that finding?

A Preliminary findings in conjunction with determining whether there was a likelihood of success on the merits. I do recall that --

Q Okay.

A -- those conclusions by the Court.

Q As a part of the bench memorandum in support of the confirmation order, correct?

A Yes.

Q Okay.

A Actually, I will -- I will -- I'll correct that. I'll let that -- the Court's order speak for itself. You may have said

a few things that were more or less than what the Court's order said, so I'd just defer to what the Court's order said.

Q Okay. Well, part of the representation for Foley here is to represent Highland and Neutra in connection with the confirmation appeal, correct?

A Yes.

Q And part of that confirmation appeal is also -- one of the grounds there is that you're appealing the plan injunction, which the plan injunction is what stops the CLOs from being redeemed, correct?

A Correct.

Q Okay. So, how is Highland damaged by the plan injunction?

A I think it's fairly obvi... again, I want to not tread too much on attorney-client privilege. But, obviously, I have yet to have a client over my 30-plus years of practicing law that likes to be subject to any kind of injunction. It limits -- that injunction is more than just on the -- it's a very broad injunction. So I'd like -- if I had the injunction in front of me, there's -- there's lots of restrictions under that injunction, and that is prejudicial to Highland to be able to act freely.

Q Able to act freely to liquidate CLOs?

A Among other things, as it may do in the ordinary course of business, in its opinion, that may be beneficial to his clients.

Q Okay. Now, Ms. O'Neil, --
A If I may, may I add one more thing?
THE COURT: You may.
THE WITNESS: Okay. Highland, at least in that role, could not liquidate CLOs. So I think that was an improper statement. Or suggestion.
BY MS. PATEL:
Q Okay. Well, then, what specific actions that Highland would like to take is it being damaged by the injunction?
A I would need to look at the -- the injunction is very, very broad. So, anything that it can't do freely that is covered by the injunction is obviously a detriment to Highland.
Q Okay. Now, Ms. O'Neil, if you would turn to Tab 31 in the book, --
A All right.
Q -- please. And I will ask you, this is the declaration of Bradley Sharp that was in support of the order authorizing the retention of Foley Gardere. Have you had an opportunity to review this?
A Yes.
Q Any dispute with any of the statements in here?
A I don't recall having a -- I don't -- I think it was accurate, but --
Q Okay. Well, when you read it, did you have any disputes

with the statements that were in here?
A I did not see it before it was filed, so -- but having read it after it was filed, I don't recall having any disputes with anything that was in it.
Q Okay. And I'll turn you specifically to Paragraph 13, which is found on Page 4 of 5.
A Okay.
Q And I'll -- well, let's look at this together. (reading) Prior to the petition date, the majority of Foley's and Lynn Pinker's fees and expenses were paid by a non-debtor entity, Highland CLO Funding Limited.
Do you see that?
A Yes.
Q Okay. And were Foley's bills sent to Highland CLO Funding?
A Yes.
Q Okay. And is -- were those bills separate and apart from the $2.15 million that we talked about earlier that were remitted through the Highland e-billing system?
A Separate, yes.
Q Okay. About how much in fees has Highland CLO Funding paid to Foley to date?
A Nothing post-petition. Prior -- I mean, during -- from the inception of the representation of Highland, probably approximately -- over a million dollars, for sure.

Q Over $2 million?
A I do not believe it is over $2 million. It's somewhere between $1 and $2 million.
Q Okay. And those separate matters that were billed to Highland CLO Funding, how did those differ from what was billed to Highland or to Neutra or to the Cayman defendants?
A If it was a matter that was clearly of some benefit to HCLOF, it was billed directly. Otherwise, there was an allocation billing for just the general work. And that was primarily through an indemnity agreement, as I understood it, between Highland and HCLOF.
Q Okay. And who did the allocation between Highland and Highland CLO Funding?
A I was instructed as to what the allocation should be or asked what I thought the allocation should be on any given time, and I believe it was the -- it was discussed with the board of HCLOF as to the allocation.
Q Okay. And who were you directed as to the categories of allocation by that you just referenced?
A You mean in terms of a person?
Q Yes.
A I most frequently discussed this with Mr. Sevilla, but also had conversations with Mr. Maloney, with King & Spalding, who was representing HCLOF, and occasionally would have direct conversations with Mr. Maloney and Mr. Scott and Ms. Bestwick,

who were the two independent directors of HCLOF.
Q Okay. And what types of work generally either were allocated or apportioned or billed in full to Highland CLO Funding. What was the benefit there?
A The work was -- the work that was going on in the bankruptcy case.
Q Okay. But I -- I understand that it was work in the bankruptcy case because that's where Foley represented Highland and various other entities, but I'm asking you specifically: What types of categories, and I don't -- you don't have to go task by task -- but categories of work that you performed for Highland or Neutra or for the Highland Cayman defendants that benefited and were billed to Highland CLO Funding?
MR. MORRIS: Your Honor, I'm going to again assert a relevance objection to any of this post-petition stuff. This is an application to retain Foley on a post-petition basis for the benefits to this estate, not with respect to what happened on a pre-petition basis.
THE COURT: Your response?
MS. PATEL: Your Honor, there's been much discussion about what -- whether Neutra should have to pay this bill or whether it should not have to pay its own way here. This is -- this is, in my mind, a bit of an extraordinary application in that we're asking a debtor entity to pay for non-debtor

representation.

I want to inquire as to sort of this jumbled mix of work that's been performed. There's -- clearly, Ms. O'Neil said she hasn't been paid by HCLOF post-petition, but I think we need to separate out all of these representations, who's controlling what, and how -- how these bills really should be paid.

THE COURT: How the allocation has worked --

MS. PATEL: Yes.

THE COURT: -- thus far?

MS. PATEL: Yes, Your Honor.

THE COURT: I overrule the relevance objection, but let me tell you a pickle we're getting into timewise. I have a confirmation hearing starting at 1:30. And we've gone three hours on this without a bathroom break. How much longer do you think you're going to need? Because we might have to stop and come back at 2:30 if you're going to need much longer.

MS. PATEL: Your Honor, I would say give me ten minutes and I can wrap it up.

THE COURT: Okay. Ten minutes.

MS. PATEL: Okay.

THE WITNESS: I'm sorry. What was the question? I apologize.

BY MS. PATEL:

Q I'm trying to remember it myself, Ms. O'Neil. The

question was, what specifically -- what -- and I don't -- you don't have to go task by task. But categorically, what was the work that was performed that you would have billed directly to HCLOF?

A Prior to King & Spalding's involvement, you may recall that we were representing HCLOF as well. So there was direct bill for the work during the bankruptcy by Foley Gardere for specific work for HCLOF.

The -- the -- pursuant to the indemnification, as I understood it, although I never read the indemnification personally, that there would be an allocation between Highland to HCLOF for that, for work that they performed that was of benefit to HCLOF or its equity interest in the CLOs.

And so I was more directed as to what that allocation should be vis-à-vis the work that was going on. I think, generally speaking, because the CLOs were being impacted, as was well-discussed during the course of the Acis bankruptcy, by the issues in the bankruptcy, by the temporary injunction that were in place vis-à-vis their inability to seek an optional redemption during the course of the bankruptcy, that they were being significantly impacted by the actions in the bankruptcy, even though they were not specifically a creditor in the bankruptcy.

Q So you performed services on behalf of your client, Highland, that you then billed to Highland CLO Funding because

Highland CLO Funding couldn't effectuate an optional redemption?
A It was -- it was in conjunction with the overall activities that were going on in the bankruptcy.
Q Okay.
A Not that specifically, no.
Q All right, Ms. O'Neil. I've only got a few minutes left. So let me ask you: Towards the end of January, did there come a time where you sent me an email regarding Acis's quarterly operating reports?
A Yes.
Q Okay. And you copied Mr. Hurst on that email as well, correct?
A Correct.
Q Okay. And your email was to say, hey, can we set up a time to talk because I've got -- Highland's got some questions about the quarterly operating report. Do you recall that?
A Yes.
Q Okay. And again, just so we're clear, this is around end of January 2020, right, after the appointment of the Board?
A Yes. You --
Q Okay.
A I think there's an exhibit. One of your exhibits is that.
Q There is. If you turn to --
A Or it's a portion of that email communication.

Q It is. It's -- if you turn to Tab 28, this is sort of your initial email to me, correct?
A Yeah. This is not the entire email dialogue, because --
Q There were other emails afterward.
A -- I did not get a response and sent a couple of emails later, several days later, asking for a response.
Q Right. And I actually did respond to you after that, correct?
A Approximately a week later, yeah.
Q Okay. Because I was out sick, actually.
A Yeah. That's what you said.
Q Right. So, --
A You didn't say sick, but you were out, so it's okay.
Q Yeah. I was out. And so -- and I will tell you, I was sick. So I responded, albeit a little bit late, but I did respond to you and say, Ms. O'Neil, could you tell me what your questions are so that I can be prepared?
Does that sound about right?
A Yeah.
Q Okay.
A Yes.
Q And I never -- I never got a response to that. You never told me what your questions were with respect to the quarterly operating report, right?
A Yes. And I --

Q Okay.
A I can explain that. Because Mr. -- I believe Mr. Pomerantz said that there was a meeting that was -- and they would discuss it then, so --
Q Okay.
A Or Mr. Demo. I'm sorry. Somebody from Pachulski told me that that would be addressed. Also, the status conference -- I mean, the questions we had were because there was a February 3rd status conference coming, and I wanted to see if we could get some clarity so that when we appeared before the status conference we could limit what we were going to be discussing with the Court, if anything.
Q Okay. Well, what were -- what were the nature of your questions? Because there was a conversation between Mr. Terry and myself and the Board and -- well, certain members of the Board. But what were your questions pertaining to?
A Oh, okay. Happy to discuss that. It's kind of awkward to have it in -- on this, in this --
Q On Q and A.
A -- forum, but --
Q I hear you.
A We sent -- as the Court will recall, the confirmation injunction can be lifted if all the claims are paid. So, since the plan, the Acis plan was confirmed, we have been tracking -- and the only way to track it is through the QORs

-- what the revenues were coming in and what has been paid. And so -- in terms of expenses and then claims. And so we have been -- my paralegal has been tracking this.

As the Court may know from looking at the record, almost all of -- any other claims that were in the case were either disallowed or withdrawn. And so, really, the only claim, other than Highland's, was Mr. Terry's that was really left to be paid, other than administrative claims. And I believe the administrative claimants had agreed to deferral on some of their payments after the effective date.

So we had been tracking the payments, which you can track through the QORs, and it appeared that all of -- including Oak Tree's most recently allowed administrative claim -- that all of the administrative claims had been paid, and it appeared at least approximately a half of Mr. Terry's claim had been paid.

When you look at the QORs, it doesn't specifically say, "Here's who got what payment," but it shows the claims being paid down, in addition to just general expenses of the post-confirmation Debtor. And I'm -- this is taking a little bit, but in the disclosure statement to the plan, there had also been plan projections that set forth the revenues that were anticipated post-confirmation to pay the claims. And so likewise -- as well as the expenses, including to Brigade or just general operating expenses for Acis.

So, likewise, through the QORs, we had been comparing

those against what was in the plan projection. And there were some things that weren't matching and we simply were having questions about the expenses seemed to be much higher. However, the claims were being paid down, so it looked like Mr. Terry was the only claimant left and was probably owed, by our calculation, around $4-1/2 million, and that was the only thing left to be paid. And, but the revenues per the QOR was showing cash available of over five and -- $5.3 million.

So, one of the things we wanted to discuss was the application of using the cash to go ahead and pay down what was left of Mr. Terry's claim so that the injunction could be lifted. But wanted to discuss that with you. That was the purpose of that.

Q Okay. And I guess let me back up. One, let me kind of correct you on a technical point, which is Mr. Terry's claim isn't the only claim that's left outstanding. There were also law firm claims that were lodged as against Acis, correct?

A I believe there were two --

MR. MORRIS: Objection, Your Honor. Just relevance. I don't get it.

THE COURT: Okay. Sustained. You've gone seven minutes. So, three more minutes and we need to wrap it up.

MS. PATEL: Okay.

BY MS. PATEL:

Q Well, I guess, Ms. O'Neil, kind of in line with the email,

the email came in shortly before Acis was sued by your co-counsel, Lynn Pinker, on behalf of the Charitable DAF and CLO HoldCo. Are you aware of this lawsuit?

A After it was filed. I was not aware of it before it was filed. The second one. I had seen the first one after it was filed. I had not seen the second one until after it was filed. We have a conflict with one of the defendants in that, so --

Q Okay. So, and when you say "the first one," are you talking about when it was originally the Charitable DAF versus U.S. Bank National Association and Moody's Investors Service?

A Yes.

Q Okay. And that all involved claims by the DAF brought against U.S. Bank and Moody's at the time relating to the Acis bankruptcy, right? It's claims that U.S. Bank didn't manage --

A Ms. --

Q -- as a trustee correctly, correct?

A Ms. --

MR. MORRIS: Objection, Your Honor. She's got no foundation. She said she has a conflict and wasn't involved with this case.

THE COURT: Sustained.

THE WITNESS: That's correct.

BY MS. PATEL:

Q Okay. I guess, Ms. O'Neil, let me just ask you: Did you have any involvement with -- if you look at Tab 27, that's a copy of the lawsuit, so that we're all clear exactly which one I'm asking you about. This is the lawsuit between the Charitable DAF and CLO HoldCo, your former client, versus U.S. Bank National Association, Moody's Investors Service, Acis Capital Management, Brigade, and Josh Terry. Did Foley have any involvement in the drafting or formulation of this lawsuit?

A None.

Q Okay.

MS. PATEL: No further questions, Your Honor.

THE COURT: All right. Any redirect?

MR. MORRIS: Very briefly.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. MORRIS:

Q Ms. O'Neil, you've been representing a number of different entities associated with Highland since 2018, right?

A Correct.

Q And are those entities identified in Plaintiff's Exhibit #2 in the engagement letter?

A Plaintiff's 2 or -- sorry.

Q The Debtor's.

A The Debtor's 2. Okay. Let me switch. They are.

Q Okay. And since the Board has been appointed, have you met with board members to discuss the status of the matters that your firm has been handling?
A Yes.
Q And without disclosing attorney-client communications, did that involve providing a history of the work that you'd done?
A Yes.
Q Did that involve providing a history of the work that you expected to do in the future?
A Yes.
Q Did the Board have an opportunity to ask questions of you?
A Yes.
Q And did you, in fact, answer the Board's questions?
A I endeavored to do so to the best of my ability, yes.
Q Okay.
A Or I followed up if -- with information via email if I needed to get additional information.
Q And is it your understanding that the Board supports your retention for the purposes that were described earlier by Mr. Nelms?
A Yes.
Q Okay.

MR. MORRIS: I have nothing further, Your Honor.

THE COURT: Any recross on that redirect?

MS. PATEL: No, Your Honor.

THE COURT: All right. Ms. O'Neil, you're excused.

THE WITNESS: Thank you.

(The witness steps down.)

THE COURT: All right. Highland, any more evidence?

MR. MORRIS: No, Your Honor. We rest.

THE COURT: All right. Is there any evidence from Acis?

MR. LAMBERSON: No, ma'am.

THE COURT: All right. Let's take a five-minute -- please, five-minute break -- and then we'll hear your closing arguments.

THE CLERK: All rise.

(A recess ensued from 12:47 p.m. until 12:56 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're going back on the record in Highland. I'll hear closing arguments.

I'm going to ask a question. I need clarification --

MR. DEMO: Of course.

THE COURT: -- on this. First off, in the Acis adversary that's stayed in the Acis bankruptcy case, Foley, it's proposed, would represent Highland. But is Foley also representing co-defendants in that adversary? You know, I think King & Spalding is representing all the co-defendants, or someone else is, but am I wrong or right about that?

MR. DEMO: Yes and no, Your Honor. I think there's been some miscommunication on that. The adversary, as we understand it, is stayed, and because of that we are not seeking to represent -- or retain Foley in that adversary, although we will if that comes up again. So, in the adversary, pre-petition, Foley did represent the Debtor and then a handful of other creditors who were brought into that adversary, as we understand it, as defendants. On a go-forward basis, though, we are proposing to retain Foley on three things: General matters in the bankruptcy proceeding; the appellate --

THE COURT: General matters in the Acis bankruptcy proceeding?

MR. DEMO: Correct, Your Honor. The appeal involving the confirmation order. And the appeal involving the Neutra litigation. And --

THE COURT: Okay. On the appeal of the involuntary, --

MR. DEMO: Yes, ma'am.

THE COURT: -- only Neutra --

MR. DEMO: That is correct.

THE COURT: -- is an appellant. Okay. So what you're asking is for authority for Highland to pay the legal fees of Neutra on that?

MR. DEMO: Yes, Your Honor.

THE COURT: Okay.

MR. DEMO: We are. And we, again, to the --

THE COURT: And let me -- let me -- and then the appeal of the confirmation order, are the appellants Highland and Neutra only, or is HCLOF an appellant?

MR. DEMO: In terms of Foley's representation, it's --

THE COURT: No, no, no. Just answer the question. Who are the appellants in the confirmation order?

MR. DEMO: Highland, Neutra, and HCLOF.

THE COURT: Okay. Who is representing HCLOF?

MR. DEMO: King & Spalding.

THE COURT: Okay. And Foley has thus far been representing Neutra and Highland?

MR. DEMO: Correct, Your Honor.

THE COURT: Okay. Well, okay. You may proceed.

MR. DEMO: And I will be brief. And I think ultimately this, this is a relatively simple thing, and I think you've nailed it.

What are the benefits to the estate of -- because nobody has objected, again, to Foley representing the Debtor. What are the benefits to the estate for Foley representing Neutra and being paid for that by the Debtor? And to answer that question, I think you have to look to all the testimony that we've heard today, and you also have to look at who's

objecting, Your Honor. The Committee is not objecting. There is no other committee member objecting besides Acis. The only party objecting to Neutra -- or, I'm sorry, to Highland paying Neutra's fees in the appeal, which, again, are a portion of the $500,000 that we think is going to be incurred post-petition on this, excluding today, because today has obviously gone a little bit long -- the only party objecting to paying a portion of that $500,000 to have Foley represent Neutra in an appeal that is happening less than six weeks from now is Acis.

Acis is the party opponent in that. Acis is the party that stands to benefit, not just because the involuntary petition will not be overturned, but because there will be a lack of leverage and a lack of ability to contest their $75 million, which is where it started, but it keeps growing. It's at $300 million now. The only party who's objected to that is Acis. None of the other creditors have objected.

THE COURT: Well, until the past 24 hours, the Committee was objecting.

MR. DEMO: Correct, Your Honor. And we had a -- finally had a chance, with the new Board in place, to discuss it with the Committee. And the new Board explained to the Committee that, in their business judgment, spending this money, this $500,000 -- which, again, is going to be allocated across these three matters; not all of it's going to be allocated to Neutra; a portion of it is going to be allocated

to Neutra -- $500,000 for the possibility of a recovery to the estate, the possibility of the ability to challenge a $300 million proof of claim that impacts not just the estate but the other creditors in the estate, substantially, because there's only so much money here. So, --

THE COURT: Okay. Let me ask you to recap what the evidence was on benefit to Highland --

MR. DEMO: On benefit --

THE COURT: -- from the overturning of the order for relief in Acis.

MR. DEMO: In terms of the overturning of the order for relief in Acis, there were -- there was testimony on the possibility -- and again, it's a possibility, and we're not disputing that. Acis's attorneys said it was 10 percent. That's fine. Maybe it's 10 percent. There was evidence presented by Mr. Nelms on the possibility that if the Acis involuntary is overturned, that the contracts at issue, the advisory and the sub-management agreements, --

THE COURT: Well, let's take it sequentially, because you've got to, you know, look at benefit of the estate --

MR. DEMO: Understood.

THE COURT: -- versus time and cost, to some degree, right?

MR. DEMO: Right.

THE COURT: So, Neutra wins.

MR. DEMO: Okay.

THE COURT: Okay? That means, according to Mr. Lamberson's argument, which I think is the correct argument, that we send to arbitration whether it's appropriate for Acis to be in a bankruptcy.

MR. DEMO: Correct, Your Honor.

THE COURT: Okay.

MR. DEMO: Well, may be correct.

THE COURT: So, --

MR. DEMO: I think we did hear there's a different possibility from Mr. Nelms.

THE COURT: Well, what is the other possibility?

MR. DEMO: Well, okay. Understood, Your Honor. Okay.

THE COURT: Okay.

MR. DEMO: So, say we -- assuming we send it to arbitration, --

THE COURT: So that means an arbitration panel is convened, and at some point, many months from now, an arbitration panel will either say yes or no, involuntary, you know, should have gone forward.

MR. DEMO: Okay.

THE COURT: Okay? Let's say the arbitration panel says no, should not have gone forward. Then what does the world look like for Highland?

MR. DEMO: I guess, taking it a step back, Your Honor, assuming that this does go to arbitration, it also means that the involuntary petition was not entered. If the involuntary petition was not entered, which means that the Acis equity did not go to Mr. Terry, it stayed under Neutra, at that point --

THE COURT: Wait, wait, wait.

MR. DEMO: -- you also go into arbitration.

THE COURT: Wait, wait. Wait, wait. So you're saying that everything is wiped out in the involuntary, the Acis bankruptcy case?

MR. DEMO: Your Honor, and I do want to be really, honestly, very, very clear about this. I am -- I am not saying anything. I'm not -- trying very hard not to draw a legal conclusion. What I'm saying is that the Board has analyzed this, the Board has applied business --

THE COURT: But I'm trying to understand --

MR. DEMO: -- judgment to this, and that there is a -- there is a possibility. Now, --

THE COURT: I'm trying --

MR. DEMO: -- obviously, reasonable minds can --

THE COURT: Okay. Here's where I'm coming from. And you can tell me if I'm analyzing this incorrectly, in your view. Okay. We used to have this terrible Fifth Circuit case -- you know, God help me if this transcript gets sent -- but

called *Pro-Snax*. Okay?

MR. DEMO: Okay.

THE COURT: I think the Fifth Circuit has decided itself that it was terrible, so it's not going to come back to haunt me, saying that. So, *Pro-Snax* said basically the Bankruptcy Court is a Monday-morning quarterback in looking at the reasonableness of fees. You know, did it provide a benefit to the estate?

MR. DEMO: Uh-huh.

THE COURT: And then that got reversed a few years ago. I think it was the *Woerner* case -- *Baron & Newburger (Woerner)* -- where the Court said, no, you don't do a hindsight look. You look at, at the time fees were expensed, --

MR. DEMO: Uh-huh.

THE COURT: -- was there something like a reasonable possibility they would benefit the estate?

MR. DEMO: Yes.

THE COURT: Okay? So I'm looking through it in that lens, so to speak, and I'm like, what benefit to the Highland estate could there be if the confirmation -- well, if the order for relief is unwound or the confirmation order is unwound? And I'm not there. I'm not there understanding any benefit for Highland.

I can understand a benefit, maybe, for Neutra, although I

am even hard-pressed to see that, because it looks like years of more litigation.

MR. DEMO: And Your Honor, I mean, I do think that there was -- and again, I'm not going to challenge your legal conclusions -- I do think that there was evidence that in the Board's business judgment they did analyze this and they see it, I think, a little bit differently.

THE COURT: And I should defer heavily to a Board's reasonable exercise of business judgment. I've got trouble. So I'm just trying to --

MR. DEMO: Understood. And I think, when you look at that business judgment, --

THE COURT: Uh-huh.

MR. DEMO: -- you know, obviously, I don't disagree. I do think that when you have a three-person independent board of this caliber who's come into a difficult situation, has reviewed all of the evidence, talked to all the applicable people, when things happened with the DAF litigation that they didn't like, they took action to stop that. When they looked at the Winstead appeal and they said, you know, there's not a benefit to the estate here, let's drop they, they dropped it.

THE COURT: But again, work with --

MR. DEMO: When they --

THE COURT: Work with me. Fifth Circuit reverses the order for relief. I don't think you have disagreed with

Lamberson's argument that best-case scenario in that reversal scenario is that an arbitration panel now looks at, should this Acis -- you know, should it have gone forward in a bankruptcy?

MR. DEMO: Well, I guess, Your Honor, then maybe I --

THE COURT: So, in that many --

MR. DEMO: -- I'm not being clear.

THE COURT: -- months, let's say eight months that an arbitration panel takes to decide, what happens during that eight months?

MR. DEMO: Well, then I guess, Your Honor, I need to step back, because I have not -- absolutely not been clear. If it goes to an arbitration panel, our view -- and I think Ms. O'Neil's briefs to the Fifth Circuit are clear on this -- the arbitration panel is going to arbiter or arbitrate whether or not there was a fraudulent conveyance. It's going to arbitrate how to resolve the claims. It's not going to arbitrate whether or not the involuntary petition should ever have been entered.

THE COURT: Wait, wait. What does that mean? Of course. That's the starting point of it all, right? The appeal is the Bankruptcy Court wrongly held a trial on the involuntary petition and ordered for relief. It should have deferred to an arbitration panel to do that. Isn't that appeal number one that we're talking about?

MR. DEMO: Yes, but --

THE COURT: Neutra's appeal?

MR. DEMO: Yes, it is.

THE COURT: Okay.

MR. DEMO: But I do think there's a nuance. And I do want to defer to the pleadings that were filed with the Fifth Circuit, because I don't want here to get myself out in front of that Fifth Circuit appeal, because obviously I do very much want that appeal to go forward. And maybe we lose and maybe we win, but if we win, I think the --

THE COURT: If Neutra wins.

MR. DEMO: If Neutra wins, one of the outcomes -- and again, I understand that, you know, reasonable minds can differ that there --

THE COURT: Okay.

MR. DEMO: -- of the outcomes.

THE COURT: But one of the outcomes.

MR. DEMO: One of the outcomes is that the involuntary petition is unwound, withdrawn, and the parties go to arbitration on the claims. If that were to happen, --

THE COURT: Wait. It's unwound and they go to arbitration on what claims? The claims in the adversary proceeding that's been filed in Acis?

MR. DEMO: Again, Your Honor, I'm not the appellate lawyer here. I mean, this is why we are here.

THE COURT: But how do you skip over the arbitration of the order for relief? Because if Joshua Terry, who commenced it, you know, he has the right now to argue to an arbitration panel that this should have been in bankruptcy, right? He doesn't have to just agree that the adversary proceeding is now arbitrated. Right?

MR. DEMO: Well, again, Your Honor, I don't want to substitute my judgment for the judgment of the Board. I think the judgment of the Board is that there is a scenario and that it's worth exploring and that it's worth the -- what we honestly think is a limited amount of money to explore. Because I think, if we explore that, we explore the possibility, quite honestly, of taking it out of bankruptcy, then, yes, in that scenario, and which we do it think is possible, in that scenario, and call it whatever probability you want, but if you're going to spend half a million dollars to get to a scenario that could reap you -- and I don't want to put a number on it -- but millions of dollars in future revenue, millions of dollars in terms of --

THE COURT: You're melding. You're collapsing. And we all know as lawyers that's not how it works. Things happen sequentially, okay?

MR. DEMO: Okay. Then I guess, going --

THE COURT: There's a setting aside -- well, there's a reversal of the Bankruptcy Court's issuance of an order for

relief.

MR. DEMO: Okay.

THE COURT: And that means you should have deferred to an arbitration panel, Judge Jernigan. And so they remand so that I can, consistent with that appellate ruling, say, We're staying the bankruptcy and it's going to arbitration to decide whether an order for relief. Is there really any realistic scenario where we skip that step?

MR. DEMO: We think that there's a scenario that is worth exploring.

THE COURT: I feel like your colleagues are really dying to chime in because they think they've got the answer to my question, no offense to you.

MR. MORRIS: I really -- I don't, Your Honor, but if I may.

THE COURT: Uh-huh.

MR. MORRIS: I think Ms. O'Neil is the appellate lawyer. Maybe she should speak on this very precise point, --

THE COURT: Okay. Because --

MR. MORRIS: -- if that's okay with the Court.

THE COURT: Because I see many miles --

MR. MORRIS: Yeah.

THE COURT: -- to go before we sleep if there's a reversal, and I'm trying to figure -- well, you know, we all know that, right?

MS. O'NEIL: Your Honor, if I may.

THE COURT: Uh-huh.

MS. O'NEIL: And I did not want to interrupt Mr. Demo, and he's done a great job, but obviously we've been involved with the appeal.

THE COURT: Right.

MS. O'NEIL: We've prepared the briefs.

THE COURT: So how does it play out if there's a reversal in favor of Neutra --

MS. O'NEIL: If I may, Your Honor.

THE COURT: -- of the order for relief?

MS. O'NEIL: The issue on the appeal is not to send the concept to arbitration of the involuntary petitions.

THE COURT: Okay.

MS. O'NEIL: It is that Mr. Terry was not a qualified petitioner because he was bound by an arbitration, a binding arbitration agreement, and that the issue that he -- by proceeding with these involuntary petitions, he commenced a suit, a proceeding that was, at its core, about fraudulent transfers, and that that should have gone to arbitration. And to proceed and try to engage this Court's jurisdiction on something that he had contractually agreed to go to arbitration on was improper.

So, if Neutra wins on that argument, and I would encourage the Court, we -- I think the briefs are in one of the

exhibits, but certainly I would provide them to the Court before the Court makes a determination if it would help. If there -- if Neutra wins on that appeal, then our position would be that yes, the bankruptcy is effectively void *ab initio*, and that's what we believe the case law supports.

Where that would put the parties, potentially -- and again, we're speculating what the Fifth Circuit may or may not due to instruct this Court to do -- could reverse and render, as it were, as Mr. Nelms testified happened to him previously, but could instruct this Court to abstain, which I think was -- and that is one of the various motions and the orders that the Court had denied. All of these are wrapped up in the appeal, Your Honor. And in doing so, instruct the petitioner, Mr. Terry, and Acis to go arbitrate the issue of the fraudulent transfers. That would reinstate Acis. Acis could reinstate Highland as the manager of the CLOs.

THE COURT: So every single order in the Acis case would be null and void?

MS. O'NEIL: We believe that the case law is that it would be void *ab initio*. And now, Your Honor, practically speaking, --

THE COURT: Void *ab initio*? Okay. That could only -- is that hinged to a subject matter jurisdiction, lack of subject matter jurisdiction --

MS. O'NEIL: Partially, that's part of the argument.

THE COURT: -- theory?

MS. O'NEIL: That's part of the argument. Yes, Your Honor.

THE COURT: Okay.

MS. O'NEIL: Practically speaking, it is our belief, although it is not clear, is what I've tried to kind of convey to the Court, and in conjunction with this conversation I was trying to have with Mr. Terry's counsel/Acis's counsel, is that we believe Mr. Terry has been paid down. Practically speaking, if that happens and he's only left with a claim or currently has a claim of $4 million, $4-1/2 million, which is what we think it is, or it's somewhere in that neighborhood, that -- and there's sufficient cash in Acis to pay that claim off -- it is a claim Judge -- Mr. Nelms testified to the fact that it would need to be paid -- then there may not even need to be a fraudulent transfer lawsuit because the claim would -- what's left of the claim would just be paid off. And then Acis -- Neutra would be back in ownership of Acis, Acis would engage Highland to come back in and do what it was doing before, Mr. Terry got his claim paid off, and there we are.

THE COURT: Okay.

MR. DEMO: That's honestly pretty much it, Your Honor. And we think that -- and the Board thinks that the benefit of pursuing that is worth it, quite honestly. And they think, in their business judgment, that it's worth paying

those Neutra fees -- which again, are a portion of the $500,000, only a portion -- because that benefit accrues to the estate, or could accrue to the estate in a situation where, in their business judgment, it's worth going forward on this.

THE COURT: Okay. The appeal -- okay. Let me make sure I heard this correctly. The appeal of the confirmation order, whereas we have Neutra only on the appeal --

MR. DEMO: Correct.

THE COURT: -- of the order for relief, the appeal of the confirmation order is Highland, Neutra, and HCLOF.

MR. DEMO: Correct.

THE COURT: And King & Spalding still represents HCLOF in connection with that appeal.

MR. DEMO: Correct. And they're the only law firm representing HCLOF in that appeal.

THE COURT: So here's what I'm struggling with. You know, what initially seemed like kind of a compelling argument -- all the briefing has been done, oral argument is set in March -- it feels like to me the main beneficiaries of a reversal of that confirmation order are HCLOF and Neutra. Foley can represent Neutra. Neutra can pay. King & Spalding can represent HCLOF. HCLOF can pay. And that seems like the reasonable scenario to me.

MR. DEMO: And I hear that. But I think -- and I

think Mr. Nelms --

THE COURT: Because let's --

MR. DEMO: -- testified to it, but --

THE COURT: Work with me. Let's say they don't reverse the order for relief --

MR. DEMO: Okay.

THE COURT: -- but they do reverse the confirmation order.

MR. DEMO: Okay.

THE COURT: So, Chapter 11 Trustee is in place representing Highland, and he can -- I'm sorry -- he is the spokesperson for the Acis, the controller of the Acis estate. He might go forward with plan number four, five, whatever it would be.

MR. DEMO: Okay.

THE COURT: Or say, I think it's time to convert this to 7. I mean I'm just trying to figure out --

MR. DEMO: And I guess I do want to go back to one thing, --

THE COURT: Uh-huh.

MR. DEMO: -- because I do not think there is another economic beneficiary that would pay Neutra's fees. I think if the Debtor is not allowed to pay Neutra's fees, nobody will pay Neutra's fees, and that portion of the appellate argument will fall by the wayside. Because --

THE COURT: So Neutra loses, but I don't see how Highland loses. You have not painted a scenario where it's clear to me there's any economic benefit to the estate.

MR. DEMO: I would, I would, with all --

THE COURT: And you're telling me, Defer to the Board's business judgment. But I'm --

MR. DEMO: Well, I --

THE COURT: I'm concerned that the evidence hasn't shown me --

MR. DEMO: I would also ask, Your Honor, --

THE COURT: -- all of the --

MR. DEMO: -- in all --

THE COURT: -- scenarios that lead to their reasonable business judgment on this.

MR. DEMO: As Ms. O'Neil just said, I mean, this is above the Fifth -- to the Fifth Circuit. The Fifth Circuit is set to hear this in six weeks. And if the Fifth Circuit rules the way that Ms. O'Neil just said, I do think, and I think the Board thinks -- actually, I know the Board thinks -- that there is a tangible benefit to the estate here. And so I know that I'm asking you to defer to their judgment, --

THE COURT: All I heard was --

MR. DEMO: -- but I'm also asking just for --

THE COURT: -- that they'd reinstate the sub-advisory and shared services agreements.

MR. DEMO: Which are --

THE COURT: Which, by the way, Highland moved to terminate, moved to compel rejection at one point during the case, and then, when that didn't work, HCLOF started calling for redemption.

MR. DEMO: And it's not the --

THE COURT: This is nuts for me --

MR. DEMO: It's not -- it's not the -- Your Honor, it's --

THE COURT: Tell me why it's not nuts for me to think --

MR. DEMO: Because it's not the same Highland.

THE COURT: -- that Highland would be thrilled to have Acis back managing the CLOs and subcontracting with Highland. I mean, that --

MR. DEMO: It's not, it's not the same Highland. The stuff that happened prior to the institution of the Board was the stuff that happened prior to the institution of the Board. There is new management of Highland. That new management is working very hard. As you've seen, Your Honor, that new management is willing to push back. That new management, with the DAF, which you've heard testimony of, that new management is working to get that motion withdrawn. That new management is not going forward with Lynn Pinker because of actions that it took that it thought subverted their control and their

management of the Debtor. The new management decided to drop an appeal that they did not think had any merit.

It's not the same Debtor, Your Honor. It is a board consisting of three highly-qualified people who are exercising their own judgment. So all of that stuff that happened prior to January 9th, I don't want to say hey, it's a clear line in the sand, but it is. Mr. Dondero is not in control of Highland Capital Management.

THE COURT: But he is in control of Neutra.

MR. DEMO: He is the economic beneficiary of Neutra. That is correct. But Mr. Dondero did tell Mr. Nelms, as Mr. Nelms testified, that he would reinstate those contracts. And I understand that. But again, as you've seen, Mr. Nelms and the Board have been able to push back, have been able to exert control, to exert influence, and to exert management over an institution that is very difficult to manage.

And I do think that deference to that is something that should very much be considered, because it's very easy to think of this as Old Highland, but this is New Highland, who has done an independent, objective review of these claims, who has sat with Ms. O'Neil, who has sat with Pachulski, who has sat with Mr. Terry and Ms. Patel and talked about this stuff, and still thinks that there is a benefit here to the estate, and that spending the $500,000 to pursue that benefit, which is not just a benefit to Highland but it's a benefit to

Highland other -- to Highland's other creditors, I guess, Your Honor, quite honestly, I would ask that you to defer to that new management, because it is not -- it is not Old Highland.

All that stuff that people have talked about -- I mean, you've seen today in court, you've heard testimony about very qualified people working to stop that and working to put this estate into a position where it can reorganize, where it can come to agreements with its creditors, where it can work through this process, where it can come out the other side.

But if we take away that Board's ability to manage litigation with one of their biggest creditors, whose litigation claim keeps growing, all you're doing is benefitting that one creditor, not to the detriment of Mr. Dondero but to the detriment of the other creditors in this case.

UBS has a claim. Redeemer has a claim. Meta-e has a claim. McKool's has a claim. You can run through that whole list. And if you take away the Board's right to direct litigation that is going directly to the Board's ability to control runaway claims, to negotiate with creditors, and to come up with an idea of how to split the pie, then, with all respect, Your Honor, you are infringing on that Board's business judgment and that Board's ability to reorganize this case.

This case isn't just about --

THE COURT: It wouldn't be taking away. And here is a nuance that -- I think it is perfectly reasonable, in case you don't know where I'm heading on this, for Foley to represent Highland in the Acis case, in that adversary proceeding, if it goes forward, because heck yeah, Highland has been sued for huge amounts of money.

MR. DEMO: Understood.

THE COURT: Their claim, that is many millions, has been objected to. So, heck yeah, this estate needs good representation of Highland in that case, where there are many unresolved issues still in the Acis case.

But on the appeal, I am just still lost as to how there is any chance in the world Highland benefits in those appeals. Neutra, heck yeah. Maybe they get their Acis back and can instruct it to, you know, stop suing Highland or whatever. Dondero controlling Neutra can do that. Okay? And HCLOF, it doesn't want Acis to have anything to do anymore with managing its equity piece of those CLOs. Sure. But how -- I mean, you're telling me that there could be a scenario -- here's what I'm hearing. That there is a benefit in having all those fraudulent transfer claims arbitrated, I guess, not litigated in the Bankruptcy or District Court, and there's a benefit in having all of the management agreements, portfolio management agreements reinstated. And I just, I don't see how that happens anytime soon based on how I perceive a reversal of

orders on appeal happening.

MR. DEMO: And I guess I don't know what else to say on that point. We do think there's a $12 million tangible benefit to reinstating those contracts. We think there's a tangible benefit to allowing Neutra to go forward with its appeal. And again, there is nobody else who I think would pay that freight besides the Debtor, because that benefit, we believe, goes to the Debtor.

THE COURT: How many years of life are there left on the CLOs that Acis manages?

MR. DEMO: I would have to check, Your Honor. I don't know off the top of my head. I can ask. But --

THE COURT: I mean, you're saying $12 million. I mean, I don't --

MR. DEMO: I, you know, --

THE COURT: There's not a -- I'm just not sure where that number is coming from. I never heard direct evidence of that.

MR. DEMO: Okay. Well, I guess, Your Honor, I mean, again, I would just ask that you defer to the business judgment of the Board and allow them to position this litigation in a way that best enables them to deal with every creditor's claim, and not just the claims of one creditor. And if they cannot fight the claims of the creditor, then they can't negotiate how that pot is going to be split in a fashion

that benefits everybody.

So I guess, Your Honor, I mean, I don't know what else to say about the benefits of the Neutra appeal except that the testimony, I think, speaks for itself. But, you know, I -- and in terms of --

THE COURT: Again, fight the claim of a creditor. Foley can represent Highland in the adversary proceeding, wherever that goes forward.

MR. DEMO: Yeah.

THE COURT: Probably District Court, not this Court. At least some of it, if not all of it. But anyway, I'm digressing. They can object to Acis's proof of claim. They can object to Terry's proof of claim. I mean, --

MR. DEMO: And conversely, Your Honor, if -- if --

THE COURT: -- this has nothing to do with -- I mean, I don't get the appeal. I mean, I --

MR. DEMO: Right.

THE COURT: Neutra can appeal, HCLOF can appeal, but I'm not seeing the benefit to Highland.

MR. DEMO: And I guess the only thing I would say, Your Honor, is if there is an improper benefit, we are not saying that the fee applications are sacrosanct. People can challenge the improper benefit there.

And again, the settlement gave broad discretion to the Committee to pursue insider claims. So if an insider is

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

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

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

MR. DEMO: One second, Your Honor.

(Counsel confer.)

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

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

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

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

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

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

to benefit if Neutra wins that appeal. Right?

MR. DEMO: Yes. Yes, Your Honor.

THE COURT: Okay. So that --

MR. DEMO: Highland would benefit greatly --

THE COURT: Okay.

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

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

MR. DEMO: No.

THE COURT: -- Highland only secondarily benefits --

MR. DEMO: I -- I --

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

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

THE COURT: Okay.

MR. DEMO: So, worst case, --

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

MR. DEMO: Worst --

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

MR. DEMO: Well, --

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

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

THE COURT: -- that's going to happen anytime soon.

MR. DEMO: But I guess worst-case scenario is that it's $8 million in hundred-cent dollars.

THE COURT: Okay.

MR. DEMO: And that's not nothing for $500,000. And only a portion of that $500,000.

THE COURT: Okay.

MR. DEMO: Thank you, Your Honor.

THE COURT: Okay. Mr. Lamberson?

MR. LAMBERSON: Your Honor, do you want a closing from me? Or no?

THE COURT: I don't really need it. Thank you.

MR. LAMBERSON: Okay.

THE COURT: Okay.

MR. LAMBERSON: Because I know your hearing starts in about two minutes.

THE COURT: All right. So, I just hate it that we spent so much time on this. I hate it that we spent so much time, but, I mean, I understand. I understand. You know, I think the employment application was filed pretty early in the case, right, and -- October 29th. And it was continued, continued, continued, because we were getting objections from the Committee, or they wanted time to look at it, I guess. And now you're kind of up against the wire, right, because oral arguments are set at the Fifth Circuit next month. So I,

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

But I'm concerned. I'm concerned -- well, here's the deal. We have a great board, and I totally get that Bankruptcy Courts should defer heavily to the reasonable exercise of business judgment by a board. And we've got great professionals. And we've got this case, I think, on a good track as a general matter now. 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.

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

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

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

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

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

that's my ruling.

I will additionally rule, for the avoidance of doubt, that if Foley wants to represent Neutra in the appeals and get paid by Neutra, I don't have any problem with that. In other words, I'm not going to find something like there's a conflict with the estate, you know, because of its simultaneous representation of Neutra. That's fine. But I'm not going to approve Highland paying anything in connection with either of those appeals. So that is the ruling of the Court.

Have I left any gaps here?

MR. DEMO: Your Honor, just one clarification.

THE COURT: Uh-huh.

MR. DEMO: Foley is representing Highland Capital Management in the appeal of the confirmation order to the Fifth Circuit. I just want to clarify that your ruling that Highland can represent -- I'm sorry -- Foley can represent Highland in all Acis matters extends to their representation of Highland Capital Management in the appeal of the confirmation order that's set for March 30th.

THE COURT: Okay. Let me think through that.

MR. DEMO: And again, Your Honor, there's been no objection to that.

THE COURT: King & Spalding is in there representing HCLOF. Foley would be representing both Neutra and Highland in connection with the confirmation order?

MR. DEMO: Technically, but Neutra really has nothing. It's a coattail party in that case. Highland Capital Management, to the extent that they could bifurcate Neutra, it would still be doing the exact same work. So if there is an issue there with the representation of Neutra, we'd still ask that Foley be allowed to represent Highland Capital Management in that appeal.

THE COURT: Okay. So you're telling me Neutra doesn't really benefit from that appeal, so you want Highland to pay all of the fees of Foley in connection with the confirmation order appeal?

MR. DEMO: All I'm asking, Your Honor, is that Foley can represent Highland Capital Management in that appeal. And again, there's been no objection to that. What happens with Neutra, I, you know, I understand your position. I am simply asking for a clarification that Foley can continue representing the Debtor in the Debtor's appeal of the confirmation order.

THE COURT: All right. I will say yes to that, but they need to be prepared to have their fees split. I'm not saying 50/50, I don't know what the percentage is, but they are going to be allocated between Neutra and Highland, and they should not expect to get a hundred percent of those covered by Highland at the end of the day. Okay? There's going to be a deep dive into looking at how that allocation

should work, okay?

MR. DEMO: And they will be filing fee apps, obviously, on all of the matters that they are --

THE COURT: Okay. Anything else?

MR. POMERANTZ: One moment, Your Honor.

THE COURT: Okay.

(Pause.)

MR. DEMO: Yeah. And Your Honor, I do just want to clarify that when we talk about the involuntary petition appeal, that when we talk about its effect on the fraudulent conveyance action, to the extent that -- and I would like to clarify your position on this, Your Honor. Is your position that the appeal of the involuntary, if successful, would have no impact on the fraudulent conveyance actions in the Acis litigation?

Because I do think that it is clear that --

THE COURT: I think we don't know. We would have to see --

MR. DEMO: And I guess that's -- that's --

THE COURT: -- what the Fifth Circuit states.

MR. DEMO: And my --

THE COURT: And it may be: Bankruptcy Court, stay the proceedings and defer, send it to arbitration. "It" being re-litigation of --

MR. DEMO: Understood.

THE COURT: -- the involuntary.

MR. DEMO: And --

THE COURT: That may be, to me, a likely scenario, but maybe not.

MR. DEMO: And -- and --

THE COURT: Maybe they'll say something else.

MR. DEMO: Understood. And I think we're honestly on the same page with that.

THE COURT: Uh-huh.

MR. DEMO: Because to the extent that it does put it into arbitration, to the extent that there is that possibility, that it changes the color of those fraudulent conveyance claims, changes the color of Acis's $300 million proof of claim, which goes to settlement strategy, which goes to the benefits to other creditors, which goes to a whole panoply of other things that tie into a benefit to the estate. And I don't want to re-argue what we've already argued, but I think, as Your Honor said, that chance that there is going to be a change to the fraudulent conveyance, either because it throws them into an arbitration or because it somehow otherwise colors it, is, in and of itself, a substantial benefit to the estate -- leaving aside the dollars from the contracts, leaving aside the $8 million proof of claim -- because that benefit goes to, again, that $300 million proof of claim that Acis has filed, which impacts the estate, which

impacts other creditors, and which impacts the settlement mechanics in this case.

So to the extent that there is a chance that the involuntary changes that and recolors it, there is a substantial benefit to the estate in that, because it allows the estate to work with creditors --

THE COURT: I mean, --

MR. DEMO: -- to figure out a way to settle claims in a way that are --

THE COURT: I get what you're saying, but guess what? You can object to that $300 million proof of claim. And we might have a very interesting conversation about --

MR. DEMO: What --

THE COURT: Well, it's the same judge either way, but -- well, I guess I don't get what you're saying. You have the ability to object to the proof of claim whether there's affirmance or --

MR. DEMO: Yeah. But --

THE COURT: -- reversal, right? I'm just --

MR. DEMO: We don't have a -- you know, we may not have to get -- I'm sorry, Your Honor, and I'll stop it -- but we may not have to get there. Objecting to the proof of claim is quali... it is quantitatively and qualitatively different than a Fifth Circuit order saying that there are changes to the fraudulent conveyance, there are changes to the

distribution of equity under the plan. Maybe there is no plan -- or maybe there is no bankruptcy at all.

Those things fundamentally change the dynamics of this case in a way that's good for the estate. And those things can only happen if there's an order from the Fifth Circuit entering that. We can object all down the pipe, and we are going to object, Your Honor, and I assume other people will object as well. But our objecting does not have the same benefit to the estate as a Fifth Circuit opinion saying, Fraudulent conveyance claims go to arbitration; saying, There is no involuntary petition.

Now, I understand that there are questions as to the probability of those things, but the fact that there is a probability of those things happening and the cost to the estate is a hundred thousand dollars, I understand what Your Honor has said and I don't want to overstay my welcome, but I do think we are -- at least maybe I am presenting it wrong -- but that Fifth Circuit order either way is going to calcify and solidify this in ways that are beneficial to the estate and beneficial to how this bankruptcy is going to progress.

THE COURT: Okay. I understand you feel passionately about that, but just so you know, for future purposes or not, I'm not there because, you know, among other things, we -- you know, life has changed. You know, if the Fifth Circuit says reversal, not a darn thing should happen in a bankruptcy case

of Acis, you know, it can all go to arbitration, well, that's the Acis litigation, right? But Acis has filed a proof of claim now. And are you going to tell me the Fifth Circuit is going to say the arbitration that should have happened in the earlier Acis case trumps, if you will, adjudication of a proof of claim now in a new case?

MR. DEMO: And the claims are --

THE COURT: I mean, I'm just -- someone mentioned *Gandy* and *National Gypsum*, and there's even a more recent Fifth Circuit case dealing with arbitration which --

MR. DEMO: The claims, Your Honor, are state law claims if there's no bankruptcy, and I think --

THE COURT: But there is a bankruptcy. There's a Highland bankruptcy now. And there's a proof of claim --

MR. DEMO: Not if the Fifth Circuit --

THE COURT: -- in the Highland case.

MR. DEMO: -- overturns the involuntary petition.

THE COURT: Yeah. I just -- okay. We're just, we're having academic conversations, and I'm probably guilty for going down this trail. So, anyway, is there anything further, then?

MR. LAMBERSON: No, Your Honor.

THE COURT: I need a few orders.

MR. LAMBERSON: If they want to prepare an order and send it to us, we're happy to look --

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 Date
Certified Electronic Court Transcriber

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RULINGS, cont'd.

EXHIBIT 4

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	)	Case No. 19-34054 (SGJ11)
Debtors.	)	(Jointly Administered)

MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS ON DEBTOR'S ABILITY, AS PORTFOLIO MANAGER, TO INITIATE SALES BY NON-DEBTOR CLO VEHICLES

Highland Capital Management Fund Advisors, L.P. ("**HCMFA**") and NexPoint Advisors, L.P. ("**NexPoint**", and together with HCMFA, the "**Advisors**"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the

"**Funds**"), by and through their undersigned counsel, hereby submit this motion for an order of the Court under Bankruptcy Code §§ 105(a), 363, and 1107 imposing temporary restrictions on Highland Capital Management, L.P.'s (the "**Debtor**") ability to initiate sales as portfolio manager (or other similar capacity) for certain non-debtor investment vehicles (the "**CLOs**"). In support of the Motion, the Funds and Advisors submit the Declaration of Dustin Norris (the "**Declaration**") attached hereto and state as follows:

BACKGROUND

A. General Background on the Advisors and their Advised Funds

1. 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 (the "**Advisers Act**").

2. Each of the Advisors advises several funds, including the Funds. Each of the Funds is a registered investment company or business development company under the Investment Company Act of 1940 (as amended, the "**1940 Act**").

3. As an investment company or business development company, each Fund is overseen by a majority independent board of trustees subject to 1940 Act requirements. That board reviews and approves contracts with one of the Advisors for the respective Fund. The Funds do not have employees. Instead, each Fund relies on its respective Advisor, acting pursuant to advisory agreements, to provide the services necessary to the Fund's operations.

B. The CLOs

4. The CLOs are Aberdeen Loan Funding, Ltd., Brentwood CLO, Ltd., Eastland CLO, Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Greenbriar CLO, Ltd., Jasper CLO, Ltd., Liberty CLO, Ltd., Red River CLO, Ltd., Rockwall CDO, Ltd., Rockwall CDO II Ltd.,

Southfork CLO, Ltd., Stratford CLO Ltd., Loan Funding VII, LLC, and Westchester CLO, Ltd.

5. The CLOs are securitization vehicles formed to acquire and hold pools of debt obligations. They also issued various tranches of notes and preference shares, which are intended to be repaid from proceeds of the subject CLO's pool of debt obligations. The notes issued by the CLOs are paid according to a contractual waterfall, with the value remaining in the CLO after the notes are fully paid flowing to the holders of the preference shares.

6. The CLOs were created many years ago. Most of the CLOs are, at this point, past their reinvestment period and have paid off all the tranches of notes or, in a few instances, all but the last and most junior tranche. Accordingly, most of the economic value remaining in the CLOs, and all of the upside, belongs to the holders of the preference shares. The repayment status of the notes in the CLOs as of November 2020 is shown on Exhibit A to the Declaration, and the Funds' collective ownership of the preference shares is shown on Exhibit B to the Declaration. As shown on Exhibit B, the Funds hold a majority of the preference shares in three of the CLOs, Grayson CLO, Ltd., Greenbriar CLO, Ltd., and Stratford CLO Ltd., and material interests in most of the other CLOs.

7. The CLOs have each separately contracted for the Debtor to serve as the CLO's portfolio manager.[1] In this capacity, the Debtor is responsible, among other things, for making decisions to sell the CLOs' assets. Although the portfolio management agreements vary, the agreements generally impose a duty on the Debtor when acting as portfolio manager to maximize the value of the CLO's assets for the benefit of the CLO's noteholders and preference

[1] The title given to the Debtor by the CLOs varies from CLO to CLO based on the relevant agreements, but the Debtor has the same general rights and obligations for each CLO. In this Motion, the Funds and Advisors have used the term "portfolio manager" when referring to the Debtor's role for each CLO regardless of the precise title in the underlying documents.

shareholders.

C. The Operating Protocols

8. As part of the resolution of certain disputes between the Debtor and the Official Committee of Unsecured Creditors (the "**Committee**"), the Debtor is operating under the restrictions and provisions of certain operating protocols (the "**Operating Protocols**") approved by the Court. See Notice of Debtor's Amended Operating Protocols (Docket No. 466). Among other things, the Operating Protocols include provisions regulating the Debtor's actions on behalf of other entities. With respect to the CLOs, however, the Operating Protocols generally exempt the Debtor from the regular approval process involving the Committee where the Debtor acts as portfolio manager for the CLOs. See, e.g., Operating Protocols at § IV(B)(3)(a).

C. Recent Asset Sales and the Advisors' Requests for a Temporary Pause in Sales

9. The Court recently approved the Debtor's Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (Docket No. 1473) (the "Disclosure Statement").

10. The Disclosure Statement discusses the Debtor's role as portfolio manager for the CLOs (which the Disclosure Statement defines as "Issuers") in Article II(U) (pg. 32). After explaining the Debtor's role and noting some proofs of claim filed by the CLOs, the Disclosure Statement states as follows:

> The Issuers have taken the position that the rejection of the Portfolio Management Agreements (including any ancillary documents) would result in material rejection damages and have encouraged the Debtor to assume such agreements. Nonetheless, the Issuers and the Debtor are working in good faith to address any outstanding issues regarding such assumption. The Portfolio Management Agreements may be assumed either pursuant to the Plan or by separate motion filed with the Bankruptcy Court.

> The Debtor is still assessing its options with respect to the Portfolio Management Agreements, including whether to assume the Portfolio Management Agreements.

11. The Financial Projections attached as Exhibit C to the Disclosure Statement make clear that, assuming confirmation of the Debtor's chapter 11 plan in its current form, the Debtor intends to liquidate its remaining assets over the next two years, concluding in December 2022.

12. The Funds and Advisors do not agree with recent sales executed by the Debtor in certain CLOs, including sales during the historically light Thanksgiving trading week, because the Funds and Advisors view those assets as having greater value if held as long-term investments. When the Advisors became aware the Debtor was considering these transactions, NexPoint requested that the Debtor not consummate the sales.

13. NexPoint has requested in two letters that the Debtor refrain from causing the CLOs to sell further assets without prior notice and consent of NexPoint. Counsel to the Funds and Advisors has also requested by email that the Debtor agree consensually to temporarily suspend further sales of the CLOs' assets and/or confirm that the Debtor is not presently planning further sales in the immediate future. The Debtor has refused these requests.

D. HCMLP Decisions Illustrating Its Short-Term Approach

14. Consistent with its proposal to liquidate all of its assets by the end of 2022 per the Disclosure Statement, HCMLP has engaged in transactions taking a short-term approach to value.

15. In addition to the sales noted above during Thanksgiving week, during the chapter 11 case, the Debtor has directed the disposition of other assets in a manner that suggests a focus on quick monetization at the expense of maximizing returns for investors and/or the

estate. For example, Debtor-controlled entities sold a collective majority interest in an unsecured term loan to OmniMax International, Inc. Other non-Debtor controlled entities, advised by the Advisors, were able to secure a substantially better price for their stake in the same asset by being willing to hold it and transacting at a later date. Given the Debtor-controlled entities large ownership in the unsecured loan, the Advisors believe the Debtor was well-positioned to realize a higher price.

16. Also, upon information and belief, the Debtor, through its wholly owned subsidiary Trussway Holdings, LLC ("**Trussway**"), consummated a sale transaction where Trussway sold a division, SSP Holdings, LLC, in which Trussway had a majority interest. Upon information and belief, the sale was conducted without a formal competitive bidding process and resulted in a loss of $10 million, despite certain metrics of SSP Holdings, LLC having improved materially since it was acquired in 2014.

REQUEST FOR RELIEF

17. The Funds and Advisors request that the Court, under Bankruptcy Code sections 105(a), 363, and 1107(a) impose a temporary restriction on the Debtor's ability, as portfolio manager, to cause the CLOs to sell assets. The Funds and Advisors request that the Court prohibit the Debtor from authorizing any such sales for a period of 30 days, absent further order of the Court.

18. Bankruptcy Code section 363 governs the Debtor's use of estate property. 11 U.S.C. § 363. Section 363 authorizes the Debtor to use that property outside of the ordinary course of business "after notice and a hearing," and in the ordinary course of business without notice and a hearing "unless the court orders otherwise . . . ." 11 U.S.C. § 363(b-c). Bankruptcy Code section 1107(a) grants the Debtor, as debtor-in-possession, the powers of a chapter 11 trustee, subject to "such limitations or conditions as the court prescribes . . . ." 11 U.S.C.

§ 1107(a). And Bankruptcy Code section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a).

19. Consistent with these powers, the Court implemented the Operating Protocols earlier in this case regarding the Debtor's actions on behalf of other non-debtor entities. Unlike where the Debtor directs sales of assets for other entities, however, the Operating Protocols generally do not restrict the Debtor's actions as portfolio manager for the CLOs. See Operating Protocols at IV(B)(3)(a).[2] The Funds and Advisors submit that the relief requested does not conflict with the Operating Protocols, but to the extent necessary, the Funds and Advisors request that the Court modify the Operating Protocols in the limited and temporary way requested in this Motion.

20. The Funds and Advisors seek this relief to preserve the status quo at the CLOs while the Funds and Advisors explore replacing the Debtor as portfolio manager either

[2] Section IV(B)(3)(a) (Transactions involving entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest)(Operating Requirements)(Third Party Transactions: All Stages) provides in full:

> **Except** (x) as set forth in (b) and (c) below and **(y) for any Transaction involving a Specified Entity and the sale or purchase by such Specified Entity of an asset that is not an obligation or security issued or guaranteed by any of the Debtor, a Related Entity or a fund, account, portfolio company owned, controlled or managed by the Debtor or a Related Entity, where such Transaction is effected in compliance with the collateral management agreement to which such Specified Entity is party,** any Transaction that decreases the NAV of an entity managed by the Debtor in excess of the greater of (i) 10% of NAV or (ii) $3,000,000 requires five business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(emphasis added). "Specified Entity" is defined in section I(K) of the Operating Protocols to include the CLOs referenced in this Motion.

consensually or through the contractual processes laid out in the relevant underlying agreements.

21. In the Disclosure Statement, the Debtor states that it has not determined if it wants to continue to serve as portfolio manager for the CLOs. The Debtor also has not sought input from the Funds and Advisers, even though the Funds are among the largest stakeholders indirectly and significantly affected by the Debtor's actions with respect to the CLOs.

22. The Advisers Act places a fiduciary duty on investment advisers comprising a duty of care and duty of loyalty. See, e.g., SEC Release No. IA-3248, "Commission Interpretation Regarding Standard of Conduct for Investment Advisers," (July 12, 2019). This means an adviser, like the Debtor, must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. See id. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times. See SEC v. Tambone, 550 F.3d 106, 146 (1st Cir. 2008) ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . . ."); SEC v. Moran, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

23. Although the Debtor's nominal "clients" are the CLOs themselves, the true parties in interest are the holders of beneficial interests in the CLOs, such as the Funds. Most or all of the other layers of CLO interests have been paid out, and the Funds hold either the majority or a substantial portion of most of the remaining CLO interests. In these circumstances, the Funds and the other preference shareholders are the parties who are economically affected by the Debtor's actions as portfolio manager.

24. The Funds and Advisors believe replacing the Debtor as portfolio manager is appropriate in light of the reduced staffing the Debtor anticipates having once the Debtor's chapter 11 plan goes effective. The Funds and Advisors also believe it is appropriate in light of the Debtor's reduced investment time horizon under the chapter 11 plan. As noted above, the Debtor intends to liquidate its investments in the next two years. The Funds, on the other hand, have a much longer investment time horizon and, as a result, have very different financial incentives with respect to their investments. The Funds and Advisors accordingly believe that the Funds and the other preference shareholders would be best served by a portfolio manager with a similar long-term perspective.

25. Upon information and belief, none of the CLOs needs liquidity at the current time, as the next quarterly waterfall payments are not due until February 2021. The Funds and Advisors accordingly submit that none of the CLOs, the other holders of preference shares and notes issued by the CLOs, or the Debtor will be harmed by the temporary restriction proposed by this Motion. Notably, the Funds and Advisors are not seeking to restrict the Debtor from performing any of its other functions for the CLOs or to modify the Debtor's compensation from the CLOs in any way.

[Remainder of Page Intentionally Left Blank]

CONCLUSION

26. For the reasons set forth above, the Funds and Advisors respectfully request that the Court grant the relief requested in the Motion and such other and further relief as the Court deems just and proper.

Dated: December 8, 2020

K&L GATES LLP

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

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2020, I caused the foregoing document to be served via first class United States mail, postage prepaid and/or electronic email through the Court's CM/ECF system to the parties that consented to such service, as each are listed in the debtor's service list filed at docket entry 1442, Exhibits A and B.

This the 8th day of December, 2020

/s/ Artoush Varshosaz
Artoush Varshosaz

CERTIFICATE OF CONFERENCE

I hereby certify that on December 7, 2020, I conferred with Mr. Greg Demo, counsel for the Debtors, regarding the relief requested in the motion. Mr. Demo informed me that the Debtors do not consent to the relief sought in the motion.

This the 8th day of December, 2020

/s/ James A. Wright III
James A. Wright III

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	)	Case No. 19-34054 (SGJ11)
Debtors.	)	(Jointly Administered)

DECLARATION OF DUSTIN NORRIS

I, Dustin Norris, hereby declare pursuant to 28 U.S.C. § 1746, that the following is true and correct.

1. I am the Executive Vice President of NexPoint Advisors, L.P. ("**NexPoint**").

2. I submit this Declaration based on my personal knowledge and information supplied to me by other members of NexPoint's management. I submit this Declaration in support of the Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles (the "Motion") by NexPoint, Highland Capital Management Fund Advisors, L.P. ("**HCMFA**", and together with NexPoint, the "**Advisors**"), Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "**Funds**").

3. The Motion concerns the following non-debtor investment vehicles: Aberdeen Loan Funding, Ltd., Brentwood CLO, Ltd., Eastland CLO, Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Greenbriar CLO, Ltd., Jasper CLO, Ltd., Liberty CLO, Ltd., Red River CLO, Ltd., Rockwall CDO, Ltd., Rockwall CDO II Ltd., Southfork CLO, Ltd., Stratford CLO Ltd., Loan Funding VII, LLC, and Westchester CLO, Ltd. (collectively, the "**CLOs**").

4. The Funds each hold interests in the CLOs.

5. The CLOs are securitization vehicles formed to acquire and hold pools of debt obligations. They also issued various tranches of notes and preference shares, which are intended to be repaid from proceeds of the subject CLO's pool of debt obligations. The notes issued by the CLOs are paid according to a contractual waterfall, with the value remaining in the CLO after the notes are fully paid flowing to the holders of the preference shares.

6. The CLOs were created many years ago. Most of the CLOs are, at this point, past their reinvestment period and have paid off all the tranches of notes or, in a few instances, all but the last and most junior tranche. Accordingly, most of the economic value remaining in the CLOs, and all of the upside, belongs to the holders of the preference shares. The repayment status of the notes in the CLOs as of November 2020 is shown on Exhibit A hereto, and the Funds' collective ownership of the preference shares is shown on Exhibit B hereto.

7. The CLOs have each separately contracted for Highland Capital Management, L.P. (the "**Debtor**") to serve as the CLO's portfolio manager. The title given to the Debtor by the CLOs varies from CLO to CLO based on the relevant agreements, but the Debtor has the same general rights and obligations for each CLO. In this capacity, the Debtor is responsible, among other things, for making decisions to sell the CLOs assets. Although the portfolio management agreements vary, the agreements generally impose a duty on the Debtor when acting as portfolio manager to maximize the value of the CLO's assets for the benefit of the CLO's noteholders and preference shareholders.

8. During the chapter 11 case, the Debtor has directed the disposition of other assets in a manner that suggests a focus on quick monetization at the expense of maximizing returns for investors and/or the estate. For example, Debtor-controlled entities sold a collective majority

interest in an unsecured term loan to OmniMax International, Inc. Other non-Debtor controlled entities, advised by the Advisors, were able to secure a substantially better price for their stake in the same asset by being willing to hold it and transacting at a later date. Given the Debtor-controlled entities large ownership in the unsecured loan, the Advisors believe the Debtor was well-positioned to realize a higher price.

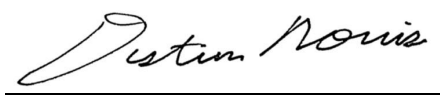
9. Also, upon information and belief, the Debtor, through its wholly owned subsidiary Trussway Holdings, LLC ("**Trussway**"), consummated a sale transaction where Trussway sold a division, SSP Holdings, LLC, in which Trussway had a majority interest. Upon information and belief, the sale was conducted without a formal competitive bidding process and resulted in a loss of $10 million, despite certain metrics of SSP Holdings, LLC having improved materially since it was acquired in 2014.

10. The Advisors did not agree with the Debtor's decision to execute recent sales for certain of the CLOs, because the Advisors viewed those assets as having greater value if held as long-term investments. When the Advisors became aware the Debtor was considering these transactions, NexPoint requested that the Debtor not consummate the sales.

11. Upon information and belief, none of the CLOs need liquidity at the current time, as the next quarterly waterfall payments are not due until February 2021.

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

Executed this 8th day of December, 2020, in Allen, Texas,

By: 

Dustin Norris

EXHIBIT A

CLO Note Repayment Status[1]

Aberdeen Loan Funding, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes	00306LAA2	$0
Class B Notes	00306LAB0	$0
Class C Notes	00306LAC8	$0
Class D Notes	00306LAD6	$0
Class E Notes	00306MAA0	$0
Class I Preference Shares	00306M201	$12,000,000.00
Class II Preference Shares	00306M300	$36,000,000.00

Brentwood CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1A Notes	107265AA8	$0
Class A-1B Notes	107265AM2	$0
Class A-2 Notes	107265AC4	$0
Class B Notes	107265AE0	$0
Class C Notes	107265AG5	$0
Class D Notes	107265AK5	$10,279,258.35
Class I Preference Shares	107264202	$34,400,000.00
Class II Preference Shares	107264400	$37,000,000.00

Eastland CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1 Notes	277345AA2	$0
Class A-2a Notes	277345AC8	$0
Class A-2b Notes	277345AE4	$0
Class A-3 Notes	277345AG9	$0
Class B Notes	277345AJ3	$0
Class C Notes	277345AL8	$0
Class D Notes	27734AAA1	$3,251,287.27
Class I Preference Shares	27734A202	$85,000,000.00
Class II Preference Shares	27734A400	$38,500,000.00

[1] As of December 1, 2020.

Gleneagles CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1 Notes		$0
Class A-2 Notes		$0
Class B Notes		$0
Class C Notes		$0
Class D Notes		$0
Class 1 Combination Notes		$0
Class 2 Combination Notes		$0
Preference Shares	37866PAB5 & G39165AA6	$91,000,000.00

Grayson CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1a Notes	389669AA0	$0
Class A-1b Notes	389669AB8	$0
Class A-2 Notes	389669AC6	$0
Class B Notes	389669AD4	$0
Class C	389669AE2	$0
Class D	389668AA2	$9,011,534.74
Class I Preference Shares	389669203	$52,500,000.00
Class II Preference Shares	389669302	$75,000,000.00

Greenbriar CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes	393647AA0	$0
Class B Notes	393647AB8	$0
Class C Notes	393647AC6	$0
Class D Notes	393647AD4	$0
Class E Notes	39364PAA0	$0
Class I Preference Shares	39364P201	$20,000,000.00
Class II Preference Shares	39364P300	$60,000,000.00

Jasper CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes		$0
Class B Notes		$0
Class C Notes		$0
Class D-1 Notes		$0
Class D-2 Notes		$0
Preference Shares	471315200	$70,000,000.00

Liberty CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1a Notes		$0
Class A-1b Notes		$0
Class A-1c Notes		$0
Class A-2 Notes		$0
Class A-3 Notes		$0
Class A-4 Notes		$0
Class B Notes		$0
Class C Notes		$0
Class Q-1 Notes		$0
Class P-1 Notes		$0
Class E Certificates	EP0175232 & 530360205	$94,000,000.00

Red River CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes	75686VAA2	$0
Class B Notes	75686VAB0	$0
Class C Notes	75686VAC8	$0
Class D Notes	75686VAD2	$0
Class E Notes	75686XAA8	$0
Class I Preference Shares	75686X209	$36,000,000.00
Class II Preference Shares	75686X308	$45,000,000.00

Rockwall CDO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1LA Notes	774262AA7	$0
Class A-1LB Notes	774262AB5	$0
Class A-2L Notes	774262AC3	$0
Class A-3L Notes	774262AD1	$0
Class A-4L Notes	774262AE9	$0
Class B-1L Notes	774262AF6	$0
Class X Notes	774262AG4	$0
Class I Preference Shares	774272207	$33,200,000.00
Class II Preference Shares	774261127	$45,000,000.00

Rockwall CDO II Ltd.

Security	CUSIP	Remaining Balance
Class A-1LA Notes	77426NAA1	$0
Class A-1LB Notes	77426NAB9	$0
Class A-2L Notes	77426NAC7	$0
Class A-3L Notes	77426NAD5	$0
Class B-1L Notes	77426NAE3	$0
Class B-2L Notes	77426RAA2	$9,838,508.11
Class I Preference Shares	77426R203	$42,200,000.00
Class II Preference Shares	77426R401	$44,000,000.00

Southfork CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1a Notes		$0
Class A-1b Notes		$0
Class A-1g Notes		$0
Class A-2 Notes		$0
Class A-3a Notes		$0
Class B Notes		$0
Class C Notes		$0
Preference Shares	84427P202	$80,200,000.00
Class I Composite Note		$2,000,000.00

Stratford CLO Ltd.

Security	CUSIP	Remaining Balance
Class A-1 Notes	86280AAA5	$0
Class A-2 Notes	86280AAC1	$0
Class B Notes	86280AAD9	$0
Class C Notes	86280AAE7	$0
Class D Notes	86280AAF4	$0
Class E Notes	86280AAG2	$0
Class I Preference Shares	86280A202	$17,500,000.00
Class II Preference Shares	86280A301	$45,500,000.00

Loan Funding VII, LLC (aka Valhalla)

Security	CUSIP	Remaining Balance
Class A-1-A Notes		
Class A-2 Notes		
Class B Notes		
Class C-1 Notes		
Class C-2 Notes		
Class I Preference Shares	91914QAA4	$82,000,000.00

Westchester CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1-A Notes	95736XAA6	$0
Class A-1-B Notes	95736XAB4	$0
Class B Notes	95736XAD0	$0
Class C Notes	95736XAE8	$0
Class D Notes	95736XAF5	$0
Class E Notes	95736XAG3	$9,141,575.05
Class I Preference Shares	95736T206	$80,000,000.00

EXHIBIT B

Holdings of Preference Shares[1] in CLOs

CLO	HIF	NSOF	NC	Total
Aberdeen	0%	30.21%	0%	**30.21%**
Brentwood	0%	40.06%	0%	**40.06%**
Eastland	31.16%	10.53%	0%	**41.69%**
Gleneagles	9.74%	8.52%	0%	**18.26%**
Grayson	49.10%	10.75%	0.63%	**60.48%**
Greenbriar	0%	53.44%	0%	**53.44%**
Jasper	0%	17.86%	0%	**17.86%**
Liberty	0%	10.64%	0%	**10.64%**
Red River	0%	10.49%	0%	**10.49%**
Rockwall	6.14%	19.57%	0%	**25.71%**
Rockwall II	14.56%	5.65%	0%	**20.21%**
Southfork	0%	7.30%	0%	**7.30%**
Stratford	0%	69.05%	0%	**69.05%**
Loan Funding VII (aka Valhalla)	0%	1.83%	0%	**1.83%**
Westchester	0%	44.38%	0%	**44.38%**

[1] Class E Certificates for Liberty CLO, Ltd.

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	)	Case No. 19-34054 (SGJ11)
Debtors.	)	(Jointly Administered)

ORDER GRANTING MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS ON DEBTOR'S ABILITY, AS PORTFOLIO MANAGER, TO INITIATE SALES BY NON-DEBTOR CLO VEHICLES

Upon the Motion (the "**Motion**"),[1] filed by Highland Capital Management Fund Advisors, L.P. ("**HCMFA**") and NexPoint Advisors, L.P. ("**NexPoint**," and together with HCMFA, the "**Advisors**"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "**Funds**"), seeking an order, pursuant to sections 105(a), 363, and 1107 of the Bankruptcy Code, imposing temporary restrictions on the Debtor's

[1] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

ability to initiate sales as portfolio manager (or other similar capacity) for certain non-debtor investment

vehicles (the "**CLOs**"); and upon the Declaration of Dustin Norris (the "**Declaration**"); and the Court, having reviewed the Motion and the Declaration; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and upon the record before the Court; and a hearing having been held on the Motion; and it appearing to the Court that good cause exists to grant the relief requested by the Motion;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.

2. For a period of thirty days, commencing on the date hereof, the Debtor, in its capacity as portfolio manager or such other similar role with respect to the CLOs, is hereby prohibited from causing the CLOs to engage in any asset sales until January ___, 2021.

3. The Court shall retain jurisdiction over all matters involving the enforcement, implementation and interpretation of this Order.

END OF ORDER # #

Submitted by:

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

EXHIBIT 5

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

In Re:	**Case No. 19-34054-sgj-11** Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Dallas, Texas Wednesday, December 16, 2020 1:30 p.m. Docket - MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS [1528] - DEBTOR'S EMERGENCY MOTION TO QUASH SUBPOENA AND FOR ENTRY OF PROTECTIVE ORDER [1564, 1565] - JAMES DONDERO'S MOTION FOR ENTRY OF ORDER REQUIRING NOTICE AND HEARING [1439]

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

APPEARANCES, cont'd.:

For James Dondero:	D. Michael Lynn Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For the Issuer Group:	James E. Bain JONES WALKER, LLP 811 Main Street, Suite 2900 Houston, TX 77002 (713) 437-1820
For the NexPoint Parties:	James A. Wright, III K&L GATES State Street Financial Center One Lincoln Street Boston, MA 02111 (617) 261-3193
For Highland CLO Funding, Ltd.:	Rebecca Matsumura KING & SPALDING, LLP 500 West 2nd Street, Suite 1800 Austin, TX 78701 (512) 457-2024
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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

DALLAS, TEXAS - DECEMBER 16, 2020 - 1:35 P.M.

THE COURT: All right. This is Judge Jernigan. We have settings in Highland. We have -- I guess the very first thing that we had set today was a motion of Dondero, Mr. Dondero wanting some sort of revised procedures for "future estate transactions occurring outside the ordinary course of business." Then, related to that, we received the other day -- I'm not showing it on the calendar, I'm not sure if that means it's moot now or not, but we had a motion for protective order and a motion to quash with regard to certain depositions that Mr. Dondero wanted in connection with his motion. The Debtor filed that motion to quash. It was to quash a deposition of Mr. Dubel, Mr. Nelms, Mr. Sevilla, and Mr. Caruso. And then we have the CLO Motion, what I'm calling the CLO Motion, of --

(Interruption.)

THE COURT: Okay. Let's --

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz. The first two motions have been resolved. And after Your Honor takes appearances, I'm happy to inform the Court of the proposed resolution, and there's an agreed order that we would upload after the hearing.

THE COURT: Okay. Well, that is certainly music to my ears. All right. So I was just trying to lay out the program for what I thought was set, potentially three motions,

one of which was a deposition dispute.

All right. So let's go ahead and get appearances. Mr. Pomerantz, you're obviously appearing for the Debtor team.

MR. POMERANTZ: Yes. Good morning, Your Honor. Or good afternoon, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones. Also on the video with me today are John Morris and Greg Demo. They will be handling the CLO Motion, and I will be reporting to the Court on the resolution of Mr. Dondero's motion and our corollary discovery motions.

THE COURT: Okay. All right. Well, why don't I take an appearance from Mr. Dondero next. Mr. Lynn, I see you there.

MR. LYNN: Yes, Your Honor. I am here with Bryan Assink, who will replace me after the preliminaries when our business is done. Other than concurring with Mr. Pomerantz, I wanted to advise Your Honor that in the last 30 minutes we filed an additional motion where we're seeking a clarification with respect to the temporary restraining order that the Court entered last week.

THE COURT: All right. Well, I did see an email from my courtroom deputy right before walking in about that motion, and so that's why I was a little surprised and said "Music to my ears" that there was an agreed order on the Dondero motions. But I'll get the details --

MR. LYNN: Well, we're --

THE COURT: I'll get the details about that in a minute. Let me go ahead and get the other appearances.

For the Movants on what I've called the CLO Motion, who do we have appearing?

MR. WRIGHT: Good afternoon, Your Honor. It's James Wright of K&L Gates for the -- I guess I'll call them the Movant for this motion.

THE COURT: Yes. Sometimes you're referred to as the Advisors and the Funds and -- but Movants on Docket Entry 1528.

All right. For the Committee, I know you have weighed in on a couple of these motions. Who do we have?

MR. CLEMENTE: Good afternoon, Your Honor. Matt Clemente with Sidley Austin on behalf of the Committee.

THE COURT: All right. Well, we have a lot of folks on the phone. I think I've covered everybody who filed a pleading for today. Is there anyone else who would like to appear? I'd really like to restrict it only to those who have filed pleadings today.

MS. MATSUMURA: This is Rebecca Matsumura from King & Spalding representing Highland CLO Funding, Ltd. I don't expect I'll be weighing in today, but there are a couple issues that I may say a sentence on, so I want to go ahead and make my appearance now.

THE COURT: All right. Thank you. Anyone else?

MR. BAIN: Yes, Your Honor. Joseph Bain; Jones Walker; on behalf of the CLO Issuers.

THE COURT: All right.

MR. BAIN: And Your Honor, if we may make certain comments at the requisite time, we'd appreciate it.

THE COURT: All right. Thank you. Anyone else?

All right. Well, Mr. Pomerantz, let's hear about the agreements you have on the Dondero-related motions.

MR. POMERANTZ: Happy to, Your Honor. And yes, Mr. Lynn is correct, we saw also an emergency motion that came through that I'll have a couple of comments at the end of my presentation.

So, as I mentioned before, Your Honor, I'm pleased to report that with respect to the two motions that Your Honor scheduled for today's hearing, we have an agreement with Mr. Dondero. One was the motion of Mr. Dondero requiring transactions out of the ordinary course to be brought before this Court. The second was the Debtor's motion to quash a series of subpoenas that had been issued in the last two days, requiring board members and others to testify.

As part of the agreement, we have agreed with Mr. Dondero that his motion, which is presently set for today, shall be continued to January 4th, which is the same date set as the continued hearing on the preliminary injunction relating to the TRO that Your Honor had entered last week.

As part of that agreement, the Debtor has agreed that it will provide Mr. Dondero with three business days' notice before selling any non-security assets from any managed funds accounts through and including January 13th, which is the date set for confirmation.

While, as the Court is aware, the Debtor doesn't believe that any notice, opportunity for hearing, or an order from the Court is required in connection with such transactions, as the Debtor does not have any current plans to sell non-security assets from managed funds before confirmation, it was willing to agree to the notice requirement as essentially a way of resolving the motion before Your Honor today and continuing until the 4th.

As part of the agreement as well, Your Honor, the parties have agreed that there will be no further discovery in connection with the motion that is set. That'll be no additional discovery by Mr. Dondero, so he is withdrawing the subpoenas as it relates to this motion, and there will be no further discovery as -- by the Debtor. As Your Honor, I think, is aware, there were depositions conducted of both Mr. Seery and Mr. Dondero on Monday in connection with this motion, but the discovery will not happen over the next couple of weeks.

Mr. Dondero wanted to make sure, and the Debtor didn't have any opposition, that that agreement with respect to no

discovery only relates to the pending motion before the Court. And in connection with any other matters relating to this bankruptcy case, Mr. Dondero would reserve the right to pursue discovery, and of course the Debtors would reserve the right to challenge discovery if we believed it was inappropriate or unduly burdensome.

With respect to the motion that was just filed, Your Honor, we had a chance to briefly review it. We haven't had a chance to discuss it with the board. In any event, we don't think there's an emergency. Mr. Dondero wants the opportunity to approach and communicate with the board. I've told Mr. Lynn that communications regarding the plan are to go through Mr. Seery. Mr. Seery is the Debtor's chief executive officer. He's the chief restructuring officer. And at this point, the board doesn't see a reason or have a desire to meet with Mr. Dondero to talk about his plan, but, again, would be happy to receive any written communications that Mr. Dondero has.

Mr. Dondero has sought to modify the TRO to allow him to speak to the board. Again, if the board agreed to speak with Mr. Dondero, that wouldn't violate the TRO, provided that counsel would be present. But at this point, the board has decided that it would be inappropriate and not a good use of anyone's time to have that communication and that Mr. Dondero should continue to communicate through Mr. Seery, the Debtor's chief executive officer.

If Your Honor, after reading the motion and hearing my comments, and I'm sure Judge Lynn's comments that he will make to Your Honor, Your Honor wants to set it for hearing, we would submit, Your Honor, there's no emergency and that a hearing could be set next week, but we would think Your Honor might be able to dispose of the motion just on the papers and the limited argument that would go on today.

THE COURT: All right.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: All right. Mr. Lynn, first, could you confirm the terms of the agreed order that Mr. Pomerantz just announced are consistent with what you and your client believed was negotiated?

THE CLERK: He's on mute.

THE COURT: You're on mute, sir.

MR. LYNN: Mr. Pomerantz has correctly stated the agreement of the parties. I am pleased to advise Your Honor that I expect that we will withdraw the motion that is presently pending to be heard on January 4th, since all we were asking for was notice until confirmation date. If those sales are going to take place before then, we don't have a problem any longer with the pre-confirmation activity of Mr. Seery.

With regard to the motion that we filed requesting that the temporary restraining order be modified, we would point

out, respectfully, that the independent board is the board of directors of Strand Advisors. Strand Advisors belongs to Mr. Dondero. It is not unreasonable for the sole stockholder of Strand Advisors to ask the board questions or present thoughts to the board or ask its advice. Mr. Seery, on the other hand, while being a member of the board of Strand, is the chief executive officer and the chief restructuring officer of Highland, which is not the same as Strand.

Furthermore, Your Honor, Mr. Dondero has been attempting for several months to negotiate an arrangement by which the Debtor can continue as a going concern. It is his desire to discuss further with the board as a whole what he can do in that regard. I think the Court, by directing him originally to participate in the mediation that took place in September, expected him to do so. He has attempted to do so. And while he has not gotten a response from the Creditors' Committee that is definitive, he has at least caught the interest of Mr. Seery, though that interest may have died for a variety of reasons in recent weeks.

And by the way, next week is fine with us. We're not in a hurry beyond that if the Court feels further discussion would be useful.

MR. POMERANTZ: Your Honor, just a couple of points in response.

Mr. Dondero has the right to request an audience with the

board. He has requested the audience with the board. The board has considered it and decided not to communicate in that fashion with Mr. Dondero at this time. There is nothing that Your Honor can do in the TRO that would change that, other than ordering the board to speak with Mr. Dondero, which I highly doubt Your Honor would do.

Having said that, this board in general and Mr. Seery in particular have been very supportive of an overall resolution to this case, not only with the creditors, but with Mr. Dondero. Mr. Seery has spent tens if not hundreds of hours over the last several months working with Mr. Dondero to try to get him in a position to present something that would have traction with the Unsecured Creditors. Unfortunately, that hasn't occurred. We understand there have been communications between Mr. Lynn and Mr. Clemente. And if there is any hope of a plan and any traction with the creditors, this Debtor in general and Mr. Seery in particular stands ready, willing, and able to do anything within the Debtor's power to help that out.

So, it's not really the Debtor standing in the way. It's an economic agreement ultimately that needs to be reached with Mr. Clemente and his constituents and Mr. Lynn. And if that can be reached, we will be the first to jump on that bandwagon and do everything humanly possible to have that occur.

Thank you, Your Honor.

THE COURT: All right. Well, again, I've not read the motion. I've just seen an email that I have this motion. I'm a little bit confused. I don't want to spend too long on this because we have another motion to get to. But I'm a little bit confused on how Dondero wants the TRO to be modified. If he has the right already to request an audience of the board, what is it that is problematic about the TRO that he wants modified?

THE CLERK: He's on mute.

THE COURT: You're on mute.

MR. LYNN: Sorry, Your Honor. As I told you before, you must forgive me, my command of technology is not great.

In response, I would say that I question whether it is appropriate, in advance of a meeting with the board of his company, that what he wants to talk about should be screened. And that is what has occurred in our effort to meet by telephone with the board.

Any such meeting would, of course, be subject to the restraints that are included in the temporary restraining order, in that both Mr. Pomerantz or his designee and I would participate in any such discussion. I respectfully submit Strand is his. Nobody may like that, but it is his, and he ought to be able to talk to his own board.

THE COURT: Is this about having a conversation without the Committee's involvement? I just don't -- hmm. I

just need to see the motion.

Mr. Clemente, anything you want to add at this juncture? Have you even reviewed the motion yet?

MR. CLEMENTE: Your Honor, I apologize. I haven't actually even seen the motion. And so I have no comment on it, Your Honor. I apologize for not having been able to look at it.

THE COURT: Okay. Well, what about the agreed order that's been announced? Any comment on that?

MR. CLEMENTE: Your Honor, we support the resolution that Mr. Pomerantz announced on the record.

THE COURT: Okay. All right. Well, I assume there's nothing further, then, on the Dondero motions that were scheduled today?

All right. So I will happily accept the agreed order that has been announced. For now, we will continue the Dondero motion that was Docket Entry No. 1439 to January 4th, when the preliminary injunction hearing is set. And we -- I understand there are going to be no more discovery requests in connection with these matters that were set today.

And I will review the motion that Mr. Dondero has filed shortly before today's hearing in chambers later, and I will have my courtroom deputy communicate to the lawyers whether I see fit to set it for an emergency hearing next week or rule on the pleadings or set it for January 4th. Those are, I

guess, the three possibilities I can think of that I might decide upon.

So, again, I'm not making any ruling at all on a motion I haven't read yet. So I'll -- the courtroom deputy will let you all know, if not later today, tomorrow. Probably tomorrow, because I have a confirmation hearing set later today in another case.

All right. So, thank you all for working these issues out. And Mr. Pomerantz, Mr. Dondero -- or, excuse me, Mr. Lynn, anything further on the Dondero disputes?

MR. POMERANTZ: Nothing from the Debtor, Your Honor.

MR. LYNN: Your Honor, nothing from Mr. Dondero. May I be excused?

THE COURT: Is anyone anticipating needing Mr. Dondero's counsel for the other matter? All right. If not, then I certainly have no problem with you dropping off the line, Mr. Lynn. Thank you.

MR. LYNN: Thank you, Your Honor.

THE COURT: Okay. All right. So let's turn next to the CLO Motion. I take it there are no agreements on this one?

MR. POMERANTZ: There are not, Your Honor.

MR. WRIGHT: There are not, Your Honor. I can confirm that.

THE COURT: All right. Mr. Wright, do you have

anything you want to say as far as an opening statement before we go to the evidence?

MR. WRIGHT: I don't, Your Honor. My intention, if it's okay with you, you asked me to bring a witness, so I do have Mr. Norris from my client, and I was going to just remind the Court who I am and state the name of all of my Movants, and then I was going to move directly to put him on the stand and go through a brief direct.

THE COURT: All right. I think I heard Mr. Morris is going to handle this phase of the hearing.

MR. DEMO: And Your Honor, this is Greg Demo from Pachulski on behalf of the Debtor.

THE COURT: Oh, okay.

MR. DEMO: We would like to make a brief opening statement before we have witnesses, if that's all right with Your Honor.

THE COURT: All right. I'm fine with that. So, --

MR. DEMO: All right.

THE COURT: -- go ahead.

MR. DEMO: All right. Well, thank you, Your Honor. Again, Greg Demo; Pachulski Stang; on behalf of the Debtor.

We are here today on what really amounts to the third of three motions that deal with Mr. Dondero's attempts, either directly or through a proxy, to transfer control away from the Debtor and back to Mr. Dondero.

The current motion is filed by NexPoint Capital and Highland Capital Management Fund Advisors and three of their managed funds: Highland Income Fund, NexPoint Capital, and NexPoint Strategic Opportunities Funds.

Mr. Dondero owns and controls NexPoint Capital and Highland Capital Management Fund Advisors. While both NexPoint Capital and Highland Capital Management Fund Advisors are governed by boards, the boards have no investment authority with respect to the funds they manage, nor was the boards' approval necessary to file the motion, or obtained.

Mr. Dondero is the sole portfolio manager for NexPoint Strategic Opportunities Fund and Highland Income Fund. Mr. Dondero is one of three portfolio managers for NexPoint Capital. Mr. Dondero's decisions are not subject to oversight.

The Movants disclosed these facts in their recent SEC filings, and there can be no dispute that Mr. Dondero is the controlling figure behind the Movants in the relief being sought in the motion which seeks to impede the Debtor's efforts to exercise its rights as a CLO manager.

The fact that this motion was even filed is quite surprising, since on December 7th the Debtor filed a complaint and TRO based upon Mr. Dondero's unlawful efforts to frustrate the Debtor's efforts to sell assets from the very CLOs that are the subject of this motion.

The Court granted the TRO on December 10th. Mr. Dondero also filed a motion seeking similar relief in November, which has now been adjourned to January 4th.

The Movants are essentially now seeking an order from this Court enjoining the Debtor from exercising its rights as a CLO manager and requiring the Debtor to seek the Movants' and Mr. Dondero's permission to fulfill its obligations as a manager for the CLOs.

The Movants, however, do not come right out and say this, and instead couch the motion as seeking to simply pause the CLOs' asset sales while the Movants and the Debtor engage in discussions regarding the future of the CLOs' management.

In the motion, the Movants also argue the Debtor has made decisions detrimental to the interests of the preference shareholders because the Debtor is trying to monetize its assets in a manner inconsistent with the preference shares' objectives.

The Movants simply mischaracterize the facts, the parties' respective rights under contracts, and the law.

First, to the extent the Movants hold interests, they hold only preference shares in the CLOs and are minority investors in the preference shares of 12 of the 15 CLOs at issue. In one third of the CLOs, the Movants' interests sit behind senior debt which must be paid first.

Notably, Your Honor, no other investors in the CLOs are

here or have expressed support for the Movants' position.

Second, the Movants simply have no right under the contracts governing the CLOs to the relief they are requesting. The CLOs are governed by a series of agreements which were agreed to long ago and dictate the rights of all investors of the CLOs. The enforceability of those agreements is relied on by all investors, not just the Movants.

Under these agreements, investment discretion is given to the CLOs' manager -- in this case, the Debtor -- and no investor has the right to direct the CLO manager. The manager was chosen to manage the CLOs' assets. No individual investor was chosen to manage the CLOs' assets.

Simply said, there will be no evidence that the Movants have the right to do what they're trying to do, and there will be no evidence that the Movants' preferences with respect to the CLOs' assets is in line with that of the other investors in the CLOs.

Under the relevant agreements, if an investor is not happy with a manager's performance, the investor's rights are generally limited to replacing the manager. The investors here -- excuse me, the Movants here -- have not done that and cannot do that. Under the agreements, replacement requires at least the majority of the preference shares that are not affiliates of the managers. In 12 of the 15 CLOs, the Movants hold a substantial minority interest position. They are not

the majority. In the three CLOs in which they are the majority, the Movants still cannot replace the Debtor as the investment manager because they are the Debtor's affiliates.

It is indisputable that, prior to January 9th, when Mr. Dondero was removed from control of the Debtor, that the Debtor, NexPoint Advisors, Highland Capital Management Fund Advisors, and the three funds were the Debtor's affiliates because of Mr. Dondero's common control.

After January 9th, where the Court removed Mr. Dondero from control of the Debtor, the Debtor is arguably, under the documents, not an affiliate. However, Your Honor, the Movants have disclosed in their recent proxy statements filed in 2020 that they still consider themselves the Debtor's affiliate, and they should be bound by that statement. The Movants, by virtue of Mr. Dondero's being removed from control of the Debtor, should not be able to use that removal to reassert control over the CLOs that were taken away from Mr. Dondero when he was removed in January 2020.

The Debtor believes that additional briefing may be needed on this issue, and that a ruling specifically on this issue and the parties' relative rights under the CLO management agreements may be needed. The Debtor reserves its right to brief this issue and to bring it before this Court, either as a declaratory judgment or any other procedurally-appropriate motion.

Because the Debtor -- excuse me. The Movants have no right to the relief requested. They argue that the relief is justified because of the mismatch between the investors' timelines and the Movants'. This is not true. The Movants cite to three transactions to justify their statement in the motion: SSP, OmniMax, and certain recent transactions.

The recent transactions were the attempted sales of two public equities immediately before Thanksgiving that Mr. Dondero interfered with. You'll hear testimony from Mr. Seery about each of these transactions and how each was in the best interest of the CLOs.

First, SSP. SSP is a steel business that was suffering for a number of reasons. The Debtor's investment team believed SSP should be sold since 2019. The Debtor received multiple offers for SSP, the Debtor evaluated these offers, and the Debtor choose the one that was the best. The SSP sale closed in early November.

Notably, Your Honor, none of the CLOs held an equity interest in SSP, its parent, or in Trussway. Instead, they held debt, and they got exactly what they bargained for, repayment of their debt obligations in full.

OmniMax, Your Honor, is the second one. It is a fabricator of building materials. The CLOs and the Movants held an interest in OmniMax debt which they have been trying to refinance or equitize since 2019. That deal was intended

to include the Movants, but instead of working with the Debtor, Mr. Dondero held out and used the threat of litigation against OmniMax to secure a higher price for the Movants, to the detriment of the CLOs.

As Mr. Seery will testify, these two transactions were all about maximizing value and have nothing to do with investment timelines.

Finally, Your Honor, the Movants reference the Thanksgiving transactions. These transactions were discussed in the context of Mr. Dondero's TRO. Mr. Seery directed Debtor personnel, on the advice of his investment team, to sell these securities. Mr. Dondero blocked those trades. Now the Movants argue that the reason those trades were blocked was because of a mismatch between the Movants' and the Debtor's investment timelines. That is not the case. Mr. Seery will testify as to these trades. The Debtor is an investment manager and appreciates that its decisions with respect to how it manages its assets are -- is a judgment call. The evidence, however, will show that the Debtor at all times exercised that judgment in good faith based on all available information.

The Movants may disagree with the Debtor's judgment, Your Honor, but that is irrelevant. The Movants have no right to interfere with the Debtor's management of the CLOs. There is simply no statutory or contractual basis for this, not under

Section 363 and not under the CLO agreements.

Finally, Your Honor, -- I guess not finally. There's one more point I want to make. But Your Honor, this -- what we're here on today is notably similar to the Acis bankruptcy that Your Honor noted last time we were here last week. In that bankruptcy, HCLOF tried to direct the collateral manager to take certain actions that HCLOF thought were in the best interest of the CLOs. In this case, the Movants, through Mr. Dondero, are trying to file an action that functionally seeks to direct the Debtor to take interests that the Movants believe are in their best interest. There is substantial overlap between the litigation in Acis and the litigation here.

Finally, Your Honor, the Debtor has been in discussions with the CLOs' counsel on this issue. And the Debtor has been informed that the CLOs' position is that the Debtor's ability to operate under the management agreements should not be interfered with, not by the Movants or not by any other party.

Thank you, Your Honor. With that, I will turn it over to Mr. Norris. Or, I'm sorry, Mr. Wright.

THE COURT: All right. Mr. Wright, you may call your witness.

MR. WRIGHT: All right, Your Honor. Dustin Norris should be -- should be dialed in and should be available on screens.

THE COURT: Okay. I'm going to --

MR. WRIGHT: I'll pause and have him confirm that.

THE COURT: I'm going to ask you, Mr. Wright, to speak up or closer to your device. I didn't hear the name of your witness.

MR. WRIGHT: Sure. Sorry. It's Dustin Norris. I -- last time, you were having trouble hearing me, and so I'm trying a different device this time. I actually followed the instructions that I found very helpful, so I'm trying my phone in hopes that it will work better.

THE COURT: All right.

MR. WRIGHT: But, yeah, it's Dustin Norris. D-U-S-T-I-N, N-O-R-R -- N-O-R-R-I-S.

THE COURT: All right. Mr. Norris, can you say "Testing one two" so we pick up your video?

MR. NORRIS: Testing one two.

THE COURT: All right.

MR. NORRIS: Testing one two.

THE COURT: All right. Please raise your right hand.

DUSTIN NORRIS, MOVANTS' WITNESS, SWORN

THE COURT: All right. Mr. Wright, you may proceed.

MR. WRIGHT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. WRIGHT:

Q Mr. Norris, you're employed by NexPoint Advisors?

A I am. That's correct.
Q And what is your title and role there?
A Yeah. I am the executive vice president of NexPoint Advisors. In that role, I oversee business development, marketing, sales, investor relations. And as far as the funds advised by the advisor, I'm the liaison with the independent board on the business side.
Q Thank you. Do you also have a role for Highland Capital Management Fund Advisors?
A I do. I'm also the same executive vice president and fulfill that same role as it pertains to business development, sales, investor relations. And in both, I'm also working on product development. So, launching, developing new products and investment funds.
Q Do you also have a role for Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc.?
A I do. I'm also executive vice president for each of those funds.
Q Thank you. Have you ever served on the boards of these three funds?
A I have. I've served as the interested trustee, sole interested trustee for each of these funds. I'm no longer the board member or interested trustee, but still serve as an officer, executive vice president, for each fund.
Q At times, I'm going to refer to NexPoint Advisors, LP and

Highland Capital Management Fund Advisors, LP simply as the Advisors, to avoid having to keep saying their long names. And similarly with the three funds that are part of the motion, I may just call them the Funds.

Can you explain the relationship between the Advisors and the Funds, briefly?

A Yeah. So, each of these are investment companies that are registered under the Investment Company Act of 1940. So, with that comes a unique relationship between an investment advisor and the funds themselves. The Funds don't have employees. They rely on the investment advisor and investment advisor employees. And between the Funds and the Advisors is an investment advisory agreement. And the Funds themselves are also overseen by an independent board, and that's by statute by the 1940 Act.

Q Okay. And just to be clear, when you said that these are -- entities are investment companies, you meant that the three Funds are investment companies?

A Correct. Correct. The three Funds are investment companies. The investment advisors are not investment companies.

Q Thank you. Can you explain the role of the board for the Funds?

A Yeah. So, as prescribed by the Investment Company Act of 1940, there are certain obligations related to an investment

company, and one of those is they must be overseen by an independent board. And the independent board has a responsibility to oversee the -- certain material agreements, including the advisory agreement. And we meet regularly with the boards. They overseas certain processes and, again, all material contracts. And the board is, by Section 15(c) of the 1940 Act, required by law to annually review the capabilities of the Advisor and to either approve or reject the advisory contracts. So, each year, those contracts are renewed by the independent board.

There are certain obligations of the Fund and operations that are delegated responsibility to the investment advisors. That includes portfolio management and investment decisions. But all those are overseen by the board.

Q Okay. And are the boards involved in the day-to-day operations of the Funds?

A They're not.

Q Okay. And do you know who the members of the boards of these three Funds are?

A I do.

Q Could you share that with us?

A Yeah. So, the -- there is one interested trustee of each board, and that's John Honis. And then for the Highland Income Fund and the NexPoint Strategic Opportunities Fund -- sorry, for NexPoint -- for Highland Income Fund and NexPoint

Capital, we have the same three disinterested or independent trustees, and that's Bryan Ward, Dr. Bob Froehlich, and Ethan Powell. And for NexPoint Strategic Opportunities Fund, we have the same four trustees, one interested, three independent, but there's another fourth independent trustee, Ed Constantino.

Q And when you refer to independent trustees, do you mean independent for purposes of the Investment Company Act of 1940, as amended?

A That's correct. They, by statute, they are independent trustees. They also have an independent legal counsel. Stacy Louizos represents them from Blank Rome. And also two of these Funds are listed on the New York Stock Exchange, and the New York Stock Exchange has various independence requirements that each independent director has met.

Q Thank you. And which are the two Funds that are listed on NYSE?

A The Highland Income Fund and the NexPoint Strategic Opportunities Fund are both NYSE-listed.

Q And I know you probably haven't memorized everybody who invests in the Funds, but can you give us a general idea of who invests in these Funds?

A Certainly. I definitely have not memorized them. There are thousands of individual investors in each of these Funds. Part of my role overseeing investor relations and sales, I do

talk to a lot of those investors. But the majority of the investors in each of these Funds are individual investors.

As '40 Act Funds, almost anybody with a brokerage account can buy them. They have tickers, particularly the Funds that are listed. Closed-end funds. And so, with that, it is mom-and-pop investors. It's retail investors, including myself. I've allocated my 401(k) to these funds, the majority of my 401(k) to these funds. But there are also institutional investors. There's hedge funds. There's ETFs. There are large high-net-worth individuals. But the majority of it is individual investors that have invested through their brokerage firms, be it Wells Fargo, Morgan Stanley, or Cetera. These are -- these are -- these are the individual investors.

Q Thank you. Does Mr. Dondero have investments in the Funds? Do you know?

A He does. He's invested in each of the Funds.

Q Does he have a majority investment in any of the Funds?

A He does not have a majority investment in any of the Funds.

Q Thank you. Does Mr. Dondero have a control relationship with the two Advisors?

A Yes. He does. With the Advisors.

Q And does he have a control relationship with the Funds?

A As it pertains to portfolio management, he is a portfolio manager of each Fund. But as discussed, as I mentioned, the

independent board on an annual basis has the ability to terminate or renew our advisory contracts, and that -- that dynamic removes the control, overall control, of the Funds in that regard.

Q Are you familiar with the motion that the Court I think has accurately referred to as the CLO Motion that was filed by the two Advisors and the three Funds?

A Yes. I am familiar with it.

Q And I'm going to ask you a question now that I think is of interest to the Court, based on the last time I was in front of Judge Jernigan. Were any employees of the Debtor involved in deciding to bring this motion or in preparing the motion?

A No. None of the HCMLP employees, to my knowledge, were involved in preparing or deciding to bring the motion.

Q Okay. And you investigated who was involved in preparing the motion, so your knowledge is pretty good on this point?

A Correct. I have. And none were involved, based on that investigation.

Q (garbled) involved in deciding to bring a motion, preparing it, other than outside counsel and my firm?

A Yeah. So, the initial cause for concern was raised by Mr. Dondero himself to our legal -- internal legal team and compliance team. And working together with them, myself, and outside counsel, and senior management of Highland Capital Management Fund Advisors, including Joe Sowin, we prepared the

order. Or, sorry, not the order, the motion.
Q All right. Thank you. Were the boards of the three Funds involved at all with bringing the motion?
A They were not involved in the preparation of the motion itself. They were aware and supportive, but they did not prepare the motion.
Q You provided a (audio gap), correct?
A Sorry. You did cut out there. I didn't hear the question.
Q I'll try again. You provided a declaration (garbled) motion, correct?
A I did, yes.
Q And there are two exhibits to your declaration. There's an Exhibit A and an Exhibit B.
A Correct.
Q Exhibit A, does this reflect the current repayment status of the various CLOs as we -- as you understand it to be as of December 1st?
A Yes, it does.
Q And does Exhibit (garbled) of the three Funds --
THE COURT: Okay. Mr. --
BY MR. WRIGHT:
Q -- and the various CLOs, --
THE COURT: Mr. Wright?
BY MR. WRIGHT:

Q -- as you understand it?

THE COURT: Mr. Wright, time out. Two things. First, I don't know what you can do to improve --

MR. WRIGHT: Sure.

THE COURT: -- your connection, but you're occasionally breaking up a little.

But second, can we be clear for myself, the record, everyone else, what you're referring to right now? We have an Advis... your witness and exhibit list is at Docket 1573. Is that what I should be looking at first?

MR. WRIGHT: Yes, Your Honor. The declaration of Mr. Norris. It's Docket 1522-1. And it's on our exhibit list. It may be the only exhibit on our exhibit list, frankly.

THE COURT: Okay. So you're talking about his declaration now, not the witness and exhibit list with the attachments to it? Actually, it is attached here. Exhibit A. Okay. I'm there. I went to Exhibit A in your attachments to your exhibit list at 1573.

All right. Let's try again with your question you just asked.

MR. WRIGHT: Sure.

BY MR. WRIGHT:

Q So, Mr. Norris, Exhibit A, this reflects the current repayment status of the CLOs that are the subject of the motion as of December 1. Correct?

A Correct.

Q And then --

MR. WRIGHT: Your Honor, if you turn to Exhibit B, which is just a couple pages forward.

MR. MORRIS: Your Honor, I would ask that this be put up on the screen, if possible.

THE COURT: Yes. Can you do that, please?

MR. WRIGHT: I'm sorry. I couldn't hear that, John.

THE COURT: He asked if you could --

MR. MORRIS: I would --

THE COURT: -- share your screen. Can you share your screen as to what you're looking at?

MR. WRIGHT: Can I share my screen? Last time I was using a computer and you were having trouble hearing me, so this time I'm doing it on my phone. So my phone, no, I don't have this on my phone to share my screen that way. It's Docket 1522-1, and it's the only exhibit that was on our exhibit list.

MR. MORRIS: No objection, Your Honor.

MR. WRIGHT: All it shows is the holdings in Funds in the CLOs. That's all it is.

MR. MORRIS: No objection, Your Honor.

THE COURT: Okay.

MR. NORRIS: I'm sorry, John. I didn't hear.

THE COURT: Give me a minute, because I was at 1573,

your witness and exhibit list.

(Pause.)

THE COURT: Okay. That's not the correct docket number.

MR. MORRIS: Your Honor?

THE COURT: Yes?

MR. MORRIS: If I may, it's John -- it's John Morris. It's Docket No. 1528. And the declaration can be found at Page 12 of 26.

MR. WRIGHT: Thank you.

THE COURT: 1528?

MR. WRIGHT: That's bizarre, because I have a printout of it and it says Docket 1522-1.

THE COURT: Okay. 1528 is the -- the actual motion we've set for hearing.

MR. MORRIS: And it's attached to that, yes. If you -- if you go to PDF Page 12, it's the first page of the declaration.

THE COURT: Okay. I'm there now. Okay. So we're on that declaration. And then you were having the witness look first at Exhibit A to that declaration. And then where are you having him look next? Exhibit B, which is entitled "Holdings of Preferred Shares in CLOs"?

MR. WRIGHT: Exhibit B, Your Honor.

THE COURT: Okay. Continue.

MR. WRIGHT: (garbled) I think some of the exhibits that I have had the wrong docket number printed on the top, and I --

BY MR. WRIGHT:

Q Exhibit B. So, Mr. Norris, Exhibit B to your declaration shows the holdings of the preference shares of the Funds in the various CLOs that are the subject of the motion, correct?

A That's correct. One clarification. It shows the percentage ownership of each of those preference share tranches that each Fund owns.

Q Thank you. Mr. Norris, do the three Funds have a date by which they have to liquidate their investments?

A Sorry, you did skip out there. If you could you repeat the question. I apologize.

Q It's frustrating. Do the three Funds have a date by which they must liquidate their investments?

A No. They do not.

Q Okay. Can you briefly explain why the Advisors and the Funds brought this motion?

A Yeah. The Advisors and the Funds were concerned with certain transactions, as described in the motion. As preference share owners, we own the majority or a substantial portion of the economics of most of these CLOs, and in three instances the majority of the economic benefit. And there was concern with the way that the sales were executed. And so,

with that, we're simply asking for a temporary relief in order to benefit and to maximize the recovery for our preference shares that we own.

Q Thank you.

MR. WRIGHT: All right, Your Honor. I have no further questions for Mr. Norris, although I guess I reserve the right to redirect.

THE COURT: All right. Cross-examination?

MR. MORRIS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MORRIS:

Q Good afternoon, Mr. Norris. Can you hear me?

A I can. Thank you, Mr. Morris.

Q All right. I'm going to go into a little bit more detail about some of the topics that you discussed. To be clear here, there are five moving parties; is that right?

A That's correct. The two Advisors and the three Funds.

Q And one of the advisory firms is Highland Capital Management Fund Advisors, LP; is that right?

A That's correct.

Q And I'll refer to that as Fund Advisors; is that okay?

A That's great.

Q James Dondero and Mark Okada are the beneficial owners of Fund Advisors, correct?

A That is my understanding, yes.

Q And your understanding is that Mr. Dondero controls Fund Advisors, correct?
A That's correct.
Q And the other advisory firm that brought the motion is NexPoint Advisors, LP; is that right?
A That is correct.
Q And Mr. Dondero is the beneficial owner of NexPoint; is that right?
A A family trust where Jim is the sole beneficiary, I believe, controls or owns NexPoint Advisors.
Q Okay. And Mr. Dondero --
A Or 99.9 percent of NexPoint Advisors.
Q Thank you for the clarification. Mr. Dondero controls NexPoint; is that right?
A Correct.
Q All right. And I'm going to refer to Fund Advisors and NexPoint as the Advisors going forward; is that fair?
A That's fair.
Q Each of the Advisors manages certain funds; is that right?
A That is correct.
Q And three of those funds that are managed by the Advisors are the Movants on this motion, correct?
A Correct.
Q All right. The Advisors caused these three Funds to invest in CLOs that are managed by the Debtor; is that right?

A The portfolio managers working for the Advisors did. That's correct.
Q And Mr. Dondero is the portfolio manager of the Highland Income Fund; is that right?
A He is one of the portfolio managers for that Fund.
Q And he's also --
A I believe there are two.
Q And he's also a portfolio manager of NexPoint Capital, Inc., one of the Movants here, right?
A That is correct.
Q And he's also the portfolio manager of NexPoint Strategic Opportunities Fund, another Movant; is that right?
A Yes. That is correct.
Q Okay. And I think you testified earlier that each of these Funds has a board. Is that right?
A That is correct.
Q But the boards don't make investment decisions for the Funds, do they?
A They do not. They have delegated that authority.
Q And that authority to make investment decisions is delegated to the Advisors; is that right?
A Yes.
Q Okay. And none of the boards of the Funds who are Movants here adopted any resolution authorizing the Funds to file this motion; is that right?

A To my knowledge, that is correct.
Q And in fact, the boards were not required to approve the filing of this motion, correct?
A I'm not -- I believe that's a legal question, but to my knowledge, there was not a requirement of the board to -- or, to adopt a resolution for that.
Q Okay. Let's talk a little bit about your background. I think you testified that you're the executive vice president at NexPoint Advisors, one of the Movants. Is that right?
A That's right.
Q Who's the president of NexPoint Advisors, LP?
A Mr. Dondero.
Q And you report directly to him; is that right?
A I do.
Q You're also the executive vice president of Fund Advisors, another Movant; is that right?
A Correct.
Q And Mr. Dondero is the president of Fund Advisors; is that right?
A He is not. There is no president of Fund Advisors. But he -- yeah.
Q You're the president of another entity called NexPoint Securities; is that right?
A That's correct.
Q And you're also the executive vice president of the 11 or

12 funds that are managed by the Advisors here, right?
A Yes. That is correct.
Q Okay. You've been working for Highland Capital Management or other Highland-related entities for a little more than a decade; is that right?
A That's correct. Since June 2010.
Q Okay. Now, you don't personally make any investment decisions for -- for the Funds. Is that right?
A That's correct.
Q And you don't hold yourself out as an investment manager, do you?
A I do not.
Q And you've never worked for a CLO, have you?
A Never worked for a -- for a C -- employed by a CLO. Worked on accounting, various other aspects, but never worked for a CLO.
Q Okay. You referred earlier to the declaration that you've submitted in support of the motion. Do you remember that?
A I do.
Q I've got an assistant on the line here.
MR. MORRIS: Ms. Cantey, can we put up onto the screen Debtor's Exhibit C, which I believe was Mr. Norris's declaration? And if we could go to Page 12 of 26. Oh, all right.
BY MR. MORRIS:

Q And, again, Mr. Norris, as we did in the deposition yesterday, I'll remind you of the difficulty of doing a virtual examination. And if at any time I ask you a question about your declaration that prompts you to think you need to see another portion of the declaration, will you let me know that?

A Yes, I will.

Q Okay. Because I'm not here to test your memory. I'm just here to ask you certain questions. So please let me know if you need to see something that's not on the screen itself.

You didn't write any portion of this declaration; is that right?

A I did not.

Q And you didn't provide any substantive comments to the declaration as drafted because you agreed with -- with the declaration as written by others; is that fair?

A Correct.

Q And all of the key information in your declaration was supplied by NexPoint's management; isn't that right?

A Correct.

Q The individuals who provided the information that's in your declaration include D.C. Sauter, Jason Post, Mr. Dondero, and outside counsel at K&L Gates; is that right?

A Correct.

Q And Mr. Sauter is in-house counsel at the Advisors; is

that right?
A That is right.
Q And Mr. Post is the chief compliance officer at NexPoint; is that right?
A That's correct.
Q The whole idea for this motion initiated with Mr. Dondero; isn't that right?
A The concern, yes, the concern originated, and his concern was voiced to our legal and compliance team.
Q Okay.
MR. MORRIS: Can we take the declaration down for -- oh, actually, no, I'm sorry, leave it there, and let's talk about Exhibit B. Now we can all see it. If you can scroll down to Exhibit B, please. Okay.
BY MR. MORRIS:
Q This page is attached to your declaration, right?
A That's correct.
Q And this page is intended to show the percentage of preferred shares owned by each of the Movant Funds and the 15 different CLOs, right?
A That's right.
Q And the Debtor is the portfolio manager for each of these CLOs; is that right?
A Yes.
Q And it's your understanding that the Debtor's management

of the CLOs on this page is governed by written agreements between the Debtor and each of the CLOs, right?
A Yes.
Q None of the Movants are parties to the agreements between the Debtor and each of the CLOs pursuant to which the Debtor serves as portfolio manager; is that correct?
A I believe that is correct. One, I think, important -- even though they're not subject to the agreement, they are the -- they have the economic ownership of each of these CLOs.
Q But they're not party to the agreement; is that right?
A Not that I'm aware of.
Q Okay. And in preparing for this motion and preparing for your testimony, you didn't personally review any of the agreements between the Debtor and any of the CLOs listed on this page, right?
A No. I relied on legal counsel for that review.
Q Okay. And, but even though you didn't review the agreements, it's your understanding that among the responsibilities that the Debtor has as the portfolio manager is buying and selling assets on behalf of the CLOs; is that right?
A Yes. And I believe I specifically stated in my statement, if you want to turn to it, what I (audio gap) to regarding the CLOs' duties under the agreements.
Q Okay. It's your understanding, in fact, that nobody other

than the Debtor has the right or the authority to buy and sell assets on behalf of the CLOs listed on Exhibit B, correct?
A That's my understanding.
Q Okay. And it's also your understanding, your specific understanding, that holders of preferred shares do not make investment decisions on behalf of the CLO; is that right?
A Correct.
Q And that's something that the Advisors knew when they decided to invest in the CLOs on behalf of the Movant Funds; is that fair?
A That's right. And at that time, the knowledge in the purchase was with Highland Capital Management, LP and the portfolio management team at that time.
Q And it's still with Highland Capital Management, LP; isn't that right?
A That's correct. I'm not sure that the portfolio management team looks the same, but it was HCMLP.
Q Okay. Let's just look at this document for a second. The first column has the list of the CLOs in which the Movant Funds have invested; is that right?
A Correct.
Q And the second column, HIF, that stands for Highland Income Fund; is that right?
A Yes, sir.
Q And Highland Income Fund is one of the Funds who are the

Movants here, right?
A That is correct.
Q And the percentages below that show the percentage of the preference shares of each of the CLOs that that particular fund holds; is that right?
A That's right.
Q And then the third column relates to NexPoint Strategic Opportunities Fund, one of the Movants here; is that right?
A That's correct.
Q And the next column, the fourth column, relates to NexPoint Capital, Inc.'s holding of preference shares in the 15 CLOs, right?
A That's right.
Q So, NexPoint Capital doesn't hold any preference shares in any of the CLOs except for a less-than-one-percent interest in Grayson; am I reading that correctly?
A Yes, that's correct.
Q Okay. And then the last column is intended to show the aggregate portion or percentage of preference shares that the three moving Funds have in each of the 15 CLOs; is that right?
A Yes, that's right.
Q Okay. Am I reading this correctly that, for 12 of the 15 Funds, the moving Funds own less than a majority of the outstanding preferred shares?
A Yes, that's correct.

Q And is it also -- am I also reading this correctly to conclude that the moving Funds owned less than 70 percent of every one of these CLOs; is that right?
A That's correct.
Q You don't know who owns the preferred shares in the CLOs that are not owned by the Movant Funds, do you?
A I don't know any -- any specific owners.
Q And some of these CLOs still have notes that are outstanding; is that right?
A Yes. Very small amounts as a percentage of the overall CLO original capital structure, but yes, some still have small --
Q So, --
A -- notes. Small amounts of notes.
Q Okay. I'm sorry to interrupt. If we looked at Exhibit A, if we took the time to look at Exhibit A, Exhibit A would show, for each of the 15 CLOs, which of those CLOs still had notes outstanding and the amount of out -- the dollar value of those notes. Is that right?
A That's correct.
Q Okay. And your understanding is that -- your understanding -- withdrawn. The payment -- the distributions from the CLOs are made pursuant to a waterfall; is that right?
A Yes, that's correct.
Q And your understanding of the waterfall process is that

the notes that are still outstanding at any CLO must be paid -- must be paid in full before the preferred shares receive any recovery; is that right?

A So, I would say that my understanding is slightly different. It's going to be dependent on each indenture. But, in general, interest payments are made to the debt holders, and anything extra is then allocated to the equity. But ultimate recovery, to your point, would be once those -- once the debt is paid off. And that's the critical thing here, where the preference shares here now with most of these CLOs almost all the way wound down, with the exception of a small piece of debt. The equity owns the lion's share of the economic interest of every one of these CLOs. And I think that's important.

Q Okay. Some of the CLOs still have outstanding notes. Is that right?

A Yes. As we discussed on -- Exhibit A will have the notes that are -- that are remaining on those.

Q And you don't know who holds the notes in the other CLOs, right?

A I don't.

Q The only holders of preferred shares that are pursuing this motion are the three Funds managed by the Advisors, right?

A In this motion, yes.

Q You're not aware of any holder of preferred shares pursuing this motion other than the three Funds managed by the Advisors, correct?
A No, I'm not aware of any others.
Q You didn't personally inform any holder of preferred shares, other than the Funds that are the Movants, that this motion would be filed, did you?
A No, I did not.
Q You're not aware of any steps taken by either of the Advisors to provide notice to holders of preferred shares that this motion was going to be filed, are you?
A I'm not, no.
Q And you're not aware of any attempt that was made to obtain the consent of all of the holders of the preferred shares to seek the relief sought in this motion, correct?
A That's correct.
Q You don't have any personal knowledge, personal knowledge, as to whether any holder of preferred shares other than the Funds managed by the Advisors wants the relief sought in the motion, correct?
A Correct.
Q You don't have any personal knowledge as to whether any of the CLOs that are subject to the contracts that you described want the relief that's being requested in this motion, right?
A That's correct. I have not spoken or been involved at all

directly with the CLOs. I'm representing the Funds.
Q Okay. Now, two of the Funds, two of the three Movant Funds, I believe you testified are publicly traded; is that right?
A That's correct.
Q And that's the Highland Income Fund and the NexPoint Strategic Opportunities Fund; is that right?
A That's right. That's right.
Q And because they are publicly-traded, the shareholders in those two funds can sell their shares any time the market is open; is that right?
A If they're willing to take the price that the market is willing to give, yes.
Q Yes.
A Between market hours.
Q And if they -- if they don't like the way the assets that are -- that the Funds have been invested, one of the things they could do is simply sell their shares, right?
A Yes.
Q And the third fund, the shareholders in the third fund have the right to sell out not on a public market but on a quarterly basis; is that right?
A Correct.
Q That third Movant Fund is NexPoint Capital; do I have that right?

A Correct.
Q So they also have the ability to exit if they don't like management on a quarterly basis; is that right?
A Correct.
Q All right. Can we turn to Paragraph -- Paragraphs 8 and 9 of your declaration? Okay. Paragraph 8 describes a transaction that's been referred to as OmniMax; is that right?
A Yes.
Q And Paragraph 9 refers to a transaction involving SSP Holdings, LLC; do I have that right?
A That's correct.
Q Do you know what SSP stands for?
A See if we say it in there. SSP Holdings, LLC.
Q Right. Do you know what SSP stands for?
A I don't. Something Steel Products. I --
Q Okay. You don't need to guess. These are the only two transactions that the Movants question; is that right?
A These transactions, as well as certain transactions around Thanksgiving time.
Q Okay. We'll talk about those. But those transactions about -- around Thanksgiving time aren't in your declaration, are they?
A Not specifically mentioned by name.
Q Okay. Let's talk about the two that are mentioned by name, Trussway and SSP. The Movants do not contend that

either transaction was the product of fraudulent conduct, do they?

A No.

Q The Movants do not contend that the Debtor breached any agreement by effectuating these transactions, do they?

A I don't believe so.

Q In fact, the Movants do not contend that the Debtor violated any agreement at any time in the management of the CLOs listed on Exhibit B; is that right?

A That's right.

Q The Movants don't even question the Debtor's business judgment, only the results of the trans -- of these two transactions. Is that right?

A That's right. And results is the key here and the approach.

Q I see. And the reason the Movants do not question the Debtor's business judgment is because you don't know what factor or factors the Debtor considered in executing these transactions, right?

A That's right. I can't look into the mind or know the business judgment and the inputs that went into this. We do know the outcomes. And to us, that's troubling, right, as the owners of the lion's share or the majority or even significant amounts of the economic ownership of the CLOs. And having insight into those transactions, as mentioned in my statement,

really just trying to maximize recoveries for our Funds.

MR. MORRIS: Your Honor, I move to strike the portion of his answer following that which was responsive to the question.

THE COURT: All right. I grant that motion.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Sir, you never asked the Debtor what factors it considered in making these trades, right?

A I did not.

Q And you have no reason to believe that anyone on behalf of the Movants ever asked the Debtor why it executed these trades, right?

A I don't have any knowledge. There could have been somebody from -- from the Movants. But I did not.

Q Okay. On OmniMax, the Movants disagree with the price at which the Debtor effectuated the trade, right?

A Correct.

Q And I believe there was a meeting of the boards of the Funds back in August at which Mr. Seery appeared. Do I have that right?

A I believe it was August, but he did appear.

Q And the purpose of the appearance was so that Mr. Seery could give an update on the bankruptcy; is that right?

A That's correct, and on the services provided by Highland

Capital Management, LP to our Advisor. Advisors. They provide various shared services.

Q And it was during that meeting that Mr. Seery forthrightly told the boards the price at which he was planning to execute the OmniMax transaction, correct?

A Correct.

Q The transaction hadn't yet occurred, right?

A I'm not sure if it had been finalized. He had a price, and these -- these things are negotiated. This was, I believe, a company in restructuring. So I don't know whether it had been transacted or not.

Q Okay. The board didn't ask Mr. Seery not to execute the transaction, did it?

A Not to my knowledge. The board wouldn't -- I don't think the board would have that authority, either.

Q Okay. But it's here asking the Court to cause the Debtor to pause in the execution of any trades in the CLOs; is that right?

A I think the order speaks in that regard.

Q Yeah. Okay. Let's talk about the SSP transaction for a moment. It's your understanding that Trussway Holdings, LLC owned a majority interest in SSP Holdings, LLC, right? That's in Paragraph 9.

A Yes. The statement in Paragraph 9 is what I believe is correct.

Q Okay. And it's also your understanding that Trussway is a wholly-owned subsi... I'm sorry, that SSP Holdings is a wholly-owned subsidiary -- withdrawn. It's also your understanding that Trussway is a wholly-owned subsidiary of the Debtor, right?
A Yes.
Q But Trussway is not a debtor in bankruptcy, right?
A I'm not sure.
Q Okay. You have no reason to believe that; is that fair?
A That it's not a debtor in bankruptcy? That Trussway is not in bankruptcy itself?
Q Correct.
A Yeah. I have no knowledge of Trussway's situation.
Q Okay. But you -- but according to your declaration that was prepared by the Advisors' management team, Trussway and not the Debtor owned SSP Holdings, LLC. Is that right?
A I'm looking here at the statement just to make sure.
Q Sure.
(Pause.)
A I -- again, I -- the statement is correct, and I believe speaks for itself regarding entity ownership.
Q The only things you know about the SSP transaction are, one, that you believe it was made without a formal bidding process; and two, that it resulted in a $10 million loss. Is that right?

A Correct.
Q Okay. But, again, neither you, or to the best of your knowledge, anybody at Advisors, ever spoke with anybody at the Debtor about the circumstances concerning either of the transactions, right?
A I don't know the conversations that were had at anyone else from our Advisors, but this is the knowledge that -- that I have.
Q Okay. And it's the only knowledge you have, right? You don't know anything about the SSP transaction other than those two facts, right?
A Correct.
Q In fact, I think you testified yesterday that you've been very remote from the SSP transaction, right?
A That's correct.
Q And that it's not a transaction that you have much knowledge on. Fair?
A Fair.
Q Let's just talk briefly about the transactions that occurred (garbled) Thanksgiving. They're not specifically referred to in your declaration; is that right?
A That's correct.
Q And you have no knowledge about any transaction that Mr. Seery wanted to execute around Thanksgiving; is that right?
A I know there were transactions and there were concerns

from our management team, but I'm not aware of what the transactions were.

Q In fact, you can't even identify the assets that Mr. Seery wanted to sell around Thanksgiving, or at least you couldn't at the time of your deposition yesterday. Is that right?

A That's correct.

Q And you have no knowledge as to why Mr. Seery wanted to make those particular trades at around Thanksgiving?

A No, I don't.

Q And in fact, you don't even know if the transactions that Mr. Seery wanted to close around Thanksgiving ever in fact closed. Is that fair?

A Correct.

Q Okay. Let's just -- let's just finish up with a few questions about the boards.

MR. MORRIS: Ms. Cantey, can we put up Debtor's Exhibit EEEE? Four E's, Your Honor. Thank you.

BY MR. MORRIS:

Q This particular page identifies the directors for each of the three Movant Funds; is that right?

A Let me take a look and confirm. (Pause.) Yes. That looks correct.

Q Okay. And this was prepared by the Movants; is that right?

A I'm not sure who prepared it.

Q Okay. To the best of your knowledge, does this document accurately reflect the composition of the boards of each of the three Movant Funds?
A Yes, it does.
Q Okay. John Honis, I think you mentioned him earlier. He's on all three boards. Is that right?
A That's correct. And the reason being we have a unitary board structure, so -- which is very common in '40 Act Fund land, where the board sits, for efficiency purposes, on multiple fund boards, and there's a lot of economies of scale from an operating standpoint. So, yes, they sit on multiple boards.
Q Okay. And for purposes of the '40 Act, Mr. Honis has been deemed to be an interested trustee. Is that right?
A That's correct.
Q Okay. But you don't specifically know what facts caused that designation; you only know that the designation exists. Right?
A That's right. And I know they are disclosed in the proxy -- or, in the -- the relative filings related to those Funds.
Q Okay. Three other people are common to all three of the Movant Funds. I think you've got Dr. Froehlich, Ethan Powell, --
A Froehlich.
Q Froehlich. Ethan Powell and Bryan Ward. Right?

A That is correct.
Q Okay. All three of those individuals actually serve on the 11 or 12 boards that you mentioned earlier that are managed by the Advisors, right?
A Yes, that is correct.
Q And they're the same Funds for which you serve as an executive vice president, right?
A Yes. That's correct.
Q So, for all of the Funds that are managed by the Advisors, you serve as executive vice president and all four of these directors -- trustees serve as trustees on the boards, right?
A Yes, that's correct.
Q Okay. In exchange for serving on all of these boards, the three individuals -- Dr. Froehlich, Mr. Ward, and Mr. Powell -- each receive $150,000 a year for services across the Highland complex; is that right?
A That's correct.
Q Dr. Froehlich has been serving as a board member across the Highland complex for seven or eight years now; is that right?
A That's correct.
Q Mr. --
A I believe it's about seven or eight years.
Q And Mr. Powell, he actually was employed by Highland or related entities from about 2007 or 2008 until 2015, right?

A That's correct.
Q And Mr. Ward, the third of the independent trustees, he's been serving as a board member on various Highland-related funds on a continuous basis since about 2004. Do I have that right?
A Yeah, I believe that's correct.
Q Okay. Just a couple of final questions. You would agree, would you not, sir, that portfolio managers have an obligation to effectuate transactions concerning the assets that they manage based on their business judgment?
A Yes. And in accordance with whatever governing documents govern the fund structure.
Q And you would personally expect a portfolio manager to execute a transaction that he or she reasonably believes in good faith and in their business judgment would maximize value for the CLO, even if the CLO did not need cash at that particular time. Is that right?
A I think it would come down to the governing documents. And I think what you're getting at here is, in this instance, these sales and the intent of the portfolio manager. And our view, again, is -- and the request for the motion is simply there is a lot at play here. Several negotiations. And in order to maximize returns, simply asking for a pause on transactions.
Q All right. Let me -- let me ask the question again, and I

would ask that you please listen carefully to the question. You would expect a portfolio manager would execute a transaction that he or she believes maximizes value, even if the CLO didn't need cash at that particular moment in time. Correct?

A Yeah. As long as that is maximizing value for the stakeholders, and in the instance of a CLO, the economic interest is owned by the equity holders. So, to their benefit, yes, that -- that would be the idea.

MR. MORRIS: Your Honor, I have no further questions.

THE COURT: Any redirect, Mr. Wright?

MR. WRIGHT: Only briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. WRIGHT:

Q Mr. Norris, I think you were asked at one point about how long you'd been working for Highland Capital Management, which there's -- there's Highland Capital Management Fund Advisors and then there's Highland Capital Management, LP, Debtor. And I wanted to give you an opportunity to just explain when and what years you worked for HCMLP and then when and what years you worked for NexPoint Advisors or Highland Capital Management Fund Advisors.

A Yes. From June 2010, I was employed by Highland Capital Management, LP, until July or August of 2012, at which time I was then hired by Highland Capital Management Fund Advisors,

not HCML -- no longer employed by HCMLP, and have worked since that time for HCMFA and NexPoint Advisors and not for the Debtor, HCMLP.

Q Okay. So -- and I'm sorry if I missed a year, but it's been about ten years since you had worked for HCMLP or been an employee of HCMLP, correct?

A Yeah. It's been over eight years since I have left employment by HCMLP. Ten and a half years ago, I started working for HCMLP, and then two years after that transitioned away and started working for the Advisors that are part of this motion.

Q Thank you for clarifying.

MR. WRIGHT: Your Honor, I hope -- you directed us to have a witness here today, and so we do. And I know that you had asked me at the last hearing some questions about the involvement of people at HCMLP, which I tried to address with Mr. Norris in my direct. But I, you know, I do want to make sure that we've answered any questions that you have.

THE COURT: All right. Yes, that's fine. Are you -- does that conclude your redirect?

MR. WRIGHT: It does, Your Honor.

THE COURT: Any recross, Mr. Morris, on that redirect?

MR. MORRIS: No, thank you, Your Honor.

THE COURT: All right, then. That concludes the

testimony of Mr. Norris.

Any other evidence, Mr. Wright?

MR. WRIGHT: I do not, Your Honor, although I guess I would offer the Exhibit A and Exhibit B to Mr. Norris's declaration --

THE COURT: Any objection to that?

MR. WRIGHT: -- into evidence.

MR. MORRIS: No, Your Honor.

THE COURT: All right. Those are admitted.

(Movants' Exhibits A and B are received into evidence.)

THE COURT: All right. Well, Mr. Morris, did you want to put on any evidence?

MR. MORRIS: Does the -- do the Movants rest, Your Honor?

THE COURT: I understood that they rest. Correct, Mr. Wright?

MR. WRIGHT: That's correct, Your Honor.

MR. MORRIS: Your Honor, I would move, effectively, for a directed verdict here. The Movants have the burden of establishing a *prima facie* case to entitlement to the relief that's been requested, and they have failed to meet that burden. The Debtor has -- we -- the undisputed facts are the Debtor has the contractual right, and indeed, the obligation, to serve as the portfolio manager of the CLOs pursuant to written agreements.

The Movants are not parties to those agreements. The testimony is undisputed that there are many holders of preferred shares and notes that have had no notice of this proceeding that will undoubtedly be impacted by the tying of the hands of the portfolio manager. The chart that was attached as Exhibit B expressly shows just what a large portion of interested parties and people who would be affected by this motion are not -- they didn't get notice. There was no attempt to get notice. There was no attempt to get their consent. All of that testimony is now in the record, and I think due process alone would prevent the entry or even the consideration of an order of this type.

There is nothing improper that's been alleged. There is no -- there is no allegation of fraud. There is no allegation of breach of contract of any kind. There's not even a question of business judgment. The Movants didn't even do their diligence to ask the Debtor why they made these transactions. There is nothing in the record that shows that the Debtor, as the portfolio manager of the CLOs, did anything improper.

The only thing that the Movants care about is that they don't like the results in two particular trades. I don't think that that meets their burden of persuasion that the Court should enter an order of this type, and I would like to relieve Mr. Seery of the burden, frankly, and the Court, of

having to put on testimony to justify transactions that really aren't even being questioned, Your Honor.

So the Debtor would respectfully move for the denial of the motion and the relief sought therein.

THE COURT: All right. Your request for a directed verdict, something equivalent to a directed verdict here, is granted. I agree that the Movant has wholly failed to meet its burden of proof here today to show the Court, persuade the Court that, as Mr. Morris said, I should essentially tie the hands of the Debtor as a portfolio manager here, as stated. Nothing improper has been alleged. There has been no showing of a statutory right here, or a contractual right here, on the part of the Movants.

I am -- I'm utterly dumbfounded, really. I agree with the -- I was going to say innuendo; not really innuendo -- I agree with part of the theme, I think, asserted by the Debtor here today that this is Mr. Dondero, through different entities, through a different motion. I feel like he sidestepped the requirement that I stated last week that if we had a contested hearing on his motion, Dondero's motion, that I was going to require Mr. Dondero to testify. He apparently worked out an eleventh hour agreement with the Debtor on his motion to avoid that. But, again, these so-called CLO Motions very clearly, very clearly, in this Court's view, were pursued at his sole direction here.

This is almost Rule 11 frivolous to me. You know, we're -- we didn't have a Rule 11 motion filed, and, you know, I guess, frankly, I'm glad that a week before the holidays begin we don't have that, but that's how bad I think it was, Mr. Wright and Mr. Norris. This is a very, very frivolous motion. Again, no statutory basis for it. No contractual basis. You know, you didn't even walk me through the provisions of the contracts. I guess that would have been fruitless. But you haven't even shown something equitable, some lack of reasonable business judgment.

Bluntly, don't waste my time with this kind of thing again. You wasted my time. We have 70 people on the video. Utter waste of time.

All right. So, motion is denied. Mr. Morris, please upload an order.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. Do we have any other business to accomplish today?

MR. POMERANTZ: I don't think so, Your Honor. I know we will see you tomorrow in connection with Mr. Daugherty's relief from stay motion.

THE COURT: Well, yeah, we do have that. Okay. We will see you tomorrow. We stand adjourned.

MR. CLEMENTE: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 3:05 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 **12/17/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBIT 6

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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.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P.,	§	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.

HIGHLAND INCOME FUND, NEXPOINT STRATEGIC OPPORTUNITIES FUND, NEXPOINT CAPITAL, INC., AND CLO HOLDCO, LTD.,	§ § § §
Defendants.	

PLAINTIFF HIGHLAND CAPITAL MANAGEMENT, L.P.'S VERIFIED ORIGINAL COMPLAINT 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 *Original Complaint for Declaratory and Injunctive Relief* (the "Complaint") against defendants Highland Capital Management Fund Advisors, L.P. ("HCMFA"), NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Advisors"), Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc. (collectively, the "Funds"), and CLO Holdco, Ltd. ("CLO Holdco" and together with the Advisors and the Funds, the "Defendants") seeking declaratory and injunctive relief pursuant to sections 105(a) and 362 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 STATEMENT

1. Mr. James Dondero ("Mr. Dondero") directly or indirectly owns and/or controls each of the Defendants. The Defendants have interfered with, and impeded, the Debtor's business, and they have threatened to initiate a process aimed at removing the Debtor as the portfolio manager of certain collateralized loan obligation vehicles ("CLOs") – although they have refused to actually bring a motion to lift the automatic stay for that purpose, thereby

contributing to the necessity of these proceedings. The Funds invested in certain of the CLOs at the direction of the Advisors. CLO Holdco also invested in the CLOs.

2. As alleged below, the Defendants have damaged the Debtor and threaten to upset the status quo by interfering with the Debtor's contractual rights.

3. Thus, the Debtor seeks damages, declaratory relief, and an order preliminarily and permanently enjoining the Defendants from: (a) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's (i) management of the CLOs, (ii) decisions concerning the purchase or sale of any assets on behalf of the CLOs, or (iii) contractual right to serve as the portfolio manager (or other similar title) of the CLOs; (b) otherwise violating section 362(a) of the Bankruptcy Code; (c) seeking to terminate the portfolio management agreements and/or servicing agreements between the Debtor and the CLOs ((a)-(c), the "Prohibited Conduct"), (d) conspiring, colluding, or collaborating with (x) Mr. Dondero, (y) any entity owned and/or controlled by Mr. Dondero, and/or (z) any person or entity acting on behalf of Mr. Dondero or any entity owned and/or controlled by him, to, directly or indirectly, engage in any Prohibited Conduct, and (e) engaging in any Prohibited Conduct with respect to any of the Successor Parties (as that term is defined below).

JURISDICTION AND VENUE

4. 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).

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

6. 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

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

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

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

10. Upon information and belief, Highland Income Fund is an investment fund managed by HCMFA in Dallas, Texas.

11. Upon information and belief, NexPoint Strategic Opportunities Fund is an investment fund managed by NPA in Dallas, Texas.

12. Upon information and belief, NexPoint Capital, Inc. is an investment fund managed by NPA in Dallas, Texas

13. Upon information and belief, CLO Holdco is a holding company that is directly or indirectly owned and/or managed by Mr. Dondero and others acting on his behalf in Dallas, Texas.

CASE BACKGROUND

14. 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").

15. 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, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch (collectively, "UBS"), and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

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

17. 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.

18. On November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan"). The Court has scheduled a confirmation hearing on the Plan for January 13, 2021. If confirmed, the Debtor will be succeeded by the Reorganized Debtor and Plan will create a Claimant Trust and a Litigation Sub-Trust (as those terms are defined in the Plan) (the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust are collectively referred to herein as the "Successor Entities," and together with the Successor Entities' directors, officers, employees, professionals, and agents, including but not limited to the Claimant Trustee and the Litigation Trustee (as those terms are defined in the Plan), and any professionals engaged by the Claimant Trustee and Litigation Trustee, the "Successor Parties").

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

STATEMENT OF FACTS

A. Mr. James Dondero Owns and/or Controls Each of the Defendants

19. Mr. Dondero directly or indirectly owns and/or effectively controls each of the Defendants.

The Advisors and the Funds

20. On December 16, 2020, Mr. Dustin Norris ("Mr. Norris") testified under oath in support of the *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [Docket No. 1528] that was brought by the Advisors and Funds (the "Restriction Motion").

21. Mr. Norris is the Executive Vice President of each the Advisors and each of the Funds.

22. During the hearing on the Restriction Motion (the "Hearing"), Mr. Norris testified that Mr. Dondero (a) directly or indirectly owns and controls each of the Advisors, and (b) is the portfolio manager of each of the Funds, each of which is advised by one of the Advisors.

23. Mr. Norris's testimony is corroborated by, among other things, (a) the Funds' public filings with the Securities and Exchange Commission in which each of the Funds disclosed that the Advisors were owned and controlled by Mr. Dondero, and that Mr. Dondero was the portfolio manager for each of the Funds, and (b) the assertion in a letter dated December 31, 2020, sent on behalf of the Advisors and the Funds, that "Mr. Dondero is the lead (and in some cases the sole) portfolio manager for certain of the Funds. He is intimately involved in the day-to-day operations and investment decisions regarding those Funds and the operations of the Advisors."

CLO Holdco

24. CLO Holdco is a wholly-owned and controlled subsidiary of the DAF. On information and belief, the DAF is managed by the Charitable DAF Holdco, Ltd. ("DAF Holdco"), which is the managing member of the DAF.

25. On information and belief, DAF Holdco is owned by three different charitable foundations: Highland Dallas Foundation, Inc., Highland Santa Barbara Foundation, Inc., and Highland Kansas City Foundation, Inc. (collectively, the "Highland Foundations"). On information and belief, Mr. Dondero is the president and one of the three directors of each of the Highland Foundations. On information and belief, Mr. Grant Scott ("Mr. Scott"), is an intellectual property lawyer based in Raleigh, North Carolina, Mr. Dondero's college roommate, is also an officer and director of each of the Highland Foundations.

26. Although the Debtor is the non-discretionary investment advisor to the DAF, the Debtor does not have the right or ability to control or direct the DAF or CLO Holdco. Instead, on information and belief, the DAF takes and considers investment and payment advice from the Debtor, but ultimate decisions are in the control of Mr. Scott who acts substantially at Mr. Dondero's direction.

B. This Court has Entered Two Orders that are Implicated by the Defendants' Actions and Threatened Actions

27. This Court has entered two Orders that are relevant to the injunctive relief sought by the Debtor.

28. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). On January 9, 2019, this Court entered an Order granting the Settlement Motion [Docket No. 339] (the "Settlement Order").

29. As part of the Settlement Order, this Court also approved a term sheet (the "Term Sheet") [Docket No. 354-1] between the Debtor and the Official Committee of Unsecured Creditors (the "Committee") pursuant to which Mr. John S. Dubel, Mr. Russell Nelms, and Mr. Seery were appointed to the Board.

30. As required by the Term Sheet, on January 9, 2020, Mr. James Dondero resigned from his roles as an officer and director of Strand and as the Debtor's President and Chief Executive Officer.

31. Among other things, the Settlement Order directed Mr. Dondero not to "cause any Related Entity to terminate any agreements with the Debtor."

32. Each of the Defendants is a "Related Entity" as defined in the Term Sheet because each of the Defendants is directly or indirectly owned and/or controlled by Mr. Dondero and/or Mr. Scott.

33. Defendants' actions and threatened actions also implicate the *Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero* [Adv. Pro. No. 20-03190-sgj, Docket No. 10], entered on December 10, 2020 (the "TRO" and together with the Settlement Order, the "Orders").

34. Pursuant to the TRO, the Court temporarily enjoined and restrained Mr. Dondero from, among other things, "interfering with or otherwise impeding, directly or indirectly, the Debtor's business" and from "causing, encouraging, or conspiring with (a) any entity owned or controlled by [Mr. Dondero], and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct [as defined in the TRO]," including interfering or impeding the Debtor's business.

C. Defendants Interfere with and Impede the Debtor's Business and Threaten to Terminate the Debtor's Management Contracts

35. In addition to filing the Restriction Motion, on at least four separate occasions the Defendants have either interfered with and impeded the Debtor's business or have threatened to do so by initiating the process for removing the Debtor as the portfolio manager of the CLOs. Such conduct violates the Orders and flouts the Court's decision on the Restriction Motion and the Court's observations made at the Hearing.

36. ***First***, on December 22, 2020, employees of NPA and HCMFA interfered with and impeded the Debtor's business by refusing to settle the CLOs' sale of AVYA and SKY securities that Mr. Seery had personally authorized. The Advisors engaged in this conduct notwithstanding (a) the denial of the Restriction Motion and the Court's pointed comments during that Hearing on the Restriction Motion, and (b) Mr. Norris's sworn acknowledgments on behalf of the Advisors and Funds during the Hearing that (i) the Debtor's management of the CLOs is governed by written contracts as to which none of the Advisors or Funds are parties; (ii) the Debtor has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs; and (iii) as the Advisors knew when they invested in the CLOs on behalf of the Funds, that holders of preference shares (such as the Funds) have no right to make investment decisions on behalf of the CLOs.

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

38. ***Second***, also on December 22, 2020, the Defendants wrote to the Debtor and renewed their "request" that the Debtor refrain from selling any assets on behalf of the CLOs until the confirmation hearing (the "December 22 Letter"). In support of their "request," the Debtor re-asserted almost verbatim the arguments advanced in connection with the Restriction Motion – all of which were soundly rejected by the Court.

39. The Debtor responded on December 24, 2020, demanding that Defendants withdraw their December 22 Letter and confirm that neither the Defendants nor anyone acting on their behalf will take any further steps to interfere with the Debtor's directions as the CLOs' portfolio manager by the close of business on December 28, 2020. The Defendants failed to comply with the Debtor's demands.

40. ***Third***, the Defendants threatened to seek to remove the Debtor as the portfolio manager of the CLOs. Specifically, in a letter dated December 23, 2020 (the "December 23 Letter"), the Defendants informed the Debtor that one or more of them "intend to notify the relevant trustee and/or issuers that the process of removing the Debtor as fund manager should be initiated, subject to and with due deference for the applicable provisions of the United State Bankruptcy Code, including the automatic stay of Section 362."

41. The Debtor responded to the December 23 Letter the next day and advised the Defendants that the Settlement Order prohibited the termination of the Debtor's management agreements with the CLOs, and that there was no factual, legal, or contractual basis to remove the Debtor as the CLOs' portfolio manager in any event. The Debtor demanded that the Defendants withdraw their December 23 Letter and commit not to take any actions, directly or indirectly, to terminate the CLO management agreements, by the close of business on December 28, 2020. The Defendants failed to comply with the Debtor's demands.

42. Because Mr. Dondero owns and/or effectively controls the Defendants, the Debtor forwarded the correspondence between the Debtor and the Defendants, including the Defendant's Letters, to Mr. Dondero's counsel. In response, Mr. Dondero's counsel contended that "[w]hile there are relationships between my client and some of the movants, I believe they are separate entities and should be treated as such."

43. On December 30, 2020, the Debtor specifically requested that the Defendants promptly bring the matters to the Court for resolution by bringing a motion to terminate the CLO management agreements and for related relief, or the Debtors would be forced to commence an action for declaratory relief and bring this Motion in order to bring clarity to the Debtor's contractual rights. In response, Defendants' counsel would not commit to bring any motion, only that they would file an objection to Debtor's plan of reorganization. The Debtor believes that its disputes with the Defendants can and must be promptly resolved.

44. ***Finally,*** because Mr. Dondero continues to interfere with the Debtor's business and engage in disruptive behavior, the Debtor gave notice to Mr. Dondero on December 23, 2020, that the Debtor would evict him and terminate all services provided to him, as of December 30, 2020. On December 31, 2020, counsel to the Advisors and the Funds sent a letter to Debtor's counsel (the "December 31 Letter" and together with the December 22 Letter and December 23 Letter, the "Defendants' Letters") contending that the Debtor's decision to remove Mr. Dondero from the Debtor's offices and services was damaging the Advisors and the Funds and implied that the Debtor would be economically responsible for such damage.

45. On January 4, 2021, the Debtor responded to the December 31 Letter by noting that (a) Mr. Dondero did not seek judicial relief, make any of the contentions the advanced in the December 31 Letter, or even complain to the Debtor, (b) no action was taken against Entities,

only against Mr. Dondero, (c) Mr. Dondero was given reasonable notice of his eviction and the termination of the Debtor's services to him, such that he could have and should have made alternative arrangements to avoid any disruption, and (d) nothing prevents Mr. Dondero from continuing to work on behalf of the Entities. The Debtor also noted that it will take all steps to protect its interests against any further frivolous claims and threats made by the Defendants.

46. Upon information and belief, Mr. Dondero has taken no steps to cause the Defendants – entities that he owns and/or effectively controls and that are each a "Related Entity" under the Term Sheet – to comply with the Debtor's demands made in response to the Defendants' Letters.

FIRST CLAIM FOR RELIEF

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

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

48. A bona fide, actual, present dispute exists between the Plaintiff and the Defendants concerning their respective rights and obligations concerning the CLOs.

49. A judgment declaring the parties' respective rights and obligations will resolve their disputes.

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

- Each of the Defendants is directly or indirectly controlled by Mr. Dondero;
- Each of the Defendants is an "affiliate" of the Debtor for purposes of the CLO Management Agreements;
- The Plaintiff has the exclusive contractual right to manage the CLOs;
- The Plaintiff has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs;

- Holders of preference shares have no right to make investment decisions on behalf of the CLOs;
- The Debtor's decision to evict Mr. Dondero from the Debtor's offices, and to terminate the provision of services to him, did not violate any contract with, or duty owed to, any of the Defendants; and
- The demands and requests set forth in Defendants' Letters constitute interference with the Plaintiff's business and management of the CLOs.

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SECOND CLAIM FOR RELIEF

(Violation of the automatic stay under section § 362(a) of the Bankruptcy Code)

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

52. The Defendants' interference with the Plaintiff's contractual rights and course of dealing violates the automatic stay pursuant to § 362(a) of the Bankruptcy Code.

53. To the extent Defendants engaged in such conduct after the entry of the Court's Order on the Restriction Motion, such conduct was willful.

54. The Plaintiff is entitled to damages in an amount to be determined at trial arising from, and related to, the Defendants' violation of the automatic stay.

THIRD CLAIM FOR RELIEF

(Tortious Interference with Contract)

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

56. Since November 2020, Defendants have tortuously interfered with the Debtor's CLO management contracts.

57. The Debtors' CLO management contracts constitute are valid contracts, and, upon information and belief, the Debtor knows of the terms and conditions of such contracts because they were prepared and executed at Mr. Dondero's direction.

58. The Defendants have willfully and intentionally impeded the Debtor's ability to fulfill its contractual duties and obligations pursuant to its CLO management contracts, by, among other things, (1) hindering the Debtor's ability to sell certain CLO assets, (2) threatening to initiate the process for removing the Debtor as the portfolio manager of the CLOs, and (3) otherwise attempting to influence and interfere with the Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs.

59. Defendants' conduct has proximately caused, and will continue to cause, damage and loss to the Debtor's estate.

60. The Plaintiff is entitled to damages in an amount to be determined at trial arising from, and related to, the Defendants' tortious interference with its CLO management contracts.

FOURTH CLAIM FOR RELIEF

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

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

62. Pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065, the Debtor seeks a preliminary and permanent injunction enjoining Defendants from (1) engaging in any Prohibited Conduct, and (2) conspiring, colluding, or collaborating with (a) Mr. Dondero, (b) any entity owned and/or controlled by Mr. Dondero, and/or (c) any person or entity acting on behalf of Mr. Dondero or any entity owned and/or controlled by him, to, directly or indirectly, engage in any Prohibited Conduct.

63. 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).

64. 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.

65. The interference and threats described herein are embodied in written communications and are without any justification, and constitute willful and intentional interferences with the Debtor's management contracts that, if not prohibited, will cause the Debtor irreparable damages; the Debtor is therefore likely to prevail on its underlying claim for tortious interference with contract.

66. In the absence of injunctive relief, the Debtor will be irreparably harmed because Defendants are likely to engage in some or all of the Prohibited Conduct, thereby interfering with the Debtor's operations, management of assets, and contractual obligations, all to the detriment of the Debtor, its estate, its creditors and the creditors and stakeholders of the Successor Entities.

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

68. Injunctive relief would serve the public interest by re-enforcing the implicit mandate in the Bankruptcy Code that debtors and their successors are to be managed and controlled only by court-authorized representatives, free from threats and coercion.

69. Based on the foregoing, the Debtor requests that the Court preliminarily and permanently enjoin Defendants from engaging in any Prohibited Conduct or from causing, encouraging, or conspiring with Mr. Dondero, or any entity controlled by Mr. Dondero or agent acting on Mr. Dondero' s behalf, from engaging in any Prohibited Conduct.

PRAYER

WHEREFORE, the Debtor prays for judgment as follows:

(a) On the First Cause of Action, a judgment declaring that: (i) each of the Defendants is directly or indirectly controlled by Mr. Dondero, (ii) each of the Defendants is an "affiliate" of the Debtor for purposes of the CLO Management Agreements; (iii) the Plaintiff has the exclusive contractual right to manage the CLOs; (iv) the Plaintiff has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs; (v) holders of preference shares have no right to make investment decisions on behalf of the CLOs; (vi) the Debtor's decision to evict Mr. Dondero from the Debtor's offices, and to terminate the provision of services to him, did not violate any contract with, or duty owed to, any of the Defendants; and (vii) the demands and requests set forth in Defendants' Letters constitute interference with the Plaintiff's business and management of the CLOs;

(b) On the Second Cause of Action, damages in an amount to be determined at trial arising from Defendants' violation of the automatic stay;

(c) On the Third Cause of Action, damages in an amount to be determined at trial arising from the Defendants' tortious interference with the Plaintiff's CLO management contracts;

(d) On the Fourth Cause of Action, a preliminary and permanent injunction enjoining Defendants from conspiring, colluding, or collaborating with (a) Mr. Dondero, (b) any entity owned and/or controlled by Mr. Dondero, and/or (c) any person or entity acting on behalf of Mr. Dondero or any entity owned and/or controlled by him, to, directly or indirectly, engage in any Prohibited Conduct;

(h) For such other and further relief as this Court deems just and proper.

Dated: January 6, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
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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 6th day of January 2021.

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

EXHIBIT 7

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Tuesday, January 26, 2021
	9:30 a.m. Docket
Debtor.	
	MOTION FOR ENTRY OF ORDER AUTHORIZING DEBTOR TO IMPLEMENT KEY EMPLOYEE PLAN [1777]
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3000-sjg**
Plaintiff,	
v.	PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AGAINST CERTAIN ENTITIES OWNED AND/OR CONTROLLED BY MR. JAMES DONDERO [5]
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.	
Defendants.	

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

WEBEX APPEARANCES:

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APPEARANCES, cont'd.:

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

DALLAS, TEXAS - JANUARY 26, 2021 - 9:40 A.M.

THE COURT: All right. We have Highland settings this morning: a Motion for Approval of a KERP, which I didn't see objections to, and then a Preliminary Injunction hearing. Let me get appearances from the parties who have filed pleadings.

For the Debtor team, I see Mr. Morris. Who do we have appearing?

MR. POMERANTZ: Good morning, Your Honor. It's Jeff Pomerantz and John Morris appearing on behalf of the Debtor. I will handle the KERP motion, which we'll propose goes first and quickly, and then Mr. Morris will handle the adversary proceeding.

THE COURT: All right. Very good.

All right. Let me get appearances from the Defendants in the preliminary injunction matter. Do we have Mr. Kane or someone for CLO Holdco?

MR. KANE: Yes, Your Honor. John Kane for CLO Holdco, Ltd.

THE COURT: All right. What about for the Funds and Advisors? I guess we have a couple of law firms involved. Who do we have appearing for the K&L Gates firm?

MR. HOGEWOOD: Good morning, Your Honor. This is Lee Hogewood with K&L Gates, and also with our firm appearing today is Emily Mather.

THE COURT: Okay. I didn't get Emily's last name. Could you repeat that?

MR. HOGEWOOD: I'm sorry, Your Honor. Emily Mather, M-A-T-H-E-R.

THE COURT: Thank you.

All right. For the Munsch Hardt team, do we have Mr. Rukavina or someone else appearing?

MR. RUKAVINA: Your Honor, good morning. This is Davor Rukavina. I represent all of the Defendants in the adversary except CLO Holdco.

Pursuant to the Court's instructions, Mr. Dondero is also present here in my conference room, so he is here. He is not on the camera, but he is here.

THE COURT: Okay. All right. And does Mr. Dondero have counsel, his individual counsel appearing today?

MR. WILSON: Your Honor, John Wilson for Jim Dondero.

THE COURT: Okay. Thank you. Do we have Creditors' Committee lawyers on the phone today?

MR. CLEMENTE: Yes, Your Honor. Good morning. Matthew Clemente; Sidley Austin; on behalf of the Official Committee of Unsecured Creditors.

THE COURT: All right. Thank you.

All right. Well, obviously, if any other lawyer is dying to chime in at some point today, I will consider letting that happen. But, again, I think we've got the parties who have

filed pleadings having appeared at this point. So, let's turn to the KERP motion. Mr. Pomerantz?

MR. POMERANTZ: Yes, Your Honor. Good morning again. On January 19th, the Debtor filed its motion for approval of a Key Employee Retention Program which would substitute out its annual bonus plan.

We have not received any opposition to the motion, although the United States Trustee did ask some questions which we are prepared to address in connection with the proposed proffer of Mr. Seery's testimony. I'm happy to make a full presentation of the motion to Your Honor, if you would like, or I could just present Mr. Seery's proffer, which I should -- which I believe will establish the factual predicate and the evidence to support the motion.

THE COURT: All right. Let's just go straight to the proffer, please.

MR. POMERANTZ: Okay. Thank you, Your Honor.

PROFFER OF TESTIMONY OF JAMES P. SEERY

MR. POMERANTZ: Mr. Seery is on the video today, and if he was called to testify he would testify that his name is James P. Seery, Jr. and that he is the chief executive officer and chief restructuring officer of Highland Capital Management.

He would also testify that he was one of the independent directors appointed to the Court on January 9th, 2020.

Because of his role with the Debtor, he is familiar with the company's day-to-day operations, including its -- the company's employee and wage benefit and bonus plans relating to the employees.

He would testify that he has been involved in the negotiation and drafting of the company's plan of reorganization, and is familiar with the expected operation of the Claimant Trust and Reorganized Debtor post-confirmation in connection with the plan.

He would testify that the plan generally provides for the monetization of the company's assets for the benefit of creditors and stakeholders, and he would testify that, as part of the plan process, he worked closely with DSI, the company's financial advisor, to assess both the costs of the Debtor's current employee base and the projected cost of operations in connection with the Reorganized Debtor and Claimant Trust following the effective date.

He would testify that, to ensure the continued smooth operation of the company in connection with the continuation and consummation of the plan for the benefit of all stakeholders, that he worked with DSI to determine the appropriate staffing needs necessary for the company's remaining operations.

He would testify that he analyzed the current employees to determine which, if any, would need to be continued to be

retained by the Debtor and operate during the Reorganized Debtor and Claimant Trust period following the effective date of the plan.

He would testify as part of that analysis he reviewed the roles and functions of the non-insider employees with respect to the services that they needed, and he reviewed the wages, benefits, and bonuses for those remaining non-insider employees necessary for those functions.

He would testify, that based upon his review, the company determined that it was in the best interests of the estate to terminate the existing annual bonus plan, as it was no longer necessary to effectively incentivize the remaining non-insider employees who would be terminated prior to being entitled to any further payments under the annual bonus plan.

He would testify that, instead, the company developed a new retention plan that was designed to incentivize the non-insider employees to remain with the company for as long as they are needed to assist in the effectuation of the plan.

He would testify that Mr. Waterhouse and Surgent, arguably two insiders of the Debtor, are not eligible for the retention plan, and that's not because there is any concern regarding their loyalty, but the Debtor is looking at ways to appropriately incentivize and compensate those people as appropriate in the future.

He would testify that there are a few persons on the list

of people who are part of the retention plan with a title that includes director or manager; however, he would testify that none of those individuals are corporate officers or directors of the Debtors -- the Debtor, and that the titles are for convenience only. He would testify that the individuals who are employed in these roles do not have any authority whatsoever to make any decisions on behalf of the Debtor.

He would testify that in connection with the new retention plan, the non-insider employees may be offered the opportunity to enter into a termination agreement with the company that will provide specified benefits and payments in return for the non-insider employee remaining as an employee in good standing with the company through the separation date.

He would testify that a key component of the retention plan is that non-insider employees will be entitled to the specific bonus payments provided that they do not voluntarily terminate their employment with the Debtor prior to the separation date and are not terminated for cause.

He would testify that that is in contrast to the existing or the prior annual bonus plan, which provided that non-insider employees would not receive their bonus payments if they were not employed by the Debtor on the vesting date for any reason except on account of disability, including termination without cause.

Mr. Seery would further testify that the retention plan is

being offered to approximately 53 employees, and the projected aggregate amount of payments under the retention plan is approximately $1,481,000, which is $32,000 approximately less than the amount that would have been paid to such employees under the annual bonus plan.

He would testify that the retention plan includes 20 employees who are not entitled to benefits under the annual bonus plan. Fourteen employees are entitled to receive more under the retention plan than they would have received under the annual bonus plan.

With respect to the 20 employees I've previously mentioned who are not otherwise entitled to receive anything under the annual bonus plan, the vast majority of those -- 18 -- will be entitled to payments of $2,500 each, and the other two entitled to payments of $10,000 and $7,500, respectively.

Mr. Seery would testify that he believes that these additional payments are reasonable in light of the current status of the company and the value to be added to the estate through the retention of these employees, and that this plan is more accurately and narrowly-tailored to achieve the company's reorganization goals.

On this basis, Your Honor, Mr. Seery would testify that he presented the proposed retention plan to the independent directors and they agreed with Mr. Seery's assessment that entry into the retention plan was in the best interests of the

estate and its creditors.

He would also testify that he had negotiations with the Creditors' Committee and its advisors regarding the retention plan and that the Committee is supportive of the retention plan.

And that would conclude my proffer of testimony from Mr. Seery, Your Honor.

THE COURT: All right. Mr. Seery, if you could say "Testing, one, two" so we can catch your audio and video, please?

MR. SEERY: Testing, one, two, Your Honor.

THE COURT: All right. There you are. Please raise your right hand.

JAMES P. SEERY, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Thank you. Is there anyone who has questions at this time for Mr. Seery?

(No response.0

THE COURT: All right. Well, I'll just double-check with the Committee. It's been represented that you all are in support of this. Mr. Clemente, if you could confirm that on the record?

MR. CLEMENTE: That's correct, Your Honor. The Committee has no objection to the motion, so Mr. Pomerantz's statements are accurate.

THE COURT: All right. Anyone else?

MS. LAMBERT: This is Lisa Lambert for the United States Trustee. The U.S. Trustee has reviewed the actual data about the comparatives, and the U.S. Trustee, based on the stipulations, has no objection.

THE COURT: All right. Thank you. Anyone else?

All right. Well, the Court will approve this motion. First, while the notice was expedited, the Court finds that it was sufficient under the circumstances. We are many months into the case, it's been vetted by the Committee, and the Court is satisfied with the level of notice here.

The Court finds that this is a KERP that is justified by all the facts and circumstance of this case, to use the wording of Section 503(c)(3) of the Bankruptcy Code. There also appears to be a very sound business purpose justifying the proposed KERP. It appears to be reasonable in all ways, and fair under the circumstances, so I do approve it.

All right. So if you all will get the order uploaded electronically, I will promise to sign it promptly.

MR. POMERANTZ: We will do so, Your Honor. Thank you.

THE COURT: All right. So, the preliminary injunction. Mr. Morris, I heard you were going to be taking the lead on that, so go ahead.

MR. MORRIS: Indeed. Good morning, Your Honor. John Morris; Pachulski, Stang, Ziehl & Jones; for the Debtor.

THE COURT: Good morning.

MR. MORRIS: A few items before I give what I hope will be an informative opening statement. I trust that Your Honor has not had the opportunity, because it was just filed a moment ago, to see that the Debtor filed on the docket notice of a settlement with CLO Holdco, Ltd., one of the Defendants here today.

THE COURT: I have not seen that. Okay.

MR. MORRIS: Right. So you'll find that at Docket 1838.

THE COURT: Okay.

MR. MORRIS: It really is a very simple settlement, Your Honor. In exchange for the withdrawal of CLO Holdco's objection to the Debtor's plan of reorganization, the Debtor is dismissing CLO Holdco from this adversary proceeding with prejudice. There are, you know, some other bells and whistles there, the most important of which to the Debtor is simply that, under the CLO management agreements, most of them but not all of them require that a level of cause be established before the contracts can be terminated, and CLO Holdco has agreed that, before it seeks to terminate a contract for cause, there will be a gating provision or a gatekeeping provision that requires them to come to this Court to simply establish whether or not there is a colorable claim -- not for a determination on the merits, but simply to protect the

Debtor from frivolous lawsuits.

So that's really the sum and substance of it. Mr. Kane is on the line now, and if I've either inaccurately or incompletely characterized the settlement, I'm sure he'll take the opportunity to supplement the record. But we don't see any need, really, to go through a full 9019 motion here. There's no releases. There's no exchange of money. It's the withdrawal of a plan objection in consideration for the dismissal of an injunctive proceeding.

So we did want to alert you to that. And as a result, there was one witness that we intended to call today, Grant Scott. Mr. Scott is the director of CLO Holdco. And with the resolution of the issues between the Debtor and CLO Holdco, we have no intention of calling Mr. Scott today. But I'd like to give Mr. Kane an opportunity to be heard just in case he's got anything to add.

THE COURT: All right. Mr. Kane, can you confirm? Do you have anything to change about what you heard?

MR. KANE: Your Honor, I do not. The settlement agreement speaks for itself. We did reach an agreement with Debtor's counsel and the Debtor yesterday evening, fairly late in the evening. Mr. Morris's synopsis of the proposed settlement is accurate. The Debtor has agreed to dismiss CLO Holdco from the preliminary injunction adversary proceeding with prejudice.

THE COURT: All right. Well, thank you. I've pulled it up on my screen. It's very short and to the point. And I agree with the comment of Mr. Morris that I don't think a formal 9019 motion is required here, given no consideration is going back and forth, or releases. It's just exactly as you described orally. So, I appreciate that. It simplifies a little bit what we have set today. And we will accept this settlement as being in place as we roll forward. All right? Thank you.

MR. MORRIS: Thank you, Your Honor.

So, before I get to the substance of the argument, I would like to take care of some housekeeping items relative to today's proceedings.

THE COURT: Okay.

MR. MORRIS: You know, this has been a bit of a challenge for me personally, and it's going to be a little bit of a challenge today for Ms. Canty, my assistant, in part because it's almost like Groundhog's Day. This is, I think, the third time that we're covering some of the same issues. We had covered them the first time on December 16th in connection with what I'll now just simply refer to as the Defendants, the Defendants' motion to try to limit the Debtor from trading the CLO assets. We heard a lot of what we're going to hear today again on January 8th in connection with the preliminary injunction motion against Mr. Dondero. And so

there's already a ton of evidence in the record. We do believe that we need to present our evidence today, but one of the challenges that we'll face, and I think we'll be able to do it efficiently, Your Honor, is there may just be some back and forth between various documents. But everything's gone pretty smoothly, and I'm optimistic we'll get through that part of it today.

So I want to deal with the exhibits themselves, Your Honor. As you may have seen, there have been a number of different filings relating to the Debtor's exhibits for this particular motion, and I just want to go through the exhibits and make sure that we're all on the same page here. I want to tell the Court exactly what happened and why and where we are today.

The Debtor timely filed its original witness and exhibit list on January 22nd. They filed that witness and exhibit list at Docket 39 in this Adversary Proceeding 21-3000. The exhibit list referenced Exhibits A through I'll just say AAAAA. It was a lot of exhibits, and somebody had the wise idea to convert them to numbers, but it wasn't me, so I can't take credit. But we're left with letters, and they go from A through AAAAA.

After filing that initial exhibit list, we realized that --

(Interruption.)

THE COURT: All right. Does someone have their device unmuted? Okay. It went away. Go ahead, Mr. Morris.

MR. MORRIS: Thank you. So, shortly after filing that initial exhibit list, we realized that we forgot to file among the exhibits AAAAA. So at Docket #40 in the adversary proceeding, the Court can find Debtor's Exhibit AAAAA.

And then we're going to -- I'm going to refer in a few minutes -- I'm going to use in a few minutes some demonstrative exhibits, and I'm going to use them again with Mr. Seery. And these exhibits concern trading in AVYA and SKY securities that you've heard about previously.

But I'm pointing that out now because I'm kind of old school, Your Honor, and I won't use a demonstrative exhibit if it doesn't have the evidence in the record. And what we realized, Your Honor, is we made two additional mistakes on Friday with all the papers that we filed. The backup for these demonstratives was mistakenly included on the exhibit list for the confirmation hearing as opposed to the preliminary injunction hearing. That was error number one. And error number two, we hadn't redacted the information to show only the SKY and AVYA.

And that's why, Your Honor, at Docket #48, you will find our amended exhibit list that includes what we have identified as Exhibits BBBBB as in boy through SSSSS as in Sam. And those exhibits, Your Honor, are the backup to the

demonstrative exhibits. I don't expect to use them at all, but I do believe strongly that one should not use a demonstrative exhibit unless the evidence is in the record to support it, and now it is.

So that's why, Your Honor, I do appreciate your court staff. I do appreciate Your Honor. I think you either had before you and you may have signed an order on redacting. This is what it was all about. It was just to make sure we had the proper evidence in the record, so I appreciate that.

At this time, Your Honor, I think, just because I'll be referring to it in the opening, the Debtor would move for the admission into evidence of Exhibits A through SSSSS.

THE COURT: All right. Is there any objection?

MR. RUKAVINA: Your Honor, there is. Your Honor, I object to UUUU. I'll object to VVVV as in Victor. I object to AAAAA. That's it, Your Honor.

I will note that there are several exhibits in here of relevance to CLO Holdco that may not be relevant to my clients, but those are my limited objections for now.

THE COURT: All right. Before we ask the nature of your objection, let me ask Mr. Morris: Shall we just --

MR. MORRIS: Yeah.

THE COURT: -- carve these out for now, and then if you want to offer them the old-fashioned way, we'll hear the objection then?

MR. MORRIS: Yes, although I can make it very clear that UUUU should not be in there precisely because it's demonstrative. We had talked that yesterday and I agreed; I just forgot that. UUUU should not be part of the record.

THE COURT: Okay. And so you'll just decide later do you want to offer VVVV and AAAAA the old-fashioned way?

MR. MORRIS: Correct.

THE COURT: All right. So, for the record, I am admitting by stipulation -- with three exceptions I'll note -- all of the exhibits of the Debtor that appear at Exhibits 39 and, well, and 48. And we're carving out of that admission UUUU, VVVV, and AAAAA, which actually appears at Exhibit -- Docket Entry 40. Those are not admitted at this time.

(Debtor's Exhibits A through SSSSS, exclusive of Exhibits UUUU, VVVV, and AAAAA, are received into evidence.)

THE COURT: All right. Go ahead, Mr. Morris.

MR. MORRIS: Yes.

MR. RUKAVINA: Well, Your Honor, while we're talking about housekeeping -- Mr. Morris, I apologize. Is there more housekeeping?

MR. MORRIS: I'd like to continue. I was going to describe the witnesses.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: So, Your Honor, the Debtor is going to call three witnesses today. The first witness will be Mr.

Dondero, the second will be Jason Post, and then the third will be Mr. Seery.

Obviously, Mr. Dondero and Mr. Seery are very familiar to the Court and they will cover much but not all of the same ground that you've heard previously.

Mr. Post, I believe, is a new witness appearing in this court for the first time. I understand that he is the chief compliance officer of each of the Debtors [sic]. He had worked at Highland Capital Management, the Debtor, for more than a decade, I believe, but moved over to NexPoint to work with Mr. Dondero shortly after Mr. Dondero resigned from Highland Capital on or about October 10th last year.

So those are the three witnesses that we plan to present today, and I'd like to describe briefly kind of what we think the evidence will show.

The theme from our perspective here, Your Honor, is that this is a case that is about power and not rights. The Debtor brings this motion for preliminary injunction in order to protect itself from the interference of Mr. Dondero and the Defendants, entities that there will be no dispute he owns and controls.

You may have read in the papers, and I suspect you will hear today from the Defendants, the clarion call for contractual rights and the need for this Court to protect their contractual rights. This is a red herring, Your Honor.

There are no contractual rights at issue here. What Mr. Dondero and the Defendants really want is to maintain control, or at least to deny Mr. Seery from exercising the Debtor's valuable contractual rights. If there are any contractual rights at issue here, it is the Debtor's. The Debtor is the party to the CLO management agreements, and it's those very rights that are being infringed upon.

This was supposed to have been resolved 53 or 54 weeks ago now, Your Honor, when Mr. Dondero agreed and this Court ordered that Mr. Dondero could not use related entities to terminate any of the Debtor's agreements. There is no dispute that each of the Defendants is a related entity for purposes of the January 9th order, since Mr. Dondero and Mr. Norris have already testified that the Defendants are owned and/or controlled by Mr. Dondero.

Notwithstanding the plain language of the January 9th order, which Mr. Dondero not only agreed to, but it may be one of the very few orders in this case that he hasn't appealed, notwithstanding the plain language, Your Honor, he persists, and that is why we are here.

How do we know that this is about power and not rights? How do we know that everything that's going to be described for you, what the evidence is going to show that this is about power and not rights, is very simple. Mr. Dondero and Mr. Post will testify -- I'm just going to give four, five, six

examples here -- are going to testify that Mr. Seery's AVYA trades were not in the Funds' best interests. It's an irrelevant point, Your Honor. There is no contractual right that gives them the ability to terminate because they don't like trades that are being made. They can sell. If they don't like it, they can sell. That's what's really funny about this.

But what's -- what makes it even more clear that this is about power and not rights is the evidence is going to show that Mr. Dondero sold AVYA shares throughout 2020. He sold those shares right up until the day he resigned. And yet six days after resigning, NexPoint sends a letter saying, Don't sell any assets.

Ms. Canty, can we put up Exhibit number -- Demonstrative Exhibit 1, please?

Okay, Your Honor. We have redacted this to shield from public disclosure the name of each fund that's trading, but the backup, as I alluded to earlier, in Exhibits BBBBB through SSSSS, some portion of those documents, that's where these demonstrative figures come from.

And as you can see, beginning on January 29, 2000, continuing through the bottom of the page, October 9th, 2020, when Mr. Dondero left Highland Capital, he traded millions and millions and millions of dollars in AVYA stock.

Can we go to Demonstrative Exhibit #2, please?

This chart is really -- no, I apologize if I -- the other one. The AVYA trading activity chart. Yeah.

This one is really interesting, Your Honor, because it shows the trading throughout the year of AVYA stock, and you can see the brown bars there represent Mr. Dondero's trades. And you can see just how many trades there are. There are over a million shares, I think, if you added it up. They're represented by the brown bars. You can see him selling AVYA stock throughout the period, sometimes at a price really near its bottom.

And then Mr. Seery tries and actually does sell some stock toward the end of the year. That's the green bars on the right. A very, very tiny amount compared to Mr. Dondero. And he sells it at a substantially greater price than Mr. Dondero sold the AVYA stock. And yet they're here telling you, Your Honor, that somehow Mr. Seery is mismanaging the CLOs and they disagree with what he's doing and he's not acting in the best interests of the investors. That's what they want -- but this is what the evidence shows, Your Honor.

With respect to SKY, if we could go to the next slide, please.

So this is SKY. Now, Mr. Dondero did not trade any SKY securities, but Mr. Seery did. And this was another security -- and we'll get to the evidence in a moment -- that Mr. Dondero interfered with and tried to stop. So Mr. Seery

succeeded sometimes and he was stopped sometimes, but the point is, Your Honor, look at the price that Mr. Seery sold.

And remember, you heard this before and you're going to hear it again. Nobody from the Defendants ever asked Mr. Seery, Why do you want to trade this? Not that they even had to. Not that Mr. Seery needs to defend himself, frankly. He's got the authority under the management contracts to act in the way that he thinks is in the best interest. But look at this chart. He made these sales, Your Honor, at more than twice the price of the bottom.

How can they have any credibility? How can Mr. Dondero and Mr. Post come into this courtroom and assert that Mr. Seery is doing anything other than a fabulous job? He is selling at the top of the market. Because they think that some high -- in the future, it's going to go higher? It's prudent, Your Honor.

Mr. Seery is going to tell you the work that he did. He is going to give you the rationale for his decisions. And the only conclusion that I hope and believe the Court will be able to reach is that these were not only rational decisions but they were prudent, taking some money off the table when the stock was near its high.

That's how we know, this is more evidence how we know this is about power. It's not about rights. It's not about justice. It's not about anything having to do with anything

other than Mr. Dondero wanting to maintain control.

How else do we know? What other evidence is there that this is about power and not rights? Again, the timing. The calendar here is going to be very, very important. The first demand from NexPoint from the Defendants that Mr. Seery stop trading came on October 16th. It was less than a week after Mr. Dondero -- like, where does this come from? There's no right to demand stopping of trading. You don't get to do it. And they're going to minimize it. They're going to spend the whole day, Your Honor, either -- either focusing on the law or trying to minimize. And they'll say, well, it was just a request, Your Honor. And if it was a third-party request, I bet Mr. Seery -- Mr. Seery is going to tell you, if it was a third party, he wouldn't care. But when you put all of this together, it is oppressive. It is an exertion -- it's an attempt at exertion of control. That's how it's perceived and that's actually what happened.

Do you need more evidence? Again, they'll talk about termination for cause and how they have the right and the Court -- you, Your Honor, don't have the power to infringe upon their contractual rights. But there will be no evidence. Absolutely none. Mr. Post is going to tell you, in fact, that he has no evidence of any breach, of any default, of any reason whatsoever that cause might exist for the termination of these contracts. That's how you know this is about power

and not rights.

Last point on the issue of power versus rights: Who were the counterparties to the CLO agreements? Did the CLO Issuers -- where are they? They're not here. They're not here to tell the Court that Mr. Seery is breaching his duty. They're not here to tell the Court that the Debtor is in default. In fact, what Mr. Seery is going to tell you, and it won't be rebutted, is that the CLO Issuers are close to finalizing a deal that will permit the Debtor to assume the CLO management contracts.

Mr. Post or Mr. Dondero might get up on the stand today and say, oh, because people have left the firm, that somehow they don't have the ability to service the contracts anymore. You know who doesn't believe that? The contractual counterparty, the Issuers. It's about power, Your Honor. It's not about rights.

There is substantial evidence that warrants the imposition of a preliminary injunction, substantial evidence, much of which you've heard already.

The October and November letters demanding or requesting that the Debtor halt trades. There's no right to that.

Mr. Dondero's interference with the support of Joe Sowin, the Advisors' trader, around Thanksgiving, when they actively moved in. And it's in the emails. It's in the record. We'll put in the record again.

And then he made the threat to Thomas Surgent -- Mr. Dondero made the threat to Thomas Surgent about potential personal liability.

The ridiculous -- remember the ridiculous motion that was heard on December 16th, a motion so devoid of factual or legal basis that the Court granted the Debtor a directed verdict and dismissed the motion as frivolous? Notably, neither Mr. Dondero nor Mr. Post testified at that hearing. Yet, within a week, Your Honor -- the hearing was on a Wednesday. The hearing was on Wednesday, December 16th. The Court entered the order on Friday, December 18th. On Monday, December 21st, the next business day, Mr. Dondero and Mr. Post and the lawyers for the Defendants held conference calls to figure out what to do next.

And the very next day, the evidence is going to show -- it's already in the record -- Mr. Dondero again actively stopped Mr. Seery's trades from being effectuated. They sent their first letter. This is less than a week after that hearing, Your Honor. They sent another letter asking the Debtor -- again, they requested -- minimize -- this is what you're going to hear: Well, we just sent a letter requesting no more trading.

What happened the next day, December 23rd? They send another letter and they say, We're thinking about terminating the contracts. Now we think we're going to terminate the

contracts. And we just want to let you know we're thinking about terminating the contracts.

And we call them -- and Mr. Seery is going to testify to this -- we say, What are you doing? Every time we just said, Please withdraw your letter. There's no basis for doing this. Leave us alone and let us do our job. They wouldn't -- they refused to withdraw the letter.

And finally -- again, Mr. Seery will testify to this -- we told them, If you think you really have a basis for terminating the contract, make your motion to lift the stay. And if you don't, the Debtor will file the motion that brings us here today.

And that's how we got here, because they continued to interfere with the trading. They continued to send these specious letters that are implicit threats. Mr. Seery is going to tell you that every one of these, he -- is an implicit threat. We asked them, Just withdraw the letters and stop it. We asked them to make their own motion if you think so strongly of it. They wouldn't do that, either. They just want it hanging out there. They just want it all hanging out there over Mr. Seery's head so that he knows somebody's -- somebody's watching and somebody's planning, you know, to take action.

It's not right, Your Honor. They have no right to any of this. There's nothing in the contract that allows them to

make even a good-faith -- to make any claim that they have cause to terminate the contract. They have no right under any circumstances to stop Mr. Seery from trading.

What they are going to tell you is there's no agreement between the Advisors and the Debtor that requires the Advisors to execute the trades. And they're right about that. They're actually right about that. But here's the thing, Your Honor. What Mr. Seery is going to tell you is that Advisors has the trading desk. For more than a decade, they executed the trades. Through the entirety of this bankruptcy case, until Mr. Dondero left Highland, they executed the trades. Even after Mr. Dondero left Highland in October, they continued to execute the trades. And on December 22nd, they fold their hands and they say, Nope, I don't care about the course of dealing, I don't care what impact it has, you can't make me do it. So Mr. Seery has tried end-arounds, and that'll be in the record, too, and that's when the threats to Surgent come. That's when the threat to Surgent come, when we try to do the workaround. Cannot do it.

This is just not right, Your Honor. It's just not right. There's order -- there's the January 9th order. There was the TRO that was in effect that we're going to hear about again, because that TRO not only applied to Mr. Dondero, it prevented him from conspiring with or even encouraging a related entity from engaging in prohibited conduct. And that prohibited

conduct, as Your Honor knows, because it's your order, is plain and as unambiguous as can possibly be: Don't interfere with the Debtor's business. It's all we're asking for. It's the only reason we're here today.

Interestingly, Your Honor, probably the best piece of evidence that I'll put in front of you today are going to be the words out of Mr. Post's mouth, because basically what he's going to tell you is that, as chief compliance officer, he has never once in the history of his employment told Mr. Dondero to stop. In fact, what he's going to tell you is that he defers to the investment professionals, and that but for the TRO that is consensually in place today, it would depend on the facts and circumstances as to whether or not he actually does anything as chief compliance officer to stop this conduct. Depends on the -- maybe he can explain to Your Honor what facts and circumstances he thinks, as chief compliance officer, would allow the Advisors to interfere with the Debtor's business. It'll be interesting to hear him answer that question.

That's all I have, Your Honor. I look forward to presenting the evidence today. I'd like this done once and for all. It's time to move on. And the Debtor -- the Debtor is in bankruptcy. Your Honor, I think, has every power, every right, and frankly, you know -- I feel very strongly about this, obviously, Your Honor -- the Debtor needs the breathing

space and to be left alone so it can do its job. And we'll respectfully request at the end of this that the Court enter an order allowing it to do so.

Thank you, Your Honor.

THE COURT: All right. We were hearing some distortion there, I'm not sure where it was coming from, but we'll try to keep it reined in.

Mr. Rukavina, your opening statement.

MR. RUKAVINA: Your Honor, thank you. Can the Court hear me?

THE COURT: Yes.

OPENING STATEMENT ON BEHALF OF CERTAIN DEFENDANTS

MR. RUKAVINA: Your Honor, I think it's important first to note a few obvious things. One, what we're talking about today is enjoining future rights, future rights under a contract. Hearing Mr. Morris's opening, it sounds like we're trying a breach of contract case. There is no declaratory relief sought for whether there is grounds for a breach of contract case. And prior to assumption and prior to confirmation, the automatic stay applies.

So let me be clear that what they're asking the Court to do today is to excise from these contracts our rights in the future, effectively for all time, as I'll explain.

The second thing that merits real consideration is that it is the Funds, Your Honor, not the Advisors, it is the Funds

that have the right to remove the Debtor as manager.

Those Funds, as you will hear, have independent boards. Mr. Dondero doesn't own those Funds. He's not on those boards. He doesn't control them.

When Mr. Morris talks about Mr. Norris's prior testimony, that testimony was limited to the Advisors. And yes, Mr. Dondero does own the Advisors, and Mr. Dondero, while I won't say controls the Advisors, certainly has a lot of input. That is not the case for the Funds, which are the ones with the contractual powers here to remove the Debtor.

You will hear that those -- that that board or those boards meet frequently, they have independent counsel, and they take separate actions, including very recently where they did not do something that was advised and acted independently.

And the third thing that makes this case different and that all of us should bear in mind is that we're talking today about other people's money. There's more than one billion dollars of investment funds, retirement funds, pension funds, firefighter funds, school funds, wealthy individuals, having nothing in the world to do with Mr. Dondero or anyone in this case.

So what we're talking about here today, Your Honor, is that if my retirement manager files bankruptcy, that I for all time would be effectively enjoined from removing him, no matter what he may do in the future, just because he needs

that revenue.

That is an absolutely inappropriate use of a preliminary injunction. It is the modification of a contract that the Debtor seeks to assume, and there is going to be no evidence on the underlying elements that the Court must consider.

I say that, Your Honor, because I'm new to -- I'm late to this case but I have studied in detail what Your Honor did in the *Acis* case. And I think that we have to qualitatively differentiate today from *Acis*. In *Acis*, there were allegations of fraudulent transfer. When Your Honor enjoined future actions, I believe in part it was because the legitimate owner of those rights might not have been having those rights.

So that was a very important difference. Here, there's no question that we have more than billion dollars of other people's funds at issue.

Also in *Acis*, as confirmed by the District Court, there was the exercise of an optional redemption right, which could have very well been used as a weapon to strip the manager of its rights. That's not the case here today. We are talking about removing the Debtor in the future -- not today, not prior to assumption, in the future -- for such things as if the Debtor commits fraud, if Mr. Seery is indicted for felonies, if the Debtor absconds with our funds. We are talking about potential hypothetical actions in the future

that are not even ripe based on the Debtor's potential wrongful actions, not based anything on our motivations or our intentions.

So this is a different case than Your Honor has heard so far in these cases. And what it boils down to, Your Honor, is will the Court give judicial immunity to the post-assumption, post-confirmation Debtor over the next two or three years as it manages and liquidates more than a billion dollars of other people's funds? It is their money at issue.

So, in order to do this, the Debtor first has to tell Your Honor that it has a likelihood of merits on the success [sic] of some claim. The Debtor cannot just come to you -- because the Debtor knows Your Honor's opinion on 105(a) and the Supreme Court law -- and the Debtor cannot just say, Judge, please give us an injunction because it's convenient or because we don't want to comply with our obligations. So they concoct a tortious interference claim. They argue that there is an automatic stay violation, which, as Your Honor knows, all of us bankruptcy lawyers take most seriously. And they argue that, well, whatever Mr. Dondero has been enjoined from doing, somehow we *a priori* are also enjoined. Basically, an alter ego with no facts, law, trial, or due process.

On the tortious interference, Your Honor will hear absolute evidence that cannot be refuted that all that we did, all that we did was we refused, our employees refused to make

a ministerial entry into a computer program of two trades that Mr. Seery authorized. Those trades closed exactly as Mr. Seery wanted. Those trades closed, were executed, before Mr. Seery asked our employees to do his bidding. And the reason why our employees were instructed not to do what Mr. Seery wanted was because our chief compliance officer looked at it, those employees looked at it, and they all said, What is this? Our internal protocols were not followed. We don't know anything about these trades. We have fiduciary duties, we have SEC obligations, and Mr. Seery has his own employees whom he can instruct to enter these two trades into the computer and our employees aren't going to do it. It's as simple as that.

Mr. Dondero did not command that decision. Mr. Dondero did not instruct that decision.

Our employees not doing what Mr. Seery requested of them is not tortious interference. It is not interference as a matter of law. There was no breach of contract as a result.

So the two elements -- two of the elements required for tortious interference, there will be zero evidence on. But in the bigger picture, what they're talking about again is restraining our rights in the future. And whether -- whether we are party to these contracts or a third-party beneficiary, it doesn't matter, because we are not a stranger to these contracts. These contracts expressly give us rights. And a

party exercising their right under a contract, it could be breaching that contract, but it cannot be tortious interference as a matter of law.

And if Your Honor is concerned about us tortiously interfering in the future, then the Court should enjoin us from tortious interference in the future, not excise from the contract the remedies that the Debtor must accept if it wants to assume these contracts.

Moving to the automatic stay issue, the sole and exclusive argument for why we violated the stay is because our counsel, a seasoned, gentlemanly bankruptcy lawyer of many years' experience, sent two letters to seasoned veteran bankruptcy lawyers for the Debtor. Communications. Communications amongst counsel.

The first, the December 22nd letter, is a request: Okay, we lost in front of Judge Jernigan, Judge Jernigan called our motion frivolous, we get that, but we ask you to please stop trading until the plan is confirmed. A request which the Debtor ignored. Or that's not true, didn't ignore: refused to comply with.

The second letter, a day later, after various communications, was: Okay, we are going to initiate the process of terminating you as the servicer.

Mr. Dondero had nothing in the world to do with these letters. Mr. Dondero did not direct these letters. This was

professional advice from outside counsel and the independent boards of the Advisors believing that their fiduciary duty compelled that.

And guess what, that letter even said: subject to the automatic stay. You heard from Mr. Morris that they basically said, File your stay motion.

Our follow-up letter clarified anything that we might do is subject to the automatic stay. We never said we're going to act in a way that the stay doesn't permit. We said we're going to come to this Court first.

But even all that, all those communications, while it may be interesting, are irrelevant, because we never took any action. You will hear that we never communicated with the CLOs, the Trustees, or the Issuers, anything like we went over with the Debtor, anything like, Please start the process of removing the Debtor. We have done nothing of the sort, we will do nothing of the sort, precisely because of the automatic stay.

So I equate this, Your Honor, to your average home lender whose lawyer sends a letter to the borrower saying, You don't have insurance; we're going to start the process of foreclosure. You're past due on your post-petition adequate protection payments; we're going to start the foreclosure process; we're going to go seek a list of stay. That is not actionable. It is not a stay violation. Those are

communications, not actions. And that is precisely what seasoned professional counsel should be doing.

And now, Your Honor, we move to the Mr. Dondero issue. The argument is, well, on January the 9th, Mr. Dondero, apparently for all time, in perpetuity, agreed that he will not cause the related entities to terminate these agreements. And then the argument is, well, the Court entered a TRO against Mr. Dondero and the Court entered a preliminary injunction against Mr. Dondero. Okay?

I don't see where the problem is. Mr. Dondero is prohibited from causing us to terminate these agreements. There are many ways, with independent boards, that Mr. Dondero has nothing to do with that. And he will have nothing to do with that in the future. So if the concern is enjoining us because of an injunction against Mr. Dondero, enjoin Mr. Dondero. Just like if the concern is that we're going to tortiously interfere, you enjoin us from tortious interference. Or if we're going to violate the stay, enjoin us from violating the stay. But do not for all time assume that any right that we may exercise in the future will necessarily be tainted and the corrupt product of Mr. Dondero's instructions. You will see today on the evidence that that has not happened and it will not happen.

And whatever Mr. Dondero may have agreed to, we are separate entities. Again, the Funds have -- are not

controlled or owned, and Mr. Dondero is not on the board. So whatever he may have agreed to is between the Court and the Debtor and him, but he never agreed to that on behalf of the Funds. He never agreed to that on behalf of the Advisors, who have their own independent fiduciary duties and duties under the law.

So, Your Honor, there will be no substantial likelihood of success on the merits. There will be no likelihood of success on the merits. And I'm talking about the post-assumption, post-confirmation time frame. The issue is fundamentally different pre-assumption and pre-confirmation. But post-assumption and post-confirmation, the Debtor will not show a likelihood of success on the merits. The Debtor will not show any irreparable injury. None.

Mr. Seery will testify that managing these agreements for the coming couple or three years will have some value to the Debtor. He doesn't know what the profitability of that is to the Debtor. You will hear that, in fact, managing these contracts for the next two years does not bring any profitability to the Debtor. The Debtor will lose money managing of them. But whatever damages there are are monetary damages, and monetary damages are not an irreparable injury as a matter of law.

Now, the Debtor says, well, the Court can enter an injunction in the aid of restructuring, but this injunction

will happen after restructuring.

On the balance of harm and public interest, Your Honor, I think we're dealing with more than a billion dollars of clean, innocent third-party funds. The balance of harm here weighs against granting this injunction. If we try to do anything in the post-confirmation world, the Debtor has all of its rights and remedies to contest what we do. If we do it wrong, we're liable in contract or in tort, there's monetary damages, and the Debtor has already successfully organized.

But if the Debtor does something wrong in the future and we cannot take action to stop a gross mismanagement or a denution [sic] of the Debtor or an abscondence with funds, then think about the harm to the innocent investors here. Because if we even go to court, your Court, any court, we will be in violation of a federal court injunction.

Your Honor, this is not the appropriate purpose of an injunction for the preservation of the status quo. The status quo, by definition, cannot extend post-assumption or post-confirmation. This is not a proper exercise of equity. We have done nothing wrong, we have threatened to do nothing wrong, and we will do nothing wrong to justify forever being prejudiced and enjoined from exercising our contractual and statutory rights.

Your Honor, this TRO extends through February the 15th. We asked the Debtor to continue this hearing. We asked the

Debtor to go to our independent boards and seek approval of the same settlement that the Debtor has with CLO Holdco, which we learned about last night. We simply haven't had the time to get those boards aligned up and present a settlement to them. We're trying to put together a competing plan.

Your Honor, there is no reason to go forward today except, like Mr. Morris said, power. Power. Mr. Seery's power, Your Honor. Not ours. Mr. Seery's power in perpetuity or for judicial immunity, get out of jail free card. Thank you.

THE COURT: All right. Mr. Morris, you may call your witness.

MR. MORRIS: Yeah. I just want to make a motion to strike the notion of a get out of jail free card. I appreciated everything counsel had to say, but I think that's a little -- a little over the top.

We call Mr. James Dondero, please.

THE COURT: Mr. Dondero, --

MR. RUKAVINA: Your Honor, bear with me.

THE COURT: Okay.

MR. RUKAVINA: Your Honor, bear with me. I'm going to get out of this chair. Mr. Dondero will get in this chair. And so that there's no reverberation, I will be sitting next to Mr. Dondero in case I have to make any objections.

THE COURT: Okay. All right. Good morning, Mr. Dondero.

MR. DONDERO: Good morning.

THE COURT: Please raise your right hand.

JAMES DONDERO, DEBTOR'S WITNESS, SWORN

THE COURT: Thank you. Mr. Morris, go ahead.

MR. MORRIS: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good morning, Mr. Dondero. Okay. John Morris; Pachulski, Stang, Ziehl & Jones; for the Debtor. Can you hear me okay, sir?

A Yes.

Q There are no board members here on behalf of any of the Funds to testify or offer any evidence; isn't that right?

A Not that I'm aware of.

Q Okay. And you knew the hearing was going to be today on the preliminary injunction, right?

A Yes.

Q And you had an opportunity to confer with the boards of the Funds in advance of this hearing, right?

A No.

Q There's no -- there's no -- no board member is expected to testify, fair?

A Correct.

Q So the Court isn't going to hear any evidence as to the

board's perception of what's happening here, right?
A Not that I'm aware of.
Q Okay. Until January 9th, 2020, you controlled the debtor Highland Capital Management, LP; isn't that right?
A I don't remember exactly when these -- when the independent board was put in place, but up until around that time, I believe.
Q Okay. So, January 2020?
A Yes.
Q And during that month, you completed an agreement with the Creditors' Committee where you ceded control of the Debtor pursuant to a court order, right?
A Pursuant to a court ...? I thought it was pursuant to a negotiation where they would have fiduciary responsibility to the estate in my absence. That's -- that's what I think the (garbled).
Q Okay. You're aware -- so you entered into an agreement with the Creditors' Committee pursuant to which you ceded control of the Debtor, right?
MR. RUKAVINA: Your Honor, I'll object. That agreement speaks for itself. And if Mr. Morris wants to present it to Mr. Dondero, he can.
THE COURT: Um, --
MR. MORRIS: Sure. Ms. Canty, can we please put up --

THE COURT: All right. Well, I --

MR. MORRIS: I'm happy to put it up, Your Honor.

THE COURT: I overrule that objection. You can ask. And then if he's not sure, you can present the agreement. All right? Go ahead.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Mr. Dondero, is there any doubt in your mind that in January of 2020 you gave up control of Highland in favor of an independent board at the Strand Advisors level?

A No. I -- yes, I agree with that.

Q Okay. And do you recall that, in connection with that agreement, the Court entered an order?

A Several orders. Which one?

Q Okay.

MR. MORRIS: Can we please put up Docket No. 339?

MS. CANTY: Sure, just one second.

MR. RUKAVINA: And you have it here.

John, I have the order if just want Mr. Dondero to review it.

MR. MORRIS: I think -- I think everybody should have the benefit of seeing it. But thank you very much.

Your Honor, while we take this moment, can you just remind me of when the Court needs to take a break today, so that I'm mindful of that and respectful of your time?

THE COURT: 11:30.

MR. MORRIS: Okay. And what time will we reconvene?

THE COURT: Well, I have said 1:00. I hope it can be a little sooner, but let's just plan on 1:00, okay, so there's no confusion.

MR. MORRIS: Okay. All right. All right. So, on the screen here, we have Exhibit OOOO, which is in the record.

BY MR. MORRIS:

Q This is an order that was entered by the Court on January 9th, 2020. Do you see that, sir?

A Yes.

MR. MORRIS: Can we scroll down to Paragraph 9, please? (Pause.) Are you having problems, Ms. Canty?

MS. CANTY: It's on the screen. You can't see it?

MR. MORRIS: Yeah. Can you scroll down to Paragraph 9?

MS. CANTY: It's on Paragraph --

MR. MORRIS: That's on Page 2, I believe.

MS. CANTY: Yeah, I have it up. I'm not sure what the disconnect is, because I can see it on my screen. I'm going to stop it and reshare it.

MR. MORRIS: Thank you very much.

(Pause.)

MS. CANTY: Do you see it now?

MR. MORRIS: Okay. Beautiful.

BY MR. MORRIS:
Q Mr. Dondero, if you'd just read Paragraph 9 out loud.
A (reading) Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor.
Q Okay. So you understood, as part of the corporate governance settlement pursuant to which you avoided the imposition of a trustee, that you agreed that you wouldn't cause any related entity to terminate any agreements with the Debtor, right?
A Uh, --
Q Is that correct? You understood that paragraph?
A Yes.
Q Okay. And you didn't appeal this particular order, did you, sir?
A I -- I believe I've refuted -- I've adhered to that order entirely.
Q Okay. NexPoint Advisors LP, is one of the defendants in this matter, right?
A Yes.
(Pause.)
Q Can you hear me, sir?
A Yes. Yes, I said, "Yes."
MR. NICHOLSON: Well, John, did you -- did you ask a question? Because you went offline for a few seconds there.
MR. MORRIS: I asked whether NexPoint Advisors, LP

was an advisory firm.

THE WITNESS: Yes.

BY MR. MORRIS:

Q And you have a direct or indirect ownership interest in NexPoint Advisors, LP, correct?

A Yes.

Q And you understand that, based on that direct or indirect ownership interest, NexPoint Advisors, LP is a related entity under Paragraph 9 of this order, right?

A Yes.

Q Okay. Highland Capital Management Fund Advisors, LP is one of the other defendants in this case, right?

A Yes.

Q And we'll refer to that entity as Fund Advisors; is that fair?

A Yes.

Q And we'll refer to Fund Advisors together with NexPoint Advisors, LP as the Advisors; is that fair?

A Yes.

Q Okay. Fund Advisors is also an advisory firm; is that (audio gap)?

A I missed that last question.

MR. RUKAVINA: John, you're freezing up on us. Is it on our end, Your Honor, or is it on Mr. Morris's end?

MR. MORRIS: Just let me know -- just let me know

when it happens.

THE COURT: Yes. I'm hearing him. But go ahead, Mr. Morris. Let's try again.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q You have a direct or indirect ownership interest in Fund Advisors, correct, sir?

A Yes.

Q (audio garbled) And based on that direct or indirect interest, you would agree that Fund Advisors is a related entity for purposes of this order, correct?

A Yes.

Q In addition to your ownership interest, you're also the president of Fund Advisors; is that (audio gap)?

THE COURT: All right. Now --

THE WITNESS: I believe so.

THE COURT: Yes. Now I'm starting to have some trouble, Mr. Morris. Every once in a while, you're freezing towards the end of a sentence. So I don't know what can be done, but it's --

MR. MORRIS: All right. Let me know if that continues.

THE COURT: Okay.

BY MR. MORRIS:

Q To use your words -- to use your words, Mr. Dondero, it's

fair to say that you generally control Fund Advisors, right?
A Yes.
Q And based on that, you acknowledge that Fund Advisors is a related entity under the Court's order, correct?
A Yes.
Q And together, the Advisors that you own and control manage certain investment funds, correct?
A Yes.
Q And three of those funds are defendants in this case, correct?
A Yes.
Q And you are the portfolio manager of each of those funds; is that right?
A I believe so.
Q Okay. Let's talk about the events that led to this matter. CLO stands for Collateralized Loan Obligations, correct?
A I'm sorry. Repeat that, please?
Q Sure. CLO stands for Collateralized Loan Obligations, correct?
A Yes.
Q Years ago, the Advisors that you own and control caused the investment funds that they manage to buy the interests in CLOs that are managed by the Debtor, correct?
A Yes. Yes.

Q Okay. And those Funds still hold an equity interest today, correct?
A Yes.
Q And K&L Gates is one of the law firms that represents the Advisors and the Funds that are managed by the Advisors, correct?
A Yes.
Q You would agree that the Debtor is party to certain contracts that give it the right and the responsibility to manage certain CLO assets, right?
A Yes.
Q And you recall that --
MR. RUKAVINA: Your Honor, Mr. Morris is frozen on our end.
THE COURT: Yes. Mr. Morris, you just froze.
MR. RUKAVINA: We heard nothing, Mr. Morris.
THE COURT: Yes.
MR. MORRIS: Okay.
BY MR. MORRIS:
Q Sir, do you recall that you resigned from the Debtor on or around October 10th, 2020?
A Yes.
Q Okay. And shortly thereafter, K&L Gates sent a couple of letters to the Debtor on behalf of the Advisors and the Funds, correct?

A Yes.
Q Okay.
MR. MORRIS: Can we take a look at these? These are documents that were admitted into evidence in a different matter, but they're actually referred to in his prior testimony, which is in evidence in this case. So I would just ask Ms. Canty to go to Trial Exhibit B, which was filed in the Adversary Proceeding 20-3190 at Docket 46. And for the record, it's PDF Page #184 out of 270. I just want to take a look at these two letters.
BY MR. MORRIS:
Q Okay. Do you see this letter, sir?
A Yes.
Q And NexPoint is one of the defendants here; is that right?
A Yes.
Q And that's one of the Advisors that you own and generally control, correct?
A Yes.
Q And so this letter is sent less than a week after you've left Highland Capital Management, right?
A Yes.
Q Do you recall this particular letter?
A No.
Q Can -- you're familiar with the substance of this letter and the other one that was sent in November, correct?

A Could you pull it a little higher and let me read it?
Q Yes. Sure.
MR. RUKAVINA: If this is an exhibit, I can show it to him as an exhibit, Mr. Morris.
MR. MORRIS: I don't know that this is one of the marked exhibits. It's one of the exhibits that's used within his prior testimony. So, but I want to give Mr. Dondero a chance to review it. And please let us know if you need to scroll further down.
(Pause.)
MR. RUKAVINA: You're going to have to scroll down.
THE WITNESS: Scroll down a little further, please.
(Pause.)
MR. RUKAVINA: Mr. Morris, can you please scroll down? Neither Mr. Dondero nor I can read the balance.
BY MR. MORRIS:
Q There you go. (Pause.) So, you see at the top of the page there there is a reference to the sale of assets and a, quote, "a rush to sell these assets at fire sale prices." Is that what you think -- did you think that Mr. Seery was selling (audio garbled) CLO assets at fire sale prices in October 2020, --
MR. RUKAVINA: Your Honor, --
MR. MORRIS: -- less than a week after --
MR. RUKAVINA: Your Honor, I'll object. We did not

hear Mr. Morris's question.

THE COURT: All right. Could you repeat the question?

MR. MORRIS: Okay. Yes, Your Honor.

BY MR. MORRIS:

Q Mr. Dondero, on or about October 16th, did you personally believe that Mr. Seery was in a rush to sell CLO assets at fire sale prices?

A I believe he had no business purpose to sell any of the assets, which I believe he stated that to Joe Sowin, our trader. I -- I -- there was no business purpose stated or ever given or obvious from the sales. And --

Q Okay.

A -- I (indecipherable) draft this letter.

Q Okay.

MR. MORRIS: I move to strike, Your Honor. It's a very simple question --

THE COURT: Sustained.

MR. MORRIS: -- and it has to do solely with Mr. Dondero's state of mind.

BY MR. MORRIS:

Q Mr. Dondero, on or about October 16th, did you personally believe that Mr. Seery was in a rush to sell CLO assets at fire sale prices?

A He was in a rush to sell them for some reason with no

business purpose. I don't know the reason.

THE COURT: All right. Can you --

BY MR. MORRIS:

Q Okay. And you never asked him, right?

THE COURT: Yes. Yes or no answer, Mr. Dondero.

THE WITNESS: Never asked him.

MR. MORRIS: Okay. Can we turn to the next exhibit, which is Exhibit C on that same docket?

(Pause.)

BY MR. MORRIS:

Q While we're waiting, can you just read the last sentence of the paragraph that ends at the top of the page, Mr. Dondero, beginning, "Accordingly"?

A (reading) Accordingly, we hereby request that no CLO assets be sold without prior notice and prior consent from the Advisors.

Q Are you aware of any contractual provision pursuant to which the Funds or the Advisors can -- can expect that the Debtor will refrain from any -- selling any assets without giving prior notice and obtaining prior consent from those entities?

A I think the documents have an overall good-faith/fair-dealing clause which would cover something like this, I believe.

Q Your -- is it your testimony, sir, that the duty of good

faith and fair dealing requires the Debtor to give notice to the Advisors and to obtain the Advisors' prior consent before they can sell any CLO assets?

A Well, I think -- yes, I do. I think --

Q All right.

A Yes. Yeah.

Q Okay. And then the next month, another letter was sent by NexPoint to Mr. Seery. Do you recall that?

A Not specifically. If you bring it up, we can talk about it.

MR. MORRIS: Can we scroll down a little bit?

(Pause.)

MS. CANTY: John, are you talking to me? I was frozen out. I just got back on. I apologize.

MR. MORRIS: That's okay. Can we just scroll down so Mr. Dondero can see more of this particular letter?

MS. CANTY: Okay.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Can you just read out loud, Mr. Dondero, out loud the last two sentences, please, beginning with, "We understand"?

A (reading) We understand that Charitable DAF Holdco, Ltd. has made a similar request. Accordingly, we hereby re-urge our request that no CLO assets be sold without prior notice to and prior consent from the Advisors.

Q What's the Charitable DAF Holdco, Ltd.?
A I think that's who you settled with yesterday.
Q Do you have an interest in that entity?
A No. It's a bona fide charity. It was one of the largest in Dallas before it got cut in half by Acis.
Q Does -- are you familiar with the Get Good and the Dugaboy Investment Trusts?

MR. RUKAVINA: Your Honor, at this time I would object to relevance. I don't see what this has to do with tortious interference and stay violation on December 22nd and December 23rd, 2020.

THE COURT: Response?

MR. MORRIS: Your Honor, I'm trying to establish that Charitable DAF Holdco, Ltd. is another entity in which Mr. Dondero holds a beneficial interest.

THE COURT: Okay. Overrule the objection.

MR. RUKAVINA: John, you're not only frozen, now you're off.

MR. MORRIS: Yeah, I can see myself. You can't hear me?

MR. RUKAVINA: We can now, but Your Honor, we lost Mr. Morris for a bit there.

THE COURT: All right. I think we were --

MR. MORRIS: Okay.

THE COURT: -- waiting on an answer from Mr. Dondero,

actually.

THE WITNESS: We didn't hear the question at --

BY MR. MORRIS:

Q Sure. Are you familiar with the Get Good and Dugaboy Investment Trusts?

A Yes.

Q Are you the beneficiary of those trusts?

MR. RUKAVINA: Your Honor, again, objection to relevance. These are non-parties, and what his personal interests are has no relevance to this.

THE COURT: Overruled.

THE WITNESS: The Get Good Trust, Get -- I believe those are defective grantor trusts. I don't believe I have any interest whatsoever in those. Dugaboy is a perpetual Delaware trust. I don't know how that's set up, but I believe I do have an interest there until I pass.

BY MR. MORRIS:

Q In fact, you're -- you're the sole beneficiary of the Dugaboy Investment Trust, right?

A Until I pass. It's a -- it's a estate planning trust.

Q I appreciate that. And the Dugaboy and the Get Good Trusts are the owners of the Charitable DAF Holdco Ltd., correct?

A No. Not as far as I know.

Q Okay.

A (garbled) time at all.
Q All right. So we just looked at these two letters, sir. And you were familiar with the substance of the letters before they were sent, right?
A Uh, just --
MR. MORRIS: You can take it down, Ms. Canty.
THE WITNESS: Just generally. Again, I wasn't involved directly with the letters.
BY MR. MORRIS:
Q You were aware of the letters before they were sent, right?
A Yes.
Q And you discussed the substance of the letters with NexPoint, correct?
A Not the substance of the letters, just the substance of the issue.
Q You actually discussed the substance of the letters with NexPoint, correct?
A I -- Again, I remember it being the substance of the issue. Generally, at most, the substance of the letters.
Q And you discussed the substance of the letters with the Advisors' internal counsel, too, right?
A The sub -- generally, the substance, yes, but more the issue than the letter.
Q Okay. If I pull up your transcript from the TRO hearing,

would that refresh your recollection that you discussed the substance of these letters with NexPoint and with the Advisors' internal counsel?

A I'd like to clarify with the testimony I just gave.

Q Okay. Would you -- do you have any reason to believe that you did not previously testify that you discussed the substance of the letters with NexPoint and with NexPoint Advisors' internal counsel?

A I repeat the same testimony. Generally. Like, those letters that you put on the screen, I have no recollection of those specifically.

MR. MORRIS: Ms. Canty, can we please call up on the screen Exhibit NNNN, which was the transcript from the January 8th, 2021 preliminary injunction hearing?

MR. RUKAVINA: Mr. Morris, just one sec. I'm trying to find it on paper.

MR. MORRIS: Yeah. It's four Ns.

MR. RUKAVINA: One, two, three, four. (inaudible) put that on the screen.

MS. CANTY: John, I'm not sure what's going on, but it won't come up on the screen. I've tried three times. I'm going to keep trying.

MR. MORRIS: All right. I have it in front of me. Do you have it, too?

MR. RUKAVINA: Yes, the witness has it --

MR. MORRIS: Okay.

MR. RUKAVINA: -- in front of him. This is NNNN, just to confirm?

MR. MORRIS: Yes. And it is the January 8th transcript.

BY MR. MORRIS:

Q Mr. Dondero, were you asked these questions and did you give these answers? Question: Are you familiar with --

MR. RUKAVINA: Where are you, John? Where are you? Where are you? We -- we -- we --

MR. MORRIS: I apologize. Page 40. I'm going to read Page 40, Lines 1 through 14.

MR. RUKAVINA: Okay. He has it in front of him, if you just want him to read it.

BY MR. MORRIS:

Q Did you give these answers at Page 40, beginning Line 1:

"Q And were you -- and you were familiar, you were aware of these letters before they were sent; is that correct?

"A Yes.

"Q And you generally discussed the substance of these letters with NexPoint; is that right?

"A Generally, yes.

"Q You discussed the letters with the internal counsel; is that right?

"A Yes.
"Q That's D.C. Sauter?
"A Yes.
"Q And you have been on some calls with K&L Gates about these letters, right?
"A I believe so.
"Q And you knew these letters were being sent, correct?
"A Yeah. They're -- they're reported.
Q Did you give those answers to those questions at the prior hearing?
A I -- I believe it's what I -- it's almost exactly what I just said, but yes.
Q And you supported the sending of the letters; isn't that right?
A Absolutely.
Q And you encouraged the sending of the letters, right?
A Absolutely.
Q Around Thanksgiving, you learned that Mr. Seery had given a direction to sell certain securities owned by CLOs managed by the Debtor, correct?
A Yes.
Q And when you learned that, you personally intervened to stop the trades, correct?
A Yes.

Q Let's -- I want to look at that email string that we looked at once before. It can be found at Trial Exhibit D found on Docket No. 46 in the adversary proceeding. It's PDF Number -- it's PDF Page 189 of two (garbled).

MR. RUKAVINA: Did you catch that?

THE COURT: Which -- which exhibit number -- letter is it?

MR. MORRIS: It's on the docket in the Adversary Proceeding 20-3190. And in that adversary proceeding, at Docket No. 46, you've got the Debtor's exhibit list. And Exhibit D, which can be found at PDF Page 189 of 270, is the email string I'm looking for.

I apologize, Your Honor. It wasn't until I was reading the transcript yesterday that I realized I needed these documents. But they are in the record. Obviously, they're referred to in the transcript that is in the record.

THE COURT: Okay.

MR. RUKAVINA: Your Honor, I would like to interject for the record here that this is the first time my clients have been sued. They have a right to be confronted with the witnesses and testimony and evidence against them. So if Mr. Morris wants to introduce this as an exhibit here today, that's one thing, but I object to any notion that there's a prior record that is going to tie my clients' hands. It might tie Mr. Dondero's hands, but not my clients' hands.

MR. MORRIS: I'd move for the introduction into evidence of this document that has emails not only from Mr. Dondero, but from Joe Sowin, the head trader of the Defendants.

MR. RUKAVINA: And Your Honor, I have no problem with that admission. I just want to make it clear that we're not conceding that whatever happened in this case previous to this is a part of today's record. That's all. So I do not have a problem with the admission of this. I would, however, ask you, Mr. Morris, to have someone email it to us so that I can use it today if I need to.

THE COURT: All right.

MR. MORRIS: Okay. Will do.

THE COURT: So, I'll --

MR. MORRIS: We'll do that at the --

THE COURT: I'll admit it into evidence. You'll need to not only email it Mr. Rukavina, but you'll need to file a supplement to your exhibit and witness list after the hearing showing the admission of --

MR. RUKAVINA: And Mr. Morris, if you could email it to Mr. -- if you could email it to Mr. Vasek as well, because obviously I can't get to it now. Thank you.

MR. MORRIS: Sure.

THE COURT: All right. So this --

MR. MORRIS: Okay. So, --

THE COURT: For the record, let's just be clear what the record is -- this is going to be called on the record. I think you are up to SSSSS, so this would be TTTTT when you file it on the record. All right? Go ahead.

MR. MORRIS: Thank you very much, Your Honor.

(Debtor's Exhibit TTTTT is received into evidence.)

BY MR. MORRIS:

Q Mr. Dondero, you recall looking at this email string at the last hearing, right?

A Yes.

Q Let's start at the bottom, please, with Mr. Covitz's email.

(Pause.)

MR. RUKAVINA: Hey, John, real quick, now we've lost you. We've lost you and we're not seeing anything from your assistant. Do you have the email, Mr. Vasek?

MR. MORRIS: I'm here. Can you hear me?

MS. CANTY: I'm here. (garbled) on the screen.

MR. MORRIS: Yeah. Can we scroll down to the bottom?

MS. CANTY: I did. I don't know why it's not showing on you guys' screen.

MR. MORRIS: Hopefully this gets fixed. Yeah. We've never had this problem before, Your Honor. I'm not sure what the issue is, but I do apologize.

THE COURT: All right. Well, I can hear you, but we

don't see movement of the exhibit.

MR. MORRIS: Yeah. When I began earlier today by suggesting that this was going to be challenging, this was not one of the challenges I anticipated.

THE COURT: Okay. All right.

MR. RUKAVINA: Do you have the email yet?

MS. CANTY: I'm sorry. I don't know what's happening on this end. I have three streams of Internet going, and I don't think it's the Internet. I don't know what's going on.

MR. MORRIS: Hmm.

MR. RUKAVINA: Yeah, John, what I'm suggesting is that you have an associate email it to Mr. Vasek immediately and then we can present it to Mr. Dondero.

MR. MORRIS: I'll tell you what. While that -- one more try.

MR. CANTY: Can you see it now?

MR. MORRIS: Okay. Yes.

BY MR. MORRIS:

Q All right. Mr. Dondero, Hunter Covitz is an employee of the Debtor, right?

MR. RUKAVINA: Hold on a sec. Hold on a sec.

Your Honor, I believe that I have the right to see the full email here. I believe that Mr. Dondero does. And we've just seen the first little bit and now some middle piece.

THE COURT: All right. So are you saying --

MR. MORRIS: And in the order that --

THE COURT: -- you want to see the whole string?

MR. RUKAVINA: Well, I think -- Mr. Dondero, do you need to see the whole string? I don't know what this is, but maybe you do.

MR. DONDERO: It depends on what the question is. I can answer some questions off of this email.

THE COURT: Okay, let's go.

MR. MORRIS: Yeah.

BY MR. MORRIS:

Q All right. So, for the moment, Mr. Covitz is an employee of the Debtor, correct?

A Yes.

Q And he's the author of this email in front of us, correct?

A Yes.

Q And Mr. Covitz helps to manage the CLO assets on behalf of the Debtor, correct?

A Yes.

Q Mr. Covitz is giving directions to Matt Pearson and Joe Sowin to sell certain securities held by the CLOs, correct?

A Yes.

Q And if we can scroll up, I think we can see that you received a copy of this email?

(Pause, 11:15 a.m.)

MR. MORRIS: What I would like to do instead, we'll

take a break in about 15 or 20 (audio gap). When we disconnect, we'll get a better connection after the break. And in the interim, I've got testimony that I would like that's already been admitted into the record but there's portions of which I would like to read into the record from Dustin Norris, who is the executive vice president for each of the Defendants. And maybe it would be easiest for me to do that.

THE COURT: Okay.

MR. MORRIS: All right. On Docket No. 39.

MR. RUKAVINA: Your Honor, I apologize. Your Honor, I apologize. We did not hear --

MR. MORRIS: I'm going to read into the record a portion of Mr. Norris' testimony from the December 16th hearing.

MR. RUKAVINA: Your Honor, I do not see that transcript in the exhibits. If Mr. Morris could give me an exhibit.

MR. MORRIS: Exhibit B as in boy.

MR. RUKAVINA: Thank you.

MR. MORRIS: All right. Instead of putting it on the screen, if we could take the exhibit down, Ms. Canty. He can just follow along. Beginning at Page 38, Line 7 through -- 7 through 17.

Are you there, Mr. Rukavina?

MR. RUKAVINA: I am. Thank you. I have it in front of Mr. Dondero.

MR. MORRIS: Okay. Page 38, Lines 7 through 17:

"Q I think you testified that you're one of the executive vice presidents at NexPoint Advisors, one of the Movants. Is that right?

"A That's right.

"Q Who is the president of NexPoint Advisors, LP?

"A Mr. Dondero.

"Q And you report directly to him; is that right?

"A I do.

"Q You're also the executive vice president of Fund Advisors, another Movant; is that right?

"A Correct."

MR. MORRIS: Beginning on Page 38, Line 25:

"Q You're also the executive vice president (audio gap) that are managed by the Advisors here, right?

"A Yes. That is correct."

MR. MORRIS: Then going back to Page 35, beginning at Line 15:

"Q To be clear here, there are five moving parties; is that right?

"A That's correct. The two Advisors and the three Funds.

"Q And one of the advisory firms is Highland Capital

Management Fund Advisors, LP; is that right?

"A That's correct.

"Q And I'll refer to that as Fund Advisors; is that okay?

"A That's great.

"Q James Dondero and Mark Okada are the beneficial owners of Fund Advisors, correct?

"A That is my understanding.

"Q And your understanding is that Mr. Dondero controls Fund Advisors, correct?

"A That's correct.

"Q And the other advisory firm that brought the motion is NexPoint Advisors, LP; is that right?

"A That is correct.

"Q And Mr. Dondero is the beneficial owner of NexPoint; is that right?

"A A family trust where Jim is the sole beneficiary, I believe, controls or owns NexPoint Advisors.

"Q Okay. And Mr. Dondero --

"A Or 99 percent of NexPoint Advisors.

"Q Mr. Dondero controls NexPoint; is that right?

"A Correct."

MR. MORRIS: Continuing at Line 16 on Page 36:

"Q All right. And I'm going to refer to Fund Advisors and NexPoint as the Advisors going forward; is

that fair?

"A That's fair.

"Q Each of the Advisors manages certain funds; is that right?

"A That is correct.

"Q And three of those funds that are managed by the Advisors are Movants on this motion, correct?

"A Correct.

"Q All right. The Advisors caused these three Funds to invest in CLOs that are managed by the Debtor; is that right?"

"A --"

MR. RUKAVINA: Your Honor, I object. Is there a question at the end of this? I mean, Mr. Dondero can't possibly remember all this and then be asked a question.

MR. MORRIS: He doesn't have to answer any questions. I'm just reading the evidence into the record.

THE COURT: Okay.

MR. RUKAVINA: Your Honor?

MR. MORRIS: Since we're having difficulty --

MR. RUKAVINA: Your Honor, that's a matter for summation. That's -- this is a question and answer, I submit.

THE COURT: Well, I overrule.

MR. MORRIS: Your Honor, here's -- here's --

THE COURT: This has been admitted into --

MR. MORRIS: Yeah.

THE COURT: -- evidence. And if he wants to highlight to the Court portions of the evidence, he can. Go ahead.

MR. MORRIS: Thank you, Your Honor.

"A The portfolio managers working for the Advisors did. That's correct.

"Q And Mr. Dondero is the portfolio manager of the Highland Income Fund; is that right?

"A He is one of the portfolio managers for that Fund.

"Q And he's also --

"A I believe there are two.

"Q And he's also a portfolio manager of NexPoint Capital, Inc., one of the Movants here, right?

"A That is correct.

"Q And he's also the portfolio manager of NexPoint Strategic Opportunities Fund, another Movant; is that right?

"A Yes. That is correct."

MR. MORRIS: Going to Line -- Page 41, Lines 6 through 9:

"Q The whole idea for this motion initiated with Mr. Dondero; isn't that right?

"A The concern, yes, the concern originated, and his concern was voiced to our legal and compliance team."

MR. MORRIS: Page 42, Lines 4 through 11:

"Q None of the Movants are parties to the agreements between the Debtor and each of the Debtors pursuant -- each of the CLOs pursuant to which the Debtor serves as portfolio manager; is that correct?

"A I believe that is correct. One, I think, important -- even though they're not (audio gap), they are the -- they have the economic ownership of each of these CLOs.

"Q But they're not party to the agreement; is that right?

"A Not that I am aware of."

MR. MORRIS: Page 42, Line 25:

"Q Okay. It's your understanding, in fact, that nobody other than the Debtor has the right or the authority to buy and sell assets on behalf of the CLOs listed on Exhibit B, correct?

"A That is my understanding.

"Q Okay. And it's also your understanding, your specific understanding, that holders of preferred shares do not make investment decisions on behalf of the CLO; is that right?

"A (audio gap)

"Q And that's something the Advisors knew when they decided to invest in the CLOs on behalf of the Movant

Funds; is that fair?

"A That's right. And at that time, the knowledge in the purchase was with Highland Capital Management, LP and the portfolio management team at the time.

"Q And it's still with Highland Capital Management, LP; isn't that right?

"A That's correct. I'm not sure that the portfolio management team looks the same, but it was HCMLP."

MR. MORRIS: Moving on to Page 46, Line 22:

"Q The only holders of preferred shares that are pursuing this motion are the three Funds managed by the Advisors, right?

"A In this motion, yes.

"Q You're not aware of any holder of preferred shares pursuing this motion other than the three Funds managed by the Advisors, correct?

"A No, I'm not aware of any others.

"Q You didn't personally inform any holder of preferred shares, other than the Funds that are the Movants, that this motion would be filed, did you?

"A No, I did not.

"Q You're not aware of any steps taken by either of the Advisors to provide notice to holders of preferred shares that this motion was going to be filed, are you?

"A I'm not, no.

"Q And you're not aware of any attempt that was made to obtain the consent of all of the noteholder -- of all the holders of the preferred shares to seek the relief that is sought in this motion, correct?

"A That's correct.

"Q You don't have any personal knowledge, personal knowledge, as to whether any holder of preferred shares other than the Funds managed by the Advisors wants the relief sought in this motion, correct?

"A Correct.

"Q You don't have any personal knowledge as to whether any of the CLOs that are subject to the contracts that you described want the relief that's being requested in this motion, right?

"A That's correct. I have not spoken or been involved at all directly with the CLOs. I'm representing the Funds."

MR. MORRIS: Moving to Page 49. I just have a bit more, Your Honor. Page 49, Line 9. And this is the reference to his declaration.

"Q And Paragraph 9 refers to a transaction involving SSP Holdings, LLC; do I have that right?

"A That's correct.

"Q Do you know what SSP stands for?

"A See if we say it in there. SSP Holdings, LLC.

"Q Right. Do you know what SSP stands for?

"A I don't. Something Steel Products. I --

"Q Okay. You don't need to guess. These are the only two transactions that the Movants question; is that right?

"A These transactions, as well as certain transactions around Thanksgiving time.

"Q Okay. We'll talk about those. But those transactions about -- around Thanksgiving time aren't in your (audio gap)?

"A Not specifically mentioned by name.

"Q Okay. Let's talk about the two that are mentioned by name, Trussway and SSP. The Movants do not contend that either transaction was the product of fraudulent conduct, do they?

"A No.

"Q The Movants do not contend that the Debtor breached any agreement by effectuating these transactions, do they?

"A I don't believe so.

"Q In fact, the Movants do not contend that the Debtor violated any agreement at any time in the management of the CLOs listed on Exhibit B; is that right?

"A That's right.

"Q The Movants don't even question the Debtor's business judgment, only the results of the trans -- of these two transactions. Is that right?

"A That's right. And the results is the key here, and the approach."

MR. MORRIS: Moving on to Page 51, Line 8:

"Q Sir, you never asked the Debtor what factors it considered in making these trades, right?

"A I did not.

"Q And you have no reason to believe that anyone on behalf of the Movants ever asked the Debtor why it executed these (audio gap), right?

"A I don't have any knowledge. There could have been somebody from (audio gap) Movants. But I do not."

MR. MORRIS: Page 54, Line 19:

"Q Let's just talk briefly about the transactions that occurred (garbled) Thanksgiving. They're not specifically referred to in your declaration; is that right?

"A That's correct.

"Q And you have no knowledge about any transaction that Mr. Seery wanted to execute around Thanksgiving; is that right?

"A I know there were transactions and there were concerns from our management team, but I'm not aware of

what those transactions were.

"Q In fact, you can't even identify the assets that Mr. Seery wanted to sell around Thanksgiving, or at least you couldn't at the time of your deposition yesterday. Is that right?

"A That's correct.

"Q And you have no knowledge as to why Mr. Seery wanted to make particular trades around Thanksgiving?

"A No, I don't.

"Q And in fact, you don't even know if the transactions that Mr. Seery wanted to close around Thanksgiving ever in fact closed. Is that fair?

"A Correct."

MR. MORRIS: Last one. Page 56, Line 1:

"Q Okay. To the best of your knowledge, does this document accurately reflect the composition of the boards of each of the three Movant Funds?

"A Yes, it does.

"Q Okay. John Honis, I think you mentioned him earlier. He's on all three boards. Is that right?

"A Yeah, that's correct. And the reason we're -- we're being -- we have a unitary board structure, so -- which is very common in '40 Act Fund land, where the board sits, for efficiency purposes, on multiple fund boards, and there's a lot of economies of scale from an

operating standpoint. So, yes, they sit on multiple boards.

"Q Okay. And for purposes of the '40 Act, Mr. Honis has been deemed to be an interested trustee. Is that right?

"A That's correct.

"Q Okay. But you don't specifically know what (audio gap) caused that designation; you only know that the designation exists. Right?

"A That's right. And I know they are disclosed in the proxy -- or, in the -- the relative filings related to those Funds.

"Q Okay. Three other people are common to all three Movant Funds. I think you've got Dr. Froehlich, Ethan Powell, --

MR. MORRIS: I think he -- pronunciation.

"A Froehlich.

"Q Ethan Powell and Bryan Ward. Right?

"A That is correct.

"Q Okay. All three of those individuals actually serve on the 11 or 12 boards that you mentioned earlier that are managed by the Advisors, right?

"A That is correct.

"Q And they're the same Funds for which you serve as the executive vice president, right?

"A This is correct -- yes. That's correct.

"Q So, for all of the Funds that are managed by the Advisors, you serve as executive vice president and all four of these directors -- trustees serve as trustees on the boards, right?

"A Yes, that's correct.

"Q Okay. In exchange for serving on all of these boards, the three individuals -- Dr. Froehlich, Mr. Ward, and Mr. Powell -- each receive $150,000 a year for services across the Highland complex; is that right?

"A That's correct.

"Q Dr. Froehlich has been serving as a board member across the Highland complex for seven or eight years now; is that right?

"A That's correct.

"Q Mr. --

"A I believe it's about seven or eight years.

"Q Mr. Powell, he actually was employed by Highland related -- Highland or related entities from about 2007 or 2008 until 2015, right?

"A That's correct.

"Q And Mr. Ward, the third of the independent trustees, he's been serving on a board or various of -- on various Highland-related funds on a continuous basis

since about 2004. Do I have that right?

"A Yeah, I believe that's correct."

MR. MORRIS: Your Honor, that concludes the reading of the portions of Mr. Norris's testimony that I wanted to present to the Court.

I know it's 11:30 now, and I would respectfully request that we simply adjourn and let Your Honor tend to your business.

THE COURT: Okay.

MR. MORRIS: And hopefully when we come back at 1:00 o'clock, we'll have a better connection.

THE COURT: All right. So, we are going to go into recess until 1:00 o'clock Central. Mike, can people just stay connected, or should they --

THE CLERK: Yes. They can stay. Yes.

THE COURT: You can stay or reconnect, whichever you want. But we'll see you at 1:00.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(A luncheon recess ensued from 11:33 a.m. until 1:37 p.m.)

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, the Honorable Stacey Jernigan presiding.

THE COURT: Good afternoon. Please be seated. Apologies. I was a little ambitious in my time estimate. So,

anyway, I didn't have any control over getting in and out of Parkland Hospital, so I'm just grateful to be here.

All right. We were in the middle of direct examination of Mr. Dondero. Mr. Morris, are you ready to proceed?

MR. MORRIS: I am, Your Honor, and I'm hopeful that the computer issues have resolved themselves. It remains to be seen once we try. If problems arise again, I plan on just putting this on mute and dialing in through the telephone, kind of the other alternative.

THE COURT: All right.

MR. MORRIS: So (garbled) and I apologize to Mr. Dondero, too. I know I'm testing his patience. But it's not for any reason other than technological.

THE COURT: All right.

MR. MORRIS: And Your Honor, you don't have to apologize for keeping us waiting. That's okay.

THE COURT: Okay.

MR. MORRIS: But thank you.

THE COURT: All right. Mr. Dondero, --

MR. MORRIS: All right. So, --

THE WITNESS: Yeah.

THE COURT: I was just going to remind you, I have to remind you you're still under oath.

Are you ready, Mr. Morris?

MR. MORRIS: I am, Your Honor.

THE COURT: All right. You may proceed.

MR. MORRIS: And we're going to begin with the document that we had difficulty scrolling through earlier, which we have now sent to counsel, and that would be what was marked as Exhibit D on Docket No. 46.

THE COURT: All right.

MR. MORRIS: That's the email string that we had seen earlier that I think Your Honor admitted into evidence. Do I have that right?

THE COURT: Yes.

MR. MORRIS: Okay.

DIRECT EXAMINATION, RESUMED

BY MR. MORRIS:

Q So, let's just start at the bottom and see if we can do this more easily, Mr. Dondero. And again, I apologize for keeping you waiting before. Starting at the bottom, that's an email from Hunter Covitz. Do you see that?

A Yeah, I see it.

Q And he's an employee of the Debtor, right?

A Yes.

Q And your understanding is that Mr. Covitz actually helps the Debtor manage the CLO assets, right?

A Yes.

Q And in this email, Mr. Covitz is giving directions to Matt Pearson and Joe Sowin regarding certain securities held by the

CLOs, right?
A Yes.
Q And if we could scroll up, hopefully, we can see that you received a copy of this email.
MR. MORRIS: Yeah. Right there.
BY MR. MORRIS:
Q Do you see that?
A Yes.
Q And then -- and then you instructed the recipients of Mr. Covitz's email not to sell the SKY securities as had been instructed by Mr. Seery, correct?
A Yes.
Q And you understood when you gave that instruction that the people on the email were trying to execute trades that Mr. Seery had authorized, correct?
A Incorrect.
Q You didn't know that, sir?
A What I knew was that Seery had not authorized the trade, he had orchestrated the trade. Hunter is not an analyst with any particular knowledge. I called Hunter, why would he sell those? And he said Seery told him to sell those. So it wasn't that Seery authorized Hunter trading it. It was Seery told Hunter to trade it, which is -- which is a material difference in my mind.
Q Okay. So I'll ask you again. At the time you gave the

instruction, "No, do not," you knew that you were stopping trades that had been authorized and directed by Mr. Seery, correct?

A Yes.

Q You didn't speak with Mr. Seery before sending this email, did you?

A No.

Q And you took no steps to seek the Debtor's consent before instructing the recipients of this email to stop executing the SKY transactions. Is that right?

A I'm sorry. I missed the first part of that question.

Q Okay. You took no steps to seek the Debtor's consent before instructing the recipients of this email to stop executing the SKY transactions that were authorized by Mr. Seery, correct?

A I don't -- I'm not sure I was permitted to talk to Seery at this point, but I don't recall specifically, no.

Q You didn't seek consent, did you, before stopping these trades?

A No.

Q Okay. In response to your instruction --

MR. MORRIS: If we could scroll up to the next response.

BY MR. MORRIS:

Q You see the response from Mr. Pearson?

A Yes.
Q And in response to your instructions, Mr. Pearson canceled all of the SKY and AVYA sales that the Debtor had directed but which had not yet been executed, right?
A Yes.
Q Okay.
MR. MORRIS: Can we scroll up to the next email, please?
BY MR. MORRIS:
Q And you responded again, right? That's your response?
A Yes.
Q Can you read your response out loud, please?
A (reading) HFAM and DAF have instructed Highland in writing not to sell any CLO underlying assets. There is potential liability. Don't do it again, please.
Q And the writings that you refer to there are the two letters that we looked at earlier, the October 16 and the November 24 letter, right?
A I believe so. If not, if there's a third or fourth letter, all the letters in aggregate.
Q All right. And you, you interpreted those letters not as requests but, as you tell the recipients of your email here, that they were actually instructions, right?
A That was -- that was my choice of words. I don't know if I thought about it that clearly.

Q Okay. But the reci... you have no reason to believe that the recipient of this email wouldn't understand that you believed that Highland had been instructed not to do these trades, right?
A I'm sorry. Can you ask that again? I had no reason to believe what?
Q That's okay. I'll move on. At this juncture, the reference to potential liability was intended for Mr. Pearson, right?
A Frankly, when you violate the Advisers Act, the CFO has liability. I mean, I'm sorry, the chief compliance officer has liability, and anybody who has an awareness that it violates the Advisers Act has potential liability also.
Q And is it -- is it your testimony and your position that Mr. Pearson had potential liability under the Advisers Act for carrying out Mr. Seery's trade requests?
A Yes, once he was informed that the underlying investors didn't want assets sold and Seery had stated he had no business purpose in selling those assets.
MR. MORRIS: I move to strike the latter part of the answer, Your Honor. Mr. Dondero has testified repeatedly multiple times that he has never communicated with Mr. Seery about why he wanted to make these transactions.
THE COURT: I grant that.
BY MR. MORRIS:

Q Mr. Sowin responded and indicated that he would follow your instructions, right, if we scroll to the next email?
A I'm sorry. What part are you saying, or what part are you referring to?
Q Mr. Sowin. Who is Mr. Sowin?
A He's Matt Pearson's boss. He's the head trader.
Q And he works for the Advisors, right?
A Yes.
Q He's one of your employees, right?
A Yes.
Q Mr. Sowin followed your instructions as set forth in this email, right?
A He did a bunch of things, but, yes, I believe -- yes, that's a fair way to characterize.
Q And the only information that you know of that he's relying upon to state that Compliance should never have approved this order was your email that preceded it, right?
A No.
Q No? There's nothing else on this email other than your email that preceded it, correct?
A Correct.
Q Okay. A few days later, you learned that Mr. Seery was trying a workaround to effectuate the trades anyway, right?
A I believe so.
MR. MORRIS: Can we scroll up to the next email?

BY MR. MORRIS:
Q This is your response to Mr. Surgent, right?
A Yes.
Q Now, Mr. Surgent hasn't written anything. He is not part of this conversation, is he?
A No.
Q But you bring him into the conversation, right?
A Because he's the chief compliance officer at Highland, yes.
Q He's not -- he's not the chief compliance officer for the Advisors. He's the chief compliance officer for a company that you no longer work for, right?
A Correct, but he has personal liability for violations of the Advisers Act.
Q Okay. And you thought it was your responsibility to remind him of that, right?
A It was my view of the situation, and at least he could evaluate it himself if I reminded him of it, yes.
Q Uh-huh. What does it mean to do a workaround? What did you mean by that?
A There's a concept in compliance called you can't do something indirectly that you can't do directly, and that's what I was referring to there.
Q Does that mean that he was trying to effectuate the trade without the assistance of the Advisors?

A I believed he was trying to do it without compliance and without proper regard for investors, so that's why I described it as a workaround.

MR. MORRIS: I move to strike.

THE COURT: Sustained.

BY MR. MORRIS:

Q I'm asking you a very specific question.

MR. MORRIS: Can I have a ruling, Your Honor? Thank you.

THE COURT: Yes.

BY MR. MORRIS:

Q Did you, when you used the phrase workaround, did you mean that he was trying to effectuate the trade without relying on the Advisors' employees?

A No.

Q Okay. But you found out about the trade and you thought it was a good idea to send Mr. Surgent this email, right?

A Yes.

Q Can you read the last line of your email?

A (reading) You might want to remind him and yourself that the chief compliance officer has personal liability.

Q Personal liability for effectuating a trade that Mr. Seery had authorized, correct?

A For violating the Advisers Act, is what I meant.

Q Uh-huh. Did you report anybody to the SEC?

A I would be happy to if it's permitted by the Court.
Q But you didn't -- you never asked the Court to do that, right?
A No.
Q It didn't seem important enough for you to take that step, right? But you wanted -- you had to make sure that you told Mr. Surgent that he might be personally liable, right? That was what you needed to do?
A Could you repeat that question, please?
Q You needed to make sure that Mr. Surgent knew that you were threatening him with personal liability if he followed Mr. Seery's instructions, right?
A No.
Q As a factual matter, you never asked Mr. Seery why he wanted to make these trades, right?
A I asked Joe Sowin to ask him.
Q As a factual matter, you never asked Mr. Seery why he wanted to make these trades, correct?
A I believe I wasn't permitted to talk to him.
Q In November 2020? What would have prevented that?
A I believe Scott Ellington was the go-between at that point in time.
Q Is it your testimony that you never spoke with Jim Seery in November 2020?
A I believe in an unauthorized fashion, the day after

Thanksgiving I talked to him, but that's the only day I can remember.

Q Should we call up the email where you threatened him not to do it again?

A That was an email.

Q Ah. So you could communicate by email? Did you ever send Mr. Seery an email and say, Why do you want to do these trades?

A No.

Q But somehow you thought you couldn't even speak to him? You couldn't speak to him but you can send him emails? That's the world that you live in, right? That's what you think?

A I have no comment on that.

Q All right. So, after this exchange, --

MR. MORRIS: And this is what I read out-of-order before, Your Honor. We moved to the December 16th hearing.

BY MR. MORRIS:

Q And you remember, Mr. Dondero, that the Defendants made that motion that asked the Court to stop the Debtor from trading in the CLO assets? Do you remember that?

A I'm sorry. You're asking me do I remember letters were sent? Yes.

Q No. Do you remember that there was a hearing in mid-December?

A Yes.

Q Okay.

MR. MORRIS: And Your Honor, for the record, Exhibit A is the Debtor -- is the Defendants' motion. Exhibit B is the transcript that we had looked at earlier or that I had read portions of earlier.

THE COURT: Okay.

MR. MORRIS: And Exhibit C is the order that the Court entered denying the Defendants' motion.

Can we call up Exhibit C, please?

BY MR. MORRIS:

Q All right. Do you see --

MR. MORRIS: If we could scroll to the very top, please. All right.

BY MR. MORRIS:

Q Do you see this document is dated December 18th, sir?

A Yes.

Q And if we scroll down, this is the order denying the motion of the Advisors and the Funds for an order trying to temporarily restrict the Debtor's ability as portfolio manager from initiating sales. Do you see that?

A Yes.

Q Okay. So, this is December 18th. And if you'll recall, the TRO was issued against you on December 10th. Do you remember that?

A I don't believe it was the 10th.

Q Okay. It was in December, and it was just before this. Is that fair?
A I believe there was an intent, and then the actual filing I think was much later. I don't have -- I don't have the knowledge. I don't have the knowledge of when the TRO was put in place.
Q Okay. (Pause.) Okay. We talked earlier about how you interfered with Mr. Seery's trading activities around Thanksgiving. Do you remember that?
A Yes, I do. I do remember the trading then, also.
Q Okay. And do you remember that just before Christmas you interfered with Mr. Seery's tradings again?
A Yes.
Q Okay.
MR. MORRIS: If we can call up Exhibit K from Docket No. 46, which I have shared with counsel?
THE WITNESS: You know what?
BY MR. MORRIS:
Q Yeah.
A Let's handle these each incident one at a time. And I don't want to use the word "interfering" or accept the word "interfering" as an answer because I think my participation in each situation was very different.
MR. MORRIS: All right. Can we scroll down?
BY MR. MORRIS:

Q This is a letter that my firm wrote to Mr. Lynn. Mr. Lynn is your lawyer. Is that right?
A Yes.
MR. MORRIS: And if we could start down at the first page. We've seen these letter before. A little further.
BY MR. MORRIS:
Q Do you see there is a reference there to the Debtor's management of CLOs?
A Yes.
Q And there is a recitation of the history that we talked about a bit earlier. If we -- if we look further in that paragraph to around Thanksgiving, when you intervened to block the trades.
A Yes, I see that sentence.
Q Okay.
MR. MORRIS: And then if we can go to the next page, the next paragraph. Yeah, that's where.
BY MR. MORRIS:
Q Then we referred to the December 16th hearing, right? And then the next paragraph says, "On December 22, 2020" --
MR. MORRIS: Can you scroll down just a little bit? Nope, the other way. Yeah, right there.
BY MR. MORRIS:
Q "On December 22, 2020, employees of NPA and HCMFA" -- those are the Advisors, right?

A Yes.
Q -- "notified the Debtor that they would not settle the CLO's sale of the AVYA and SKY security." Have I read that correctly?
A Yes.
Q All right. On or about December 22nd, you personally instructed employees of the Advisors not to trade the SKY and AVYA securities that Mr. Seery had authorized. Is that right?
A No.
Q You personally instructed, on or about December 22, 2020, employees of those Advisors to stop doing the trades that Mr. Seery had authorized with respect to SKY and AVYA, right?
A No. You know, we need to look at source documents. My recollection is I encouraged Compliance to look at those trades. But I'm willing to be -- I'm willing to be -- get source documents again, if you'd like.
Q All right. My source document is your prior testimony.
MR. MORRIS: Can we please call up Exhibit NNNN at Page 73? Beginning at Line 2? Okay.
BY MR. MORRIS:
Q Page 73, beginning at Line 2, did you give the following answer to my question?
"Q And you personally instructed, on or about December 22nd, 2020, employees of those Advisors to stop doing the trades that Mr. Seery had authorized

with respect to SKY and AVYA, right?

"A Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions not to settle the trades that occurred, but that's a different ball of wax."

Q Did you give that answer, sir?

A I believe I confused dates or misspoke there, but I did give that answer.

Q Okay. Thank you. Stated a different way, you personally instructed the Advisors' employees not to execute the trades that Mr. Seery had authorized but which had not yet been made, right?

A No. Not -- not on December 22nd. That was in November. November 22nd, I did not do that.

Q Okay.

MR. MORRIS: Can we go to Page 76, please? Line 15.

BY MR. MORRIS:

Q Did you give this answer to my question?

"Q And you would agree with me, would you not, that you instructed the employees of the Advisors not to execute the very trades that Mr. Seery identifies in this email, correct?

"A Yes."

Q Did you give that answer, sir?

A Well, like I said, I -- I confused the Thanksgiving

trades, the week of Thanksgiving, with my more nuanced responses to later trades.

MR. MORRIS: I move to strike, Your Honor. It's a very simple question.

THE COURT: Granted.

BY MR. MORRIS:

Q Did you give that answer to my question, sir?

A I -- yes, I did.

Q Thank you. Now, all of this is just a week after that December 16th hearing, right?

A Yes.

Q And right after that hearing, the K&L Gates firm sent, on behalf of the Defendants, more letters to the Debtors, right?

A Yes.

MR. MORRIS: Can we please pull up the first letter? It's Exhibit DDDD. And if we can go not to our response but to the original letter that was sent that's attached to this. I think it is Exhibit A. Right there.

BY MR. MORRIS:

Q That's the first of the letters, December 22, 2020. Do you see that?

A Yes.

MR. MORRIS: And can we scroll down to the end of the letter to see what the request is here? Right there.

BY MR. MORRIS:

Q Can you read the end of that letter right there, sir?
A (reading) Sincerely, A. Lee Hogewood, III.
Q Nice. I meant the actual substance.
A (reading) For the foregoing and other reasons, we request that no further CLO transactions occur, at least until the issues raised by and addressed in the Debtor's plan are resolved at the confirmation hearing.
Q Okay. And that's similar in substance to the letter that was sent on behalf of the Defendants on October 16th that you saw and approved, right?
A I did not see and approve.
Q All right. The record will speak for itself. And it's similar in substance to the letter that was sent on November 24th by the K&L Gates clients on behalf of the Defendants, right?
A I don't know.
Q We looked at it before. Should we get it again?
A It's a -- all the letters, as far as I understand, were similar in requesting that the -- the beneficial owners of the CLOs were requesting that no wholesale liquidation of their assets occur. That's how I understand it.
Q And that's --
A You asked my understanding. That's my understanding.
Q Okay. And notwithstanding the request in this letter, when you were -- when you were talking to the traders at your

shop, you actually told them that the Debtor was instructed not to do these trades, right?

A Are you parsing "instructed" versus "requested"? I don't understand the question.

Q I am, in fact. You used a very different phrase when speaking to your employees than you did -- then your lawyers did when they wrote to the Debtor, right?

A It seems to be a difference, yes.

Q Okay. So, this is on December 22nd. Now, the night before, you participated in a meeting with Grant Scott and with the lawyers for the Defendants, right, to talk about what you guys were going to do with respect to the Debtor's management of the CLOs. Isn't that right?

A I don't remember specifically.

Q Okay. But is it fair to say it's true, is it not, that during the week leading up to Christmas you participated in several phone calls with the K&L Gates firm and with other members of the Defendants' -- the Advisors, Mr. Sowin or Mr. Post or Mr. Sauter, and the lawyers, right? You were all together talking about these issues during the week before Christmas, right?

MR. RUKAVINA: Your Honor, I'm going to object. If counsel is asking what was discussed with counsel present for the purpose of legal advice, that is an inappropriate question.

THE COURT: Okay.

MR. MORRIS: I'm certainly not. I'm asking if the conversations took place.

MR. RUKAVINA: And the conversations -- the question was, did they discuss what to do with respect to the CLOs? That would be privileged, Your Honor. If they discussed football, that's not privileged, but what to do with the CLO management agreements is privileged.

THE COURT: Okay. I sustain.

MR. MORRIS: Can we please call up Exhibit TT? I'm sorry, TTT. Nope, TTTT. TTTT. Can you scroll down a bit? Right there.

BY MR. MORRIS:

Q Do you see -- this is an email from Grant Scott to Scott Ellington; do you see that?

A Yes.

Q And at this point, Mr. Ellington is still working for the Debtor, right?

A Yes. I believe he was settlement counsel.

Q Uh-huh. And do you see that this is an email that refers to your availability for a 9:00 a.m. call?

A Yes.

Q And do you see that there's a question as to whether the K&L people can make it?

A Yes.

Q And you understand that refers to K&L Gates, right?
A I -- I guess so.
Q And so does this refresh your recollection that at or around Christmas, or in the days leading up to Christmas, you participated in calls with Mr. Scott, with Scott Ellington, and with the K&L Gates folks?
A I -- I don't know. I don't know if -- if I actually did or not. But I was highly concerned with inappropriate behavior.
Q And you were available -- and did you tell somebody that you were available for this call on the morning of the 23rd?
A I don't know.
Q This is the day after you stopped the trades, right?
A Again, I didn't stop the trades on the 23rd.
Q You stopped them on the 22nd, right?
A No, I stopped them on the week of Thanksgiving.
MR. MORRIS: Can we go back to Exhibit NNNN, the transcript? Page 73?
BY MR. MORRIS:
Q Let me see if I can refresh your recollection. Tab 2. Did you give this answer to this question:
"Q And you personally instructed, on or about December 22, 2020, employees of those Advisors to stop doing the trades that Mr. Seery had authorized with respect to SKY and AVYA, right?

"A Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them."

Q Did you give that answer to the question?

A Yes.

Q Okay.

A But we -- we corrected.

Q All right. You didn't correct it at the preliminary injunction hearing, did you?

A No, I did not.

Q Okay. So as far as the Court knows as of this moment, that's the only testimony that you've ever given on the topic, right?

A I'm trying to give some now.

Q Okay. And on December 22nd, that's the date that the first letter was also sent, right, we just looked at?

A All right. Okay.

Q You agree with that, right?

A I don't remember the date on the letter. If you want to pull it up, I'll say it is the 22nd or the 23rd, whatever it says. I don't know.

Q Sure.

MR. MORRIS: Let's go back to DDDD, please. And if we can just go to the top of the letter. Thank you.

BY MR. MORRIS:

Q K&L Gates. December 22nd. That's the letter, right?

A Yes.
Q And according to the testimony that you gave at the preliminary injunction hearing on January 8th, that's the day that you also stopped AVYA and SKY trades, right?
A I'm not agreeing to that testimony. I am changing the testimony.
Q Okay. And then we just saw that other exhibit where they were trying to arrange a phone call with you, the K&L Gates lawyers, and Mr. Ellington and Grant Scott for the 23rd. Do you remember that one we just looked at?
A Yes.
Q And then later on the day on the 23rd, K&L Gates sends another letter, right?
MR. MORRIS: Can we call up EEEE? And can we scroll to the Exhibit A, to our response? Right there.
BY MR. MORRIS:
Q That's the 23rd. Do you see that letter?
A Yes.
Q Again, this is one week after the hearing, right?
A Yes.
Q Okay. And this is a letter where K&L Gates states on behalf of the Defendants that they are contemplating taking steps to terminate the CLO management agreements, right?
A I don't know. Can you scroll down, if you want to ask me --

Q Sure.

MR. MORRIS: Can we flip to the next page, please? Keep going. Right there.

BY MR. MORRIS:

Q Can you read the first sentence of the paragraph beginning, "Consequently"?

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

Q Okay. So, on December 23rd, the Defendants told the Debtor that they intended to notify the relevant Trustees and/or the Issuers that the process of removing the Debtor as the fund manager should be initiated, right?

A That's what it says.

Q And then the K&L Gates firm sent yet another letter to the Debtor, right? Do you remember that?

A No.

MR. MORRIS: Can we get up FFFF, please?

BY MR. MORRIS:

Q This is dated December 31st. Do you see that?

A Yes.

MR. MORRIS: Can we scroll down a bit?

BY MR. MORRIS:

Q Do you recall this is the letter where they claim that they've been damaged by the Debtor's eviction of you from the Highland offices?

A I don't remember specifically, but that's true.

Q Okay. So we just saw these three letters, in addition to your -- the -- at least the testimony you gave regarding your conduct on the 22nd of December. You were aware that all of these letters were being sent by K&L Gates, correct?

A Yes, generally.

Q And you were supportive of the sending of these letters, right?

A Absolutely. They were appropriate.

Q And you pushed and encouraged the chief compliance officer and the general counsel to send these letters, right?

A I'd like to think that they believed and they acted largely on their own judgment, but I strongly believed it was a violation of the Advisers Act, and stated that numerous times.

Q Sir, you pushed and encouraged the chief compliance officer and the general counsel to send these letters, correct?

A No, I wouldn't use those words.

Q Do you understand that the Debtor demanded that the K&L Gates clients or the Defendants withdraw these letters?
A I believe they requested it. I didn't -- I didn't know the former, what you mean by demand, but --
Q Well, it's fair to say you never instructed the K&L Gates clients or the Defendants to withdraw these letters, right?
A No. I still believe they are appropriate and accurate. I wouldn't withdraw them today.
Q Okay. Sir, throughout 2020, when you were still the portfolio manager at Highland Capital Management, it's true that you sold AVYA shares on numerous occasions on behalf of both the CLOs and on behalf of the Funds outside of the holdings of the CLOs?
A Always with a business purpose, yes. That is still a small percentage of our total AVYA holdings, and we still liked AVYA.
Q Sir, I'm going to ask you just one more time. In 2020, you sold AVYA stock many times on behalf of the CLOs and on behalf of the Funds?
A Yes.
Q Thank you.
MR. MORRIS: No further questions, Your Honor.
THE COURT: All right. Mr. Rukavina?
MR. RUKAVINA: Your Honor, I will reserve my questions to my case in chief, and I would request a very

short restroom break.

THE COURT: All right. Mr. Dondero, we're --

MR. RUKAVINA: And I do mean short. I will --

THE COURT: I'm sorry. What?

MR. RUKAVINA: And I do mean short, Your Honor. I just need to run and be back -- I can be back in three minutes.

MR. MORRIS: No problem, Your Honor.

THE COURT: Okay. You're finished for now, Mr. Dondero, but you're going to be recalled, so hang tight.

Your next witness, Mr. Morris?

MR. MORRIS: The Debtor calls Jason Post.

MR. RUKAVINA: Your Honor, may I be excused to run to the restroom and Mr. Vasek take over for a few minutes?

THE COURT: Oh. Okay. I'm sorry. If you made that request, I didn't hear you. So that's fine.

All right. Mr. Post, --

MR. MORRIS: Your Honor, can we just -- I apologize for interrupting. Can we just direct Mr. Dondero not to speak with anybody about anything at any time? Not by phone, not by text, not by email, not by meeting, not by anything? Because he's still on the stand.

MR. RUKAVINA: Well, Your Honor, anything at any time. I think I know that Mr. Morris is being facetious, but if he's trying to get the rule invoked, that's different.

MR. MORRIS: Okay. I'm trying to get the rule invoked.

THE COURT: Okay. All right. I'm not going to make that instruction. All right. So, --

MR. RUKAVINA: I've got to run to the restroom. I'll be -- listen for the instructions.

THE COURT: Jason Post, you've been called to the witness stand. Could you say, "Testing, one, two"?

MR. POST: (Indiscernible.)

THE COURT: All right. Please raise --

MR. POST: Testing, one, two.

THE COURT: Thank you. Please raise your right hand.

JASON POST, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Mr. Morris, go ahead.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good afternoon, Mr. Post. We met the other day. Do you remember that?

A I do.

Q Okay. So, again, just to remind you, my name is John Morris. I'm an attorney at Pachulski, Stang, Ziehl & Jones. We represent the Debtor here. You're the chief compliance officer for each of the Defendants; is that right?

A I am.

Q And in your role as the chief compliance officer, your job

is to act as a liaison between regulatory bodies and internal working groups with respect to the rules and regulations for the funds advised by the Advisors; is that correct?

A Correct, that's -- that's the (inaudible). Correct.

Q All right. And internally, you report to Mr. Dondero. Isn't that right?

A Correct.

Q And you've been working with Mr. Dondero since 2008 when you joined Highland Capital Management, correct?

A I worked at Mr. Dondero's firm since 2008, but I reported to other direct reports during that time outside of Mr. Dondero. I started to report to him directly in October of 2020.

Q Okay.

A (overspoken)

Q But you've -- you've worked at Highland -- you worked at Highland since 2008, fair?

A Yes.

Q Okay. And you were employed by Highland up until October 2020, correct?

A Yes.

Q Okay. And at that time, Mr. Dondero left and he went to NexPoint and you went to NexPoint. Is that right?

A Shortly after Mr. Dondero left Highland, I transitioned over to NexPoint.

Q And that's where Mr. Dondero is, right?
A Correct.
Q Okay. You joined Highland in 2008, and in around 2011 you joined Highland's internal legal and compliance team, correct?
A That's correct.
Q And in 2015, while still employed by Highland, Mr. Dondero appointed you as the chief compliance officer of the Advisors and the Funds, right?
A Technically, the retail board appointed me the CCO of the Funds, and then I was appointed internally. I believe Mr. Dondero was part of that decision for the Advisors.
Q Had you ever worked with the retail boards before that?
A There was about -- I worked with them for about a year prior to that.
Q Okay. And you've served as the CCO, the chief compliance officer, of each of the Advisors and each of the Funds since September 2015 on a continuous basis, right?
A That is correct.
Q You know Thomas Surgent; is that right?
A I do.
Q Mr. Surgent has been the Debtor's chief compliance officer since around 2013 or 2014; is that right?
A I believe -- uh -- I -- I think that's correct. It may be a year or two off. He took the role after the former CO resigned, which I don't know if that was 2011 or 2012. I

can't recall specifically.
Q Okay. But he's been -- he's been in that position for a long time, right? Fair enough?
A Yes, that's fair.
Q And during the whole time that you were employed by Highland and serving as the chief compliance officer for the Funds and the Advisors, you reported to Mr. Surgent?
A Internally. Yes, that's correct.
Q Yeah. And you respect Mr. Surgent; isn't that right?
A During the time I reported to him, yes.
Q Yeah. And you believed that he did his job well, right?
A As far as I could see, yes.
Q You viewed it as -- you viewed him as a mentor, did you not?
A Yes. I mean, when I joined the legal compliance team, you know, he was there. He was a senior member on the team. And he, you know, helped educate me, along with other, you know, external sources, et cetera, on the compliance function.
Q Uh-huh. He trained you for the work you're doing now, right?
A With respect to the on-the-job training, yes.
Q Uh-huh. Despite all of that, throughout all the proceedings, the court hearings, all of the issues that we're talking about in this case, you never, ever stopped to discuss any of these issues with your former mentor, Mr. Surgent; is

that right?
A The -- with respect to, for example, the trade (garbled) that you were talking about earlier?
Q Let's do it this way. From the time that you left Highland until today, you've never discussed with Mr. Surgent Mr. Seery's trades; is that right?
A I believe there was a discussion after -- I can't recall exactly the context. There was a discussion after the trades in the November time frame. And then I believe there was a -- I responded to an email exchange in the December time frame regarding booking of the trades.
Q Sir, you -- you've never spoken with Mr. Surgent about any issue concerning the Debtor's management of the CLOs, correct?
A I don't recall directly, no.
Q In fact, you're not aware of anyone acting on behalf of the Advisors or the Funds who has reached out to Mr. Surgent to get his views on any of the issues related to this motion. Isn't that right?
A I believe previously there's correspondence that Mr. Dondero had with Surgent. But aside from that, I'm not aware of any.
Q Is that the email where he reminded him of his personal liability? Is that the one you're thinking of?
A Correct.
Q Yeah. Do you know of any other communication -- do you

know of any other communication that any of the Defendants had with Mr. Surgent concerning the Debtor's management of the CLOs?

A With Mr. Surgent directly, I don't -- I don't -- I don't believe so.

Q Yeah. You graduated from Baylor; is that right?

A Correct.

Q But you don't have any certifications or licenses applicable to your work, correct?

A Correct.

Q You don't have any specialized training or education that's relevant to your work as a chief compliance officer, correct?

A Correct.

Q Your job -- your training is limited to on-the-job training; isn't that right?

A That is correct.

Q You've never spoken at any conferences on compliance matters, have you?

A Spoken, no. Attended, yes.

Q You don't recall presenting any papers at any compliance-related conferences, do you?

A That is correct.

Q You've never published anything in connection with your work as a compliance officer; isn't that right?

A Not that I can recall.
Q Let's talk about the CLO management agreements briefly. You're aware that the Debtor is party to certain management agreements pursuant to which it serves as the portfolio manager for certain CLOs, correct?
A Correct.
Q And until your lawyers recently asked you to review them, you last had reason to review a CLO management agreement about five or six years ago; isn't that right?
A I believe that's correct.
Q And the request from your lawyers to look at the CLO management agreements, that request came in late November/ early December; isn't that right?
A I believe that's around the right time frame.
Q And the portions of the management agreements that you read were the portions that your counsel asked you to read; isn't that right?
A Correct.
Q And other than the general recollection of having read something about the rights of preference shareholders, you don't recall much about the agreements at all; isn't that right?
A I mean, the agreements are very lengthy in nature. You know, I think it was probably rights that the preference shareholders had, and, you know, possibly indemnification

provisions. But aside from that, I don't recall anything else specifically right now.

Q As the chief compliance officer of the Advisors and the Funds, you don't know whether any of them are party to the CLO management agreements between the Debtors and -- between the Debtor and the Issuers, correct?

MR. RUKAVINA: And Your Honor, I would just object to the extent that that calls for a legal conclusion. This witness is not a lawyer.

THE COURT: Overruled.

THE WITNESS: I'm sorry. Can you repeat the question, please?

BY MR. MORRIS:

Q Sure. As the chief compliance officer for each of the Defendants, you don't know whether any of them are party to the CLO management agreements between the Debtor and the Issuers, correct?

A They're not the named collateral manager, but they're a security holder of the CLOs, so they should be entitled to, you know, the rights that those security holders are afforded under those agreements.

MR. MORRIS: I move to strike, Your Honor.

THE COURT: Granted.

BY MR. MORRIS:

Q All right. So, now, Mr. Post, I know this is difficult,

and I do appreciate that it's difficult just to focus on the question. Your counsel will have the opportunity to ask you whatever he wants. But I would respectfully request that you listen to my question and only answer my question. It really is very likely to require just a yes or no answer.

So, let me try again. As the chief compliance officer of the Advisors and the Funds, you don't know whether any of them are a party to the CLO management agreements between the Debtor and the Issuers, correct?

A I don't believe they are, correct.

Q Okay. Let's talk about that prior hearing. Now, by the way, Mr. Post, did you listen in to Mr. Dondero's testimony earlier?

MR. RUKAVINA: Mr. Post was here with me --

MR. MORRIS: Yeah.

MR. RUKAVINA: -- as my representative..

MR. MORRIS: Okay. I -- there's no problem. I just -- I just -- that way there's some background and he has some context. That's the only reason I asked.

BY MR. MORRIS:

Q You're aware that the Funds and the Advisors previously filed a motion in the Bankruptcy Court asking the Court to institute a pause in the Debtor's ability to sell CLO assets, correct?

A Correct.

Q And you recall that that happened in mid-December, around December 16th; is that right?
A That sounds correct.
Q And in connection with that motion, you provided information to counsel that they requested from you, right?
A Yes. I was part of the working -- internal working group, with internal and external counsel.
Q Other than providing that information, you generally agreed with the position being taken that it wasn't in the best interest of the Funds involved for Highland to make any trades; isn't that right?
A Yes. And that was based off of discussions with the investment professionals.
Q And the investment professionals are Mr. Sowin and Mr. Dondero, correct?
A Correct.
Q Okay. So you're the chief compliance officer, and they made a motion that was based on the idea that the fund manager, Highland Capital Management, shouldn't trade any assets in the CLOs. Do I have that right?
A I believe that's what the motion contained.
Q But you don't even remember who authorized the filing of the motion; isn't that right?
A I believe it was pursuant to discussions internally and with external counsel, and I believe Mr. Norris signed the

filing, if I -- if I recall correctly.
Q Sir, you don't remember who authorized the filing of the motion, correct?
A It -- it was pursuant to a discussion with the investment professionals and counsel, and it was in the best interest of the Funds to make the filing. So I think it was a collaborative determination.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Granted.
MR. MORRIS: Ms. Canty, can we please pull up Mr. Post's deposition transcript? And let's go to Page 35. Line 21. Okay.
BY MR. MORRIS:
Q Do you remember giving the following answer to the following question:
"Q Who authorized the filing of this motion?
"A I can't recall specifically who authorized it."
Q Did you give that answer to my question just the other day?
A That's -- that's what it says there, yes.
Q And it says that because that's, in fact, what you testified to under oath the other day, right?
A Correct.
Q Okay. And the one thing that you know for certain is that you didn't authorize the filing of the motion; isn't that

right?
A I didn't sign anything in connection with the filing.
Q All right. Listen carefully to my question. The one thing that you're certain of is that you did not authorize the filing of the motion as the chief compliance officer of the Debtors, correct?
A Correct.
Q Okay. But you did participate in conversations with Mr. Dondero and counsel concerning the motion; is that fair?
A There were conversations with Mr. Dondero initially, and then the conversations were then more so with internal and external counsel in terms of the filing.
Q Okay. So they started just with Mr. Dondero, and then they moved on to counsel. Is that what you're saying?
A I can't recall specifically. It may have been part of a discussion internally with internal counsel and Mr. Dondero. I just -- I can't recall the specifics.
Q Okay. But Mr. Dondero certainly supported the filing of the motion, right?
A Yes. From an investment perspective, it was in the best interest of the Funds in terms of the sales that were occurring.
Q Okay.
MR. MORRIS: I move to strike.
THE COURT: Granted.

BY MR. MORRIS:
Q It's a very simple question. Mr. Dondero supported the filing of the motion; is that correct?
A Yes.
Q You did not file a declaration in support of the motion; is that correct?
A Me personally, no.
Q Okay. So you're the chief compliance officer of the Defendants; is that right?
A Correct.
Q But instead of you filing a declaration, Mr. Norris filed the declaration. Do I have that right?
A Correct. My understanding is one person needs to sign the declaration.
Q And remind me, what is Mr. Norris's position? He's the executive vice president, right?
A Correct.
Q What responsibilities does he have? Does he have trading responsibility?
A He does not.
Q Does he have compliance responsibility?
A Not directly, no.
Q Does he have investment responsibility?
A He's familiar with the composition of the portfolios in his role as a product strategy team member.

Q Does he have investment responsibility, sir?
A He is not making direct investments for the -- for the Funds.
Q Okay. So he doesn't -- and he's not a compliance person, right?
A Correct.
Q And he's not a lawyer, right?
A Correct.
Q But nevertheless, as the chief compliance officer, you believed that Mr. Norris's declaration contained all of the information that was relevant to support the motion, right?
A It was a determin... or a collaborative determination in conjunction with counsel. But I, you know, I don't -- yeah, it was -- it was a collaborative determination. There were multiple elements that went into that -- the letter.
Q Okay. You believed that the motion and Mr. Norris's declaration contained all the relevant facts that supported the Advisors and the Funds' requests to the Court, correct?
A Yes.
Q In fact, you believed that Mr. Norris was the most knowledgeable person to testify on behalf of the Movants; isn't that right?
A I think it was -- he was identified pursuant to discussions with counsel to be the most knowledgeable.
Q I'm going to ask you just about you and not counsel. You

believed at the time that Mr. Norris was the most knowledgeable witness to testify on behalf of the Movants; isn't that right?

A Yes.

Q And you didn't testify -- not only didn't you submit a declaration, but you didn't testify at the hearing, did you?

A Correct on both.

Q Okay. And you listened to parts of the hearing, but not all of it, because you were busy doing other stuff, right?

A Correct.

Q You didn't listen to Mr. Norris's testimony at all, right?

A I don't believe I did.

Q You didn't listen to the Court when the Court rendered its decision, did you?

A I don't -- I don't believe I did.

Q And you didn't read the transcript from the hearing, did you?

A I don't -- correct. I did not.

Q Okay. So in your capacity as the chief compliance officer, you didn't believe that you should take the time to review the transcript, did you?

A Correct. I mean, just it was filed based off of the belief that the -- that the trades weren't in the best interest, and I -- and no, I didn't read it personally.

Q And you didn't believe, in -- that in your capacity as the

CCO, the chief compliance officer, that it was in the scope of your responsibility to listen to the hearing, correct?

A I was -- I wasn't asked to listen, and quite frankly, I don't -- I don't recall if I remember the timing, but I did not listen.

Q Okay. And in your capacity as the chief compliance officer, you didn't believe that it was in the scope of your responsibilities to listen to the hearing; isn't that right?

A Correct.

Q And because you didn't listen to the hearing or review the transcript, you were unaware of what the Court said or how Judge Jernigan described the motion or the people involved in presenting the case on behalf of the Defendants, right?

A Correct, but I -- I believe I probably would have received some guidance from counsel who attended or listened to the hearing.

Q Well, after the hearing was over, you did speak to Mr. Norris, right?

A Very briefly.

Q In fact, --

A Very --

Q In fact, the only thing you can remember about your conversation with Mr. Norris following the hearing was discussing with him how long the hearing took. Isn't that right?

A Correct, because I -- I believe I heard it was a short hearing.
Q And that's -- that's all -- that's all you asked Mr. Norris about, about the hearing, right? That's all you remember talking to him about?
A I believe so, correct.
Q You don't recall discussing with Mr. Norris any other aspect of the hearing other than the length of time it took to conduct, correct?
A I don't recall specifically.
Q And you have no recollection of ever discussing with Mr. Dondero what happened at the hearing, right?
A I don't think I talked with Jim, Jim Dondero about that.
Q Nor did you talk to Mr. Dondero about the Court's ruling; isn't that right?
A Correct.
Q Okay. Let's talk about the events that occurred after the hearing, in the two weeks following the hearing. The Defendants for which you serve as the chief compliance officer sent three separate letters to the Defendant [sic], correct?
A If you could bring them up, I can confirm.
Q Sure.
MR. MORRIS: Let's start with DDDD, please. Okay. Okay. Can we scroll to the attachment, please?
BY MR. MORRIS:

Q All right. So this is the first letter, Mr. Post. Do you recall, on or about December 22nd, the K&L Gates firm sent, on behalf of the Advisors and Funds for which you serve as the chief compliance officer, a letter to the Debtors?

A Yes.

Q Okay.

MR. MORRIS: And can we call the next exhibit? I guess it's EEEE.

And I don't mean to be quick about these. If there's any reason that you want to read them, I wasn't planning on asking any questions about the substance of the letters of this witness.

BY MR. MORRIS:

Q But Mr. Post, I don't mean to be quick here. So if you think there's a benefit to you to reading the letters, please let me know.

Do you see, December 23rd, the next day, another letter was sent by K&L Gates?

A Yes.

Q Okay. And do you recall generally that the Advisors and Funds for which you serve as chief compliance officer told the -- told the Debtor that they were going to begin the process of seeking to terminate the CLO management agreements?

A I believe -- I believe that was contained in the letter, so long as it was done in compliance with the Court.

Q Uh-huh. And do you remember there was a third letter that was sent?
A If you wouldn't mind pulling it up.
Q Yeah, not at all.
MR. MORRIS: Can we get the December 31st letter? I think it might be -- yeah.
BY MR. MORRIS:
Q Now, here's the December 31st letter. Do you remember the December 31st letter was the one where K&L Gates suggested that the Advisors and the Funds had suffered damages because the Debtor evicted Mr. Dondero from the Highland suite of offices?
A I -- I had heard of that letter being drafted, but I don't recall -- I obviously don't recall a specific date. But if it says December 31st, --
Q Okay. Mr. Dondero was one of the main voices in the decision to send these letters, correct?
A He was part of the preliminary conversation and expressed his opinion, and then myself and others internally, and with external counsel, then worked to draft the letters.
THE COURT: All right. Mr. Post, I am going to interject. I have heard Mr. Morris give you this instruction many times. Maybe it's time for me to. Maybe it's past time for me to.
Most of his questions simply require a yes or no answer.

If you feel like there are other things that you want to supplement your testimony with, Mr. Rukavina is going to have a chance to question you, and that would be the situation where maybe you could give more fulsome answers. But please listen to the question. If it's a yes or no answer, that's all we want you to give right now. Okay? Got it?

THE WITNESS: Understood.

THE COURT: Okay.

MR. MORRIS: Thank you, Your Honor.

BY MR. MORRIS:

Q Mr. Post, Mr. Dondero was one of the main voices in the decision to send the letters; isn't that correct?

A He was a voice.

THE COURT: That was not a yes --

BY MR. MORRIS:

A And he was -- he --

THE COURT: Okay.

THE WITNESS: I'm --

THE COURT: Please, just a yes or no answer, okay?

THE WITNESS: No.

MR. MORRIS: Okay. Can we go to Mr. Post's transcript, please, Page 47? Line 22?

And Your Honor, when we pull it up on the screen, there is an objection, and I would respectfully request that the Court rule on the objection before I read the question and the

answer.

THE COURT: All right.

MR. MORRIS: So if we could just call up Page 47 beginning at Line 22.

MR. RUKAVINA: Page 47, Line 22.

THE COURT: Okay.

MR. MORRIS: One moment. Give her a moment. She's not there.

MR. RUKAVINA: Do you remember what exhibit this is?

MR. MORRIS: Yeah. There it is. Beginning at Line 22, "Do you know?" And there is Mr. Rukavina's objection.

MR. RUKAVINA: Your Honor, it's very simple. He can't go into Mr. Dondero's head. But he -- but if Mr. Dondero told him something, that's different. So I think counsel can rephrase the question and it's perfectly fine, but he can't go into Mr. Dondero's state of mind.

MR. MORRIS: Your Honor, I'm not asking for Mr. Dondero's state of mind. I'm asking for Mr. Post's knowledge. "Do you know?"

THE COURT: Okay. I'll overrule the objection. He can answer.

BY MR. MORRIS:

Q All right. So, Mr. Post, do you remember giving this answer to the following question:

"Q Do you know whether Mr. Dondero supported the

sending of each of these three letters?

"A I don't -- I don't recall specifically. I think he had his views on certain of the transactions that were occurring, and he wasn't in agreement with those transactions, as one of the main voices."

Q Do you see that?

A I do.

Q Does that refresh your recollection that Mr. -- that you testified that Mr. Dondero was one of the main voices?

A Yes.

Q Okay. Mr. Dondero --

MR. MORRIS: You can take that down now for the moment, please.

BY MR. MORRIS:

Q Mr. Dondero had his views on certain of the transactions that were occurring, and he wasn't in agreement with those transactions. Isn't that right?

A Yes.

Q All right. Going back to the letters that we just looked at quickly, you recall the Debtor responded to each of those letters, but as the chief compliance officer, you couldn't really recall what the Debtor said in response. Is that fair?

A I'm -- I believe they -- I'm sorry. I can't recall specifically without seeing the letters.

Q Okay. So you don't recall that, in response, the Debtor

requested that the Advisors and the Funds withdraw the letters, right?
A I believe that was requested in the letters.
Q Okay. But the Funds and the Advisors didn't comply with that request, right?
A To my knowledge, they have not withdrawn the letters.
Q You do recall that the Debtor specifically asked the Defendants to file their lift stay motion so that they could finally resolve the issue of whether or not the Advisors and the Funds could actually terminate the agreement, right?
A I -- I'm sorry. Can you repeat that question, please?
Q Do you recall that the Funds and the Advisors informed the Debtor that they were going to initiate steps to terminate the CLO management agreements, including moving to lift the stay?
A I think they indicated that they were going to take steps, but it would be pursuant to what was permitted in the court.
Q And do you remember that the Debtor specifically asked the Defendants to do exactly that, to bring this matter to a conclusion, to file the motion so that the Court could resolve the issue of whether or not they had a right to terminate the agreement? You remember that, right?
MR. RUKAVINA: Objection, compound, Your Honor.
THE WITNESS: I can't --
THE COURT: I'm sorry.
MR. MORRIS: I can't recall.

THE COURT: Was there an objection?

MR. RUKAVINA: Yes, Your Honor. That's four questions in one. That's compound.

MR. MORRIS: I'll rephrase, Your Honor.

THE COURT: Okay. And let me interject a minute. Mr. Post, you have this habit of not looking squarely at the camera but looking over to your right. And in a normal courtroom setting, that might be fine, but I have no way of knowing if some lawyer or some other person is -- you're looking at them and they're somehow instructing you. I would certainly hope that's not what's going on, but it just kind of leaves room for me to wonder when you're not looking squarely at the camera. So can you start looking squarely at the camera, please?

MR. RUKAVINA: Your Honor, I can explain that, and certainly there's no funny business going on. There are two cameras on Mr. Post. One is on a laptop. We're looking at the Court on the big camera. I'm sitting behind Mr. Post. So if the Court would prefer that Mr. Post look directly into the laptop, then that's what he'll do, or if the Court would prefer that he look into the big camera.

THE COURT: Okay. Well, I prefer he look into the big camera just because it --

MR. RUKAVINA: So keep looking there? Yeah.

THE COURT: No, no, no, no. Okay. I don't know what

-- I thought -- okay. Do you see what I'm seeing? I don't know if you can see what I'm seeing.

MR. MORRIS: Yes.

THE COURT: I'm seeing the left side of his face.

THE WITNESS: I'm sorry. I'll just look at the laptop. Sorry. I was -- I was looking at who was speaking to me.

THE COURT: Okay. Well, I don't --

MR. MORRIS: Okay.

THE COURT: I don't know the setup, so it was confusing to me.

All right. This is better. Thank you.

THE WITNESS: Yeah. I apologize.

MR. RUKAVINA: We'll focus on the laptop, Judge.

BY MR. MORRIS:

Q All right. So the question, Mr. Post, is: You do recall that the Debtor specifically asked the Defendants to file their motion to lift the stay so that the issue could finally be resolved; isn't that right?

A I can't recall that specifically.

Q You believe that may be one of the options that the Debtor specifically proposed, right?

A It -- yes.

Q Okay. But the Defendants never filed their lift stay motion to terminate the agreements; isn't that right?

A I don't believe so.
Q Right. So the Debtor filed its complaint and its request for the injunction, right?
A Correct.
Q As the CO -- as the CCO, you may have reviewed the Debtor's complaint and motion, but you can't recall, given all the documentation that's involved, right?
A Correct.
Q You can't recall any facts that the Debtor asserted in support of its motion; isn't that right?
A I can't recall specifically. Correct.
Q But the one thing you do know is that the Debtor's motion is based on its entitlement to transact business pursuant to their arrangement with the CLOs as collateral manager, correct?
A Yes.
Q Now, you heard that there was supposed to be an initial hearing on the Debtor's motion for a temporary restraining order against the Defendants, right?
A Correct.
Q But you don't believe the motion for the TRO got heard, and you presume it got resolved, right?
A I don't believe it was heard.
Q Okay. And you understand that there is a TRO in place now, pursuant to which the Advisors and the Funds are

prevented from interfering with the Debtor's execution of its rights under the CLO management agreements, right?

A Correct.

Q Before the TRO was resolved, you weren't personally involved in the process of deciding what witnesses would be called and what exhibits would be offered into evidence; is that right?

A No.

MR. MORRIS: During the deposition, Your Honor, subject to correction from Mr. Rukavina, I believe that the Defendants and the Debtor reached the following two stipulations.

First, the Defendants and the Debtor stipulate that Mr. Post was not going to be called as a witness at the TRO hearing.

MR. RUKAVINA: That is correct.

MR. MORRIS: And second, the Defendants and the Debtor stipulate that the Defendants were not going to offer into evidence any exhibits other than those specifically listed on their witness and exhibit list.

MR. RUKAVINA: That being the witness and exhibit list filed before the TRO. That is correct.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Let's talk about Mr. Seery for a minute. You know who Mr.

Seery is, correct?
A Correct.
Q You understand he's an independent director and the CEO of the Debtor, right?
A Correct.
Q And you also understand that his -- in his capacity as the Debtor's CEO, Mr. Seery is authorized to sell certain securities and assets that are owned by the CLOs, correct?
A Correct.
Q In your opinion as the CCO, the chief compliance officer of the Advisors and the Funds, Mr. Seery has the knowledge and experience to trade securities on behalf of the CLOs, correct?
A Correct.
Q But you don't believe that it's in the Funds' best interest for Mr. Seery to sell SKY and AVYA securities, right?
A Correct.
Q But even though you reached that decision about Mr. Seery, you have no knowledge as to whether Mr. Dondero ever traded either of those securities before he resigned from Highland; isn't that right?
A I saw some trades that were shown on the screen earlier. I don't think I recalled at the time I was asked on Friday.
Q As of the time -- as of Friday, you had no knowledge as to whether Mr. Dondero had traded in AVYA securities prior to his departure from Highland, correct?

A Correct.
Q And before, before forming your view as the chief compliance officer that Mr. Seery's trading of AVYA was not in the best interest of the Funds, you made no effort to see if Mr. Dondero had sold the exact same securities Mr. Seery was selling, correct?
A Correct.
Q And the sole source of information that you relied upon to reach your opinion that the trades weren't in the best interest of the Funds is Jim Dondero and Joe Sowin, correct?
A I'm sorry. Can you repeat that? You kind of cut out at the beginning.
Q Sure. And please, any time that happens, let me know. We had some problems this morning.
The sole source of information that you relied upon to reach your opinion that the trades weren't in the best interest of the funds is Jim Dondero and Joe Sowin; isn't that correct?
A Correct. They're the investment professionals, yes.
Q And you have no understanding as to why Mr. Seery wanted to sell the AVYA and SKY securities, do you?
A I was told that -- I don't know why he wanted to sell them personally, correct.
Q Okay. In fact, before reaching your conclusion as the CCO that Mr. Seery's trades were not in the best interest of the

Fund, you did not undertake any investigation of any kind to try to determine why Mr. Seery wanted to sell AVYA or SKY stock, correct?

A Correct. I didn't reach out to Mr. Seery.

Q All right. You believe that Mr. Dondero and Mr. Sowin's opinion that Mr. Seery's trades aren't in the Funds' best interest should be heard pursuant to the Advisers Act, right?

A Correct.

Q Specifically, Section 2000 -- 206 of the Advisers Act, right?

A Correct.

Q Have you ever read Section 206 of the Advisers Act?

A Yes.

Q Okay.

MR. MORRIS: Ms. Canty, can you please put up the demonstrative for Section 206 of the Advisers Act?

MR. RUKAVINA: Your Honor, the witness just asked me for water. Nothing more.

THE COURT: Okay.

MR. MORRIS: Yeah. No problem.

BY MR. MORRIS:

Q I've put on the screen Section 206 of the Advisers Act, Mr. Post. Can you please tell the Court what provision of 206 you believe Mr. Seery allegedly breached when he sought to sell AVYA and SKY securities?

A It would be Number 4.
Q Do you believe that Mr. Seery engaged in fraudulent, deceptive, or manipulative practices by trying to trade AVYA and SKY securities?
A The -- as collateral manager for the CLOs, they're supposed to maximize returns for the preference shares, which we didn't believe the sales reflected that, and so they weren't acting, --
THE COURT: Okay.
THE WITNESS: -- you know, pursuant to their duties --
THE COURT: Here I -- here I go --
THE WITNESS: -- under the collateral management --
THE COURT: Here I go again. Here you go again.
THE WITNESS: I'm sorry.
THE COURT: It really was a yes or no question. All right?
BY MR. MORRIS:
Q You're the -- you're the chief compliance officer, right?
A Yes.
Q And this is the provision in Section 4 that you cite to as the provision that Mr. Seery violated when he attempted to sell SKY and AVYA securities, correct?
A Yes.
Q Did Mr. Seery engage in an act, practice, or course of

business which was fraudulent when he looked to sell those securities?

A No.

Q Do you believe that Mr. Seery engaged in an act, a practice, or a course of business which was deceptive when he went to sell the SKY and the AVYA securities?

A Yes.

Q Who did he deceive?

A The investors of the CLOs, --

Q How?

A -- the preference shareholders.

Q How?

A By selling securities that the preference shareholder investors believed had further upside to them.

Q Did he lie to them?

A I don't believe he talked to the investors.

Q But you're putting your reputation on the line here and you're swearing under oath that Mr. Seery deceptively tried to sell SKY and AVYA securities?

A I believe that based off of a review and discussion with counsel.

Q Do you think he was manipulative?

A No.

Q Did you -- did you check in with the SEC to tell them that you had a bad actor here?

A No.
Q You first formed your view that the Debtor violated Section 206 of the Advisers Act after the sales started to occur in the CLOs, correct?
A Correct.
Q But you don't know when the sales actually started, right?
A I believe there were sales --
Q And I assume, since you were the chief compliance officer since 2015, you don't believe that Mr. Dondero's sale of AVYA stock was deceptive, right?
A You would have to ask Mr. Dondero that, but I believe he was selling for cash, cash needs for other funds.
MR. MORRIS: Okay. I move to strike. I'm asking him not --
THE COURT: Sustained.
BY MR. MORRIS:
Q I'm asking about you. I'm asking about you. You're the chief compliance officer, right?
A Yes.
Q And you don't believe that when Mr. Dondero sold AVYA stock that he was engaged in deceptive practices, do you?
A No.
Q And that's because you don't even know whether he sold AVYA stock; isn't that right?
A On Friday, I -- that is correct.

Q In fact, the only reason you learned that Mr. Seery wanted to sell AVYA and SKY stock is because Mr. Dondero told you; isn't that right?
A I believe I was forwarded the email after -- after there was communications on the sales.
Q And that's the email where Mr. Dondero told Mr. Surgent that he had personal liability, correct?
A I -- I believe it was an email prior to that about were trades being requested and Mr. Dondero responding.
Q You're familiar with the email where Mr. Dondero interfered with Mr. Seery's trades?
A Yes.
Q Okay. And you're aware that Mr. Dondero told Mr. Surgent that he faced potential liability if he continued to follow Mr. Seery's instructions, correct?
A Correct. Based off of Mr. Dondero's view.
Q Notwithstanding all of that, in your capacity as the chief compliance officer, you don't believe it's ever appropriate for an investor to step in and impede transactions that have been authorized by the portfolio manager unless the contract permits the investor to step in; isn't that right?
A I believe -- I'm sorry, can you repeat that, please? There was a lot of question.
Q Sure. Sure. In your capacity as the chief compliance officer, you don't believe it's ever appropriate for an

investor to step in and impede transactions that were authorized by the portfolio manager unless the contract permits the investor to do so; isn't that correct? Isn't that correct?

A Yes.

Q Okay. I know you're not a lawyer, but you are the chief compliance officer of the Funds; isn't that right?

A Correct.

Q And you can't point to anything in any contract that gives Mr. Dondero the right to step in and impede transactions that have been authorized by Mr. Seery; isn't that correct?

A He's entitled rights as preference shareholders for the -- for the Funds that hold those preference shareholders. So, indirectly, he should be afforded those rights as portfolio manager for those Funds.

Q Sir, you can't point to anything in any contract that gives Mr. Dondero the right to step in and impede transactions that have been authorized by Mr. Seery; isn't that correct?

A Correct.

Q Okay. But yet you have never told Mr. Dondero that he should not interfere with Mr. Seery's trades; isn't that a fact?

A Correct.

Q In fact, you never personally took any steps at any time to make sure that there would be no further interference with

the Debtor's trading activities; isn't that correct?
A Correct.
Q And that's because you believe, as the chief compliance officer of the Funds, that Mr. Dondero should have the leeway to make the determination as to whether or not the transactions are appropriate; isn't that correct?
A He should be able to be heard in the transactions that are being made, correct.
Q Sir, not to be heard, but to make the determination. Let me ask the question again. You believe, as the CO -- CCO of the Funds, that Mr. Dondero should have the leeway to make the determination as to whether or not the transactions are appropriate; isn't that correct?
A Yes.
Q Okay. And you completely deferred to Mr. Dondero; isn't that right?
A For the investment determination, yes.
Q And based on that deference, you never took any steps at any time to make sure no one on behalf of the Advisors or the Funds impeded or stopped transactions authorized by Mr. Seery, correct?
A Correct.
Q You understand there's a TRO in place today that prevents Mr. Dondero and the Advisors and the Funds from interfering with Mr. Seery's trading activities; isn't that right?

MR. RUKAVINA: I'm going to object to that, Your Honor, to the extent that calls for a legal conclusion. And I do think it mischaracterizes the testimony. I'm sorry. The TRO.

THE COURT: Overruled.

BY MR. MORRIS:

Q You can answer, sir. Would you like me to repeat the question?

A Yes, please.

Q You understand that there is a TRO in place -- TRO in place today that prevents Mr. Dondero, the Advisors, and the Funds from interfering with Mr. Seery's trading activities on behalf of the CLOs, correct?

A Correct.

Q But in the absence of the TRO, in your view, whether you tell Mr. Dondero not to interfere with Mr. Seery's trades depends on the facts and circumstances that exist at the time, right?

A Correct. From a -- yes.

Q Okay. And up until this point, there have been no facts and circumstances that have caused you to tell Mr. Dondero not to interfere with Mr. Seery's trades on behalf of the CLOs, correct?

A He can't because of the TRO.

Q Correct. But if the TRO wasn't in place, it's possible

that you wouldn't take any steps to stop Mr. Dondero from impeding Mr. Seery's trades; isn't that right?
A I mean, if Mr. Dondero or other investment professionals have a view, that they should be -- they should have a right to be heard as preference shareholders of the CLOs.
Q Okay. But if the TRO wasn't in place, you wouldn't act to stop Mr. Dondero from interfering or impeding the Debtor's trades on behalf of the CLO; isn't that right?
A He would -- if he would be permitted to talk to Mr. Seery.
Q Okay. Prior to the imposition of the TRO, you took no steps to stop Mr. Dondero from interfering with Mr. Seery's trades, correct?
A Correct.
Q And if the TRO wasn't in place, it's possible you wouldn't take any steps to stop Mr. Dondero from impeding -- impeding Mr. Seery's trades again; isn't that right?
A If there's an investment rationale as to why they feel the trades shouldn't be done, I -- again, I feel like Mr. Dondero or the other investment professionals should be able to raise those points with Mr. Seery.
Q Do you think they should be able to stop the trades?
A I -- I -- I think they should be able to question the trades. But flat-out stop them, I'd probably say no.
Q Then why didn't you do anything before the TRO was entered?

A Um, I'm sorry, can you repeat the -- do anything in -- in what manner?
Q Why didn't you take any steps before the TRO was entered to stop Mr. Dondero from interfering and stopping and impeding the Debtor's trades?
A I think, as I recall, there was only one -- one set of trades in question that he stepped in on.
Q So, one is okay? How about two?
A Or, sorry. There were two trades on one day that -- that, you know, he questioned. Or stepped in on. I don't -- I don't recall him stopping any other trades thereafter.
Q That's all you know about, right?
A Correct.
Q And with that knowledge, it never occurred to you to tell Mr. Dondero to knock it off, did it?
A He believed the trades weren't in the best interest for the investors, so I did not.
Q And that's what you mean by deferring to him; isn't that right?
A From the investment perspective, yes.
Q Thank you for your -- thank you for your honesty. As the CCO, you have never communicated with the Issuers about the Debtor's performance under the CLO management agreements; isn't that right?
A Correct.

Q And that's because you didn't believe it was in your responsibility as the CCO to check with the Issuers to see if the Issuers believed that the Debtor was in compliance with the CLO management agreements, correct?
A That communication would have involved counsel and that communication didn't occur. I wouldn't have reached out to them directly.
Q Yeah. You didn't believe it was within your responsibility as the chief compliance officer to communicate with the Issuers to see if they had any views as to Mr. Seery's performance as portfolio manager, correct?
A Correct, because it would have involved me working with counsel and there was never direction to do that.
Q As the chief compliance officer of the Defendants, you have no idea if anyone on behalf of the Advisors or the Funds ever asked the Issuers whether they believed the Debtor was in default under the CLO management agreements, correct?
A Correct.
Q As the CCO, you have no idea if anyone on behalf of the Advisors or the Funds ever asked the Issuers whether they believed was in breach under the CLO management agreements, correct?
A Correct. I believe there was a call that I wasn't a part of, that it was just involving lawyers, that I don't know what was discussed on the call. So, correct.

Q As the CCO, you have no idea if anyone on behalf of the Advisors or Funds ever asked the Issuers whether they believed it was appropriate to try to take steps to terminate the CLO management agreements; isn't that right?
A Correct.
Q None of the Issuers joined any of the letters that were sent on behalf of the Funds and the Advisors, right?
A I didn't -- I don't recall seeing their names listed.
Q As the CCO, you don't have any understanding as to what the standard is for terminating the CLO management agreements unless you get legal advice; isn't that right?
A Yes. It was -- it would be a discussion with counsel, given the complexity of the agreements.
Q But as a factual matter, you're not aware of any facts that would support the termination of the CLO management agreements except that there were trades that Mr. Dondero didn't think were in the best interests of the Funds; isn't that right?
A Yes. And because the belief was those trades weren't maximizing value for the preference shareholders.
MR. MORRIS: I move to strike everything after the word yes, Your Honor.
THE COURT: Granted.
MR. MORRIS: I have no further questions.
THE COURT: All right. Mr. Rukavina?

MR. RUKAVINA: Your Honor, I'll reserve my questions for my case in chief.

THE COURT: All right. Mr. Post, that concludes your testimony for now. Stick around.

Mr. Morris?

MR. MORRIS: Your Honor, last witness, and I hope it's rather brief, actually. The Debtor calls James Seery.

MR. RUKAVINA: Your Honor, may we have a brief restroom break, all of us in this room, before we start the next witness?

THE COURT: All right. We'll take a five-minute restroom break. I know part of the long day is because of my commitment at the lunch hour, but you all did estimate three or four hours for this hearing, right? That's what I recall.

MR. MORRIS: We did.

MR. RUKAVINA: Your Honor, I was never consulted on a time estimate. I had no idea that someone said three to four hours.

THE COURT: All right.

MR. MORRIS: And part -- part of that is my fault and the technological problems we had this morning, so I take responsibility for that, Your Honor, and I sincerely apologize.

THE COURT: Okay. Well, just so you know, we cannot come back tomorrow. I've got two -- too booked today tomorrow

to come back, so --

MR. MORRIS: I don't expect Mr. Seery to be more than about 15 minutes.

THE COURT: Okay. We'll take a five-minute break.

THE CLERK: All rise.

(A recess ensued from 3:22 p.m. until 3:32 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. I wanted to clarify one thing I said, just so no one is confused. I know that originally you had today, Wednesday, and Thursday, 26th, 27th, and 28th, for confirmation. So if anyone thought, oh, we're coming back tomorrow on this if we don't finish, because originally you had all three of those days, you know, as soon as we continued the confirmation hearing, we started filling in Wednesday. So we have three different Chapter 11 case matters set tomorrow. And so it was, you know, you give up time and we have people usually wanting to get that time, so that's what happened.

But anyway, people, we'll talk fast and we'll get it done today, right?

MR. RUKAVINA: Your Honor, my -- Your Honor? Oh, wait. I need to --

THE COURT: Ooh, it sounds like you're in a cave. Let's get those headphones on.

MR. MORRIS: I promise to be as quick as I can, Your

Honor.

THE COURT: Okay. Mr. Rukavina, were you trying to say something?

MR. RUKAVINA: I was, Your Honor. Can you hear me?

THE COURT: Yes.

MR. RUKAVINA: This darn video. Too many -- Your Honor, we have an agreed TRO that goes through February the 15th. And I'm certainly not suggesting taking any more of the Court's time than is necessary, but I cannot commit to finishing today, especially because Mr. Morris has taken so much time. So I think we will do our best, but I just want the Court to know that there's no urgency to this, and if we have to come back at some point after Tuesday or Wednesday, there's no possible harm to the Debtor.

MR. MORRIS: Your Honor, it's my hope that we can get this done, and I think the sooner we begin the better.

THE COURT: Okay. Well, we're going to try to get it done. All right, Mr. Seery. You've called Mr. Seery to the stand now?

MR. MORRIS: Yes, Your Honor. The Debtor calls James Seery.

THE COURT: All right. Mr. Seery, please raise your right hand.

JAMES P. SEERY, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Thank you.

MR. MORRIS: May I proceed?

THE COURT: You may.

MR. MORRIS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good afternoon, Mr. Seery. Can you hear me okay?

A I can, yes.

Q Okay. Let's just cut to the chase here. You're the CEO of the Debtor; is that right?

A That's correct.

Q And in that capacity, do you understand that the Debtor is party to contracts pursuant to which it manages certain CLO assets?

A Yes.

Q And are you personally involved in the management of those assets?

A Yes.

Q Do you have any prior experience managing other people's money or other people's assets?

A Yes.

Q Can you please explain to the Court your experience and your knowledge as to investing other people's money?

A Yes. I was a finance lawyer -- I'll go quickly, if it's okay. I can fill in later, if you like. I was a finance and bankruptcy lawyer for ten years before I went to Lehman on the

business side in 1999.

In that role, I started immediately in distressed investing. I worked as part of a team of analysts and traders to build distressed positions in prop (phonetic) business, trading Lehman Brothers balance sheet at the time. This was in 1999 and 2000. We were one of the most significant investors on the Street, and I was part of that team, and a leading part of the team, putting on significant investments of our balance sheet, which was Lehman's money, into different kinds of stressed, distressed, high yield investments. That included bonds, that included loans, unsecured, subordinated. Sometimes equity. Typically, we stayed in credit, but a lot of this was very distressed credit, which often ended up as reorg equity.

After that, I began running different teams for making distressed loans to companies that no one else would lend money to. These investments were significant, anywhere from fifty to a billion dollars. Some of the largest transactions in the world at the time were transactions I ran, like a rescue loan to PG&E for a billion dollars. That was in 2000.

After that, I continued to grow my career there, running distressed investments. In 2005, I took over the loan business at Lehman. That included all high-grade loans, high-yield loans, trading and sales of those loans; managing that portfolio, which was in excess of $10 or $20 billion,

depending on the time; exposure both in committed transactions as well as funded loans; the hedging of that portfolio; traders and salespeople working for me. In addition, I had significant responsibility for the distressed book, as well as all restructuring business at Lehman.

After Lehman, I -- and I was one of the people who sold Lehman -- I became a senior investing partner at RiverBirch Capital. We were about a billion and a half dollar long/short investor, mostly stressed and distressed, but a lot of high-grade trades as well, particularly in preferred stocks. That was a global business, but primarily U.S., Europe, some Asian investments as well.

Since then, I've gotten to Highland. I've been responsible for Highland's investments. After the first quarter, when the performance managed by Mr. Dondero was absolutely disastrous -- we lost about $80 million in equity securities, positions that he managed, about $50 million in the Select Equity Fund, and about $30 million in the -- in the Highland internal account. After Jefferies seized the Select account, I took over the --

A VOICE: I think Mr. Seery has sort of gone beyond the question of his background.

THE WITNESS: He's asked me if I was experienced in investing other people's money. I was giving that background. But we -- I can stop or I can keep going, if you like.

THE COURT: Okay. If that was an objection, --
MR. MORRIS: Let's --
THE COURT: -- I overrule it. Go ahead.
THE WITNESS: I've been managing that portfolio. In addition, after Mr. Dondero left, but I actually started looking at it before that, started taking over the CLO portfolio, or taking a look at it, frankly. We have a -- we have an experienced professional sitting on top of it, Hunter Covitz, who manages the day-to-day exposure. But those portfolios -- we call them CLOs, Your Honor, but I think you've heard testimony before, they're not really. Acis 7 is a CLO. The 1.0 CLOs are very old investment vehicles that are primarily structured as, right now, closed-end investment funds. They don't have the typical diverse portfolio of loans that a CLO has. They have mostly reorg equity or positions in real estate and in MGM. So the -- the securities we've been talking about in these trades are publicly-traded liquid securities that Highland took as post-reorganization equity.
Q Thank you, Mr. Seery. Let's cut to the chase on the AVYA and the SKY. Nobody seems to have asked you this question, but did you -- have you looked to sell AVYA and SKY securities since the time that Mr. Dondero left in October?
A I have, yes.
Q Can you please explain to the Court your investment rationale, the reason why you wanted to sell -- let's just

take them one at a time. Let's start with AVYA. In the last couple of months, why have you wanted to sell AVYA?

A Well, the original impetus to sell AVYA came from Mr. Covitz when it started moving up as a post-reorg security in the communications space that had -- had really performed extremely poorly post its Chapter 11. Mr. Covitz over the summer felt we should start lightening up on that position. I agreed. He did that. And Mr. Dondero eventually cut him off.

As it got to the fall, what I did was I got Mr. Covitz, as well as then the analyst -- the analyst on that is Kunal Sachdev. That's the Highland analyst on the position -- as well as Joe Sowin and Matthew Gray, who's another senior analyst. And I looked at all of the equity positions in the CLOs and wondered why we had them. What was the view? Were they worth keeping?

Primarily, the ones we looked at were four of the post-reorg equities that were liquid. A company called Vistra, a company called Arch Coal. Vistra is the old TXU, a well-known bankruptcy. Arch Coal, another well-known bankruptcy. Avaya, a bankruptcy; and Sky Champion, a less -- less-known bankruptcy but came out of there.

Mr. Gray is the analyst on Vistra and Arch. We determined, based upon his recommendations, not to sell those. Mr. Sachdev was the analyst on Avaya, and he believed that it had reached its peak, and even though it could continue to go

up or down -- stocks often do that -- he did not think that the value was there. His recommendation was to sell.

Mr. Sowin was in those meetings. Prior testimony to the contrary or any statements that were said before are completely false, they're completely made up, so I know it's frustrating and I apologize for -- for being frustrated.

So we decided that we would sell the Sky Champion. A pretty simple answer. Highland didn't have an analyst. Literally didn't have an analyst. Nobody had a view as to what the stock was. It just sat in there, in two CLOs, without anybody paying any attention to it.

I had Matthew Gray take a look. He felt that it was at fair value. I did my own work on it, felt it was at fair value, notwithstanding some good tailwinds in -- secular tailwinds in the home building space, and determined that that CLO should sell those securities.

Q Thank you, sir. Prior to his departure at Highland, did Mr. Dondero have responsibility over the management of any of the CLO assets?

A He did, yes.

Q And do you understand, do you know whether Mr. Dondero sold AVYA securities on behalf of the CLOs and on behalf of the Funds during the time that he was employed as the portfolio manager from January until October 2020?

A I do. And he did sell those securities. The chart you

put up, based upon our business record, is accurate, and he engaged in significant sales of those securities throughout the year.

Q Okay.

MR. MORRIS: Can we please put upon Demonstrative #1?

BY MR. MORRIS:

Q Okay. And can you just explain to the Court what this document is?

A It's a trade report, one of Highland's -- this shows the whole platform, so it's the aggregate sales. The name of the email -- I apologize, I forgot the system; it just left my mind. But the email you saw before is anybody on the platform used for various trades if they're part of a trading group. And that's to make sure that, across the portfolio, in its corporate platform, you aren't running into either compliance problems or allocation problems that could lead to a compliance problem.

Q So this shows sales of Avaya on these particular dates. The trade is -- the trade symbol is AVYA. This is a liquid security. Trades in, you know, liquid equity markets. I believe its average trading volume is somewhere about a million and a half a day, approximately. So you have a trade date. You have the type of transaction. It could be a buy or a sell. These are all sales. The quantity. And then the price. And then it would have the Fund, and then the

aggregate dollars, which is simply multiplying the price times the quantity.

Q And if we just scroll down to the end of the document, October 9th, is that around the time that Mr. Dondero left Highland?

A Right around that time. This was coming into a number of hearings that we thought it was most important to have Mr. Dondero depart, particularly in light of some of the positions that he and his companies were taking vis-à-vis the Debtor.

MR. MORRIS: Can we put up Demonstrative Exhibit #2, please?

BY MR. MORRIS:

Q Can you explain to the Court what this is?

A Uh, --

MR. MORRIS: And again, just for -- just for the record -- sorry to interrupt, Mr. Seery -- the backup for this information can be found at Debtor's Exhibits BBBBB to SSSSS

BY MR. MORRIS:

Q Go ahead, sir. Could you explain to the Court what this is?

A Yeah. This is just a pretty straightforward chart showing the bars being sales and the lines being the -- the closing sale price of a buy on that day. And so you can see, you know, with the market fallout in the early part of the year, AVYA hit a low, but like most of the securities in the market,

it has come back very strongly. And you see Mr. Dondero's trades earlier in the year, the rest of it during the middle part of the year, sales in the third quarter, and then, when he's gone, I began selling in November and December.

Q Now, so is it fair to say that Mr. Dondero and the Defendants didn't completely impede and stop the Debtor from selling AVYA shares?

A That's fair. What -- there's a little bit of confusion. The way the trading desk worked previously is that you have these separate companies but they're not really separate companies. HCFMA is populated by about seven employees. Many of them have functions across a number of different companies. HCFMA exists solely because Highland funds it. They haven't paid fees of about three million bucks this year. They owe $10 million related to a disastrous bailout of what was an open-end fund called Global Al a couple years ago where the SEC, you know, came in and took significant action, almost shut significant parts of Highland down. And these traders do the trading of all the equities across the platform.

So I typically would call them, and this is how we worked in the spring when I took over the internal account after the seizure by Jefferies of Mr. Dondero's management of the Select Equity account. I would work with Joe Sowin as the trader, make decisions on what we wanted to do for the day, he would execute those trades by going out in the market with a broker,

selling them to -- to the dealer on the other side, run it through our automated system, and then the trades get closed with the back office.

So there's the trade, which is your agreement to buy or sell at a particular dollar price. That gets inputted into the OMS system, and then from there it's the back office takes over, and then ultimately securities are delivered versus payment to the counterparty.

Q Okay. And can you just describe, you know, in one or two sentences, your interpretation of this chart and how your sales and the green bars compare to Mr. Dondero's sales and the brown bars?

A Well, the two simple obvious answers are, one, they're smaller, and two, they're at higher prices.

Q Okay. You also traded, since Mr. Dondero's departure, securities known as SKY; is that right?

A That's correct. It's Sky Champion Corp. The ticker is SKY.

Q And did Mr. -- to the best of your knowledge, Dr. Mr. Dondero trade in SKY securities prior to his departure?

A I don't believe so. As I said earlier, we didn't appear to have an analyst on that for some time. I don't even know how far back it goes. It was a bit of an orphan security sitting in the portfolio. It's only -- it was only in two of the CLOs.

Q Okay.

MR. MORRIS: Can we please put up Demonstrative #3, please? Okay.

BY MR. MORRIS:

Q And can you just explain to the judge what's depicted on this page?

A Again, similar to the last chart, you have the dollar price of the security at the close each day, throughout the year, and then the green bar showing where we began to sell securities for those CLOs.

Q And so, again, is it fair to say that Mr. Dondero and the Defendants haven't completely stopped the Debtor from engaging in SKY transactions?

A That's correct. What we did was the so-called workaround previously mentioned, was that we decided that I would have to do the trading directly. So I'd literally look at the stock each day, talk to the broker at Jefferies, determine what level to sell at, communicate with him throughout the day, work through transactions. Then he reports in whether he's been able to sell and execute on our behalf. When he's done that, then we have the back office manually enter the trades, as opposed to doing it from the automated trading desk, and then have those trades close. So, so far, knock on wood, we haven't failed on any trades.

Q Okay.

MR. MORRIS: We can the demonstrative down, please.
BY MR. MORRIS:
Q Just two more topics here, sir. Can we talk briefly about what efforts, if any, the Debtors have made to avoid this litigation? I'll just ask them one at a time. Has the Debtor made any attempt to transfer the CLO management agreements to the Defendants or to others?
A Well, our original construct of our plan was to do that. We've since determined, when we tried to do that, we got virtually no response from the Dondero interests. The structure of the original thought of the plan was if we didn't get a grand bargain we would effectively transition a significant part of the business to Dondero entities, they would assume employee responsibilities and the operations, and then assure that the third-party funds were not impacted.
As I think I testified on the -- I can't recall if it was the deposition or my prior testimony in court -- Mr. Dondero, true to his word, told me that would be very difficult, he would not agree, and he has made that very difficult.
So we examined it. We've determined that we're going to maintain the CLOs and assume them. But we originally tried to contemplate a way to assign those management agreements. We've had --
Q All right.
A -- significant discussions with the CLO Issuers, and

they're supportive of us retaining them.
Q Okay. You were on the -- you've been participating or listening in to the hearing throughout the day; is that right?
A I have, yes. I apologize. I didn't leave the screen on because I didn't want to suck up bandwidth.
Q Are you familiar with all of the K&L Gates letters that that were reviewed today?
A I am, yes.
Q Did the Debtor request that the Defendants withdraw those letters?
A Yes, we did.
Q Had the Defendants withdrawn those letters, might that have avoided this whole litigation?
A I think it would have. What we wanted to have here is a withdrawal of the letters and an agreement by the clients for the -- the K&L Gates clients that they wouldn't interfere with the operations of the Debtor and our drive towards a plan. They could take their legal positions and object to the plan, if they like, but interfering on a day-to-day basis was unacceptable to us in terms of trying to operate this business in the most efficient manner.

We specifically requested that they do that. This is, I don't think, lost on anybody, certainly not on me in my experience here for years: These entities are all dominated and controlled by Mr. Dondero, and each of these attacks is

specifically coordinated for the purpose of diverting the Debtor, causing confusion, and forcing us to spend estate resources.

Q Do you know if the Debtor also asked the Defendants to avoid this whole injunction proceeding by simply filing their motion to lift the stay and see if they could actually win a motion to terminate the contract?

A Well, what we did was we contemplated the best, most efficient way out, and it was either withdrawing the agreement; if they didn't agree, then we'd said you should file your stay motion immediately and let's have this determined. We told them, short of that, if they weren't willing to do that, then we would have to put this in front of the Court to try to make sure that we could operate the business.

Q All right. So, just to summarize, you attempted to sell the CLO management agreements, but were unable to do so; is that right?

A I would say assign. We would have looked for a payment, there is a cure payment that we have to make, but we didn't we didn't conduct an auction for the CLO assets.

Q And to the best of your knowledge, the Defendants never withdrew the letters; is that right?

A They did not.

Q And to the best of your knowledge, the Debtors -- the

Defendants never brought their contemplated lift stay motion, right?

A They have not, no.

Q And so why did the Debtor bring this action?

A Well, quite clearly, to try to prevent the managers and Mr. Dondero and the Funds from interfering with the way that we operate the business. We intend to continue to manage the CLOs, we intend to assume those contracts, we intend to manage them post-confirmation, after exit from bankruptcy. And causing confusion among the employees, preventing the Debtor from consummating trades in the ordinary course, deferring those transactions, we thought put the estate at significant risk, in addition to the cost.

Q Did you hear Mr. Rukavina in the opening suggest that these might, in fact, be money-losing contracts?

A I did, yes.

Q Why would the Debtor want to assume money-losing contracts?

A They're not money losing contracts.

Q And why, why do you say that?

A They generate fee income. So the fees on each of these CLOs get paid to the Debtor. Now, not all of these CLOs, as I mentioned earlier, are -- none of them are ordinary CLOs, other than Acis 7. But not all -- because they don't all have liquid assets that are able to pay their fees each quarter,

some are deferred. There are some CLOs that will probably never pay any deferred fee because they are underwater. Those are not CLOs that Mr. Dondero or the Funds own any of. That's not really a surprise. But we will continue to manage those and look for ways to exit for those investors who are noteholders who are underwater in those CLOs.

Q Okay. Can you describe for the Court the Debtor's contentions as to how the conduct that has been adduced through today's evidence, how is the Debtor harmed by Mr. Dondero's interference in the trades and the sending of these letters?

A I think it's clear in terms of operational risk. Being forced to construct a workaround to consummate trades that we think are in the best interest of the Funds.

It's telling not only that neither Mr. Dondero nor Mr. Sowin nor -- Mr. Sowin was on the calls and agreed to the analyst view, by the way -- nor anybody from MHF ever asked me a question, their lawyers in the deposition never asked me why we were selling these securities. They simply want to get in the way, cause additional risk to the estate, and cause additional exposure with respect to legal fees, divert our attention from trying to consummate the case. I think that's, in my opinion, that's pretty clear.

Q Is there any concern on the part of the Debtor that that Mr. Dondero's emails and conduct is creating uncertainty

among the staff as to who's in charge?
A I think they did initially, and if they continued, they would. Right now, the workaround is working pretty well. We still do keep Mr. Sowin on the emails to make sure that, you know, from a compliance perspective, that our sales, he knows about; that we're not stepping on each other's markets, if you will; that we're not getting in the way that -- in the way if he wants to sell assets from a different MHF other managed asset holding, but we do have a workaround that works right now.

I think the biggest risk is, because it's much more manual, you have risk of so-called fat-finger trades, where you think you're selling a thousand and you sell 10,000, you think you're executing a sale and you're executing a buy, you think you're executing from an account that has the securities and end up selling short from an account that doesn't. So we've got to be very careful of that, but the team is doing that now. There certainly was confusion at the start.
Q And can you just explain to the Court your view as to how the Debtor is able to -- how the Debtor will be able to service the contract on a go-forward basis?
A The CLO contracts?
Q Yes.
A We'll have a team of folks able to manage these assets with professionals that are experienced credit analysts,

equity analysts. I think we'll be able to manage this -- these assets in a pretty straightforward manner. It's not going to be very difficult.

Q Has the Debtor been harmed through the diversion of your personal attention as CEO in responding to all of this?

A I like to think that I can juggle a lot of different things. I would prefer not to have to be looking at the securities levels each day and feeding out securities that we determine to sell through the broker at Jefferies, who, notwithstanding, is doing a great job. It's the job of the trader to actually do that and day-to-day -- throughout the day monitor the markets and look for the best place to sell.

So do I think I'm getting the best execution? I think the trader at Jefferies is excellent. Do I think if a trader on the Highland side was involved every step of the way, I think it would be better.

Q Have the Debtor's professionals' attention and resources been diverted to deal with all of this stuff?

A That -- I think that's -- that's quite clear as well. It's a significant expense.

Q Okay.

MR. MORRIS: Your Honor, I have no further questions of this witness.

THE COURT: All right. Mr. Rukavina?

MR. HOGEWOOD: Your Honor, if you please, Lee

Hogewood from North Carolina. You've admitted me *pro hac vice*. If I may do cross-examination, I would appreciate it.

THE COURT: All right. Go ahead.

MR. HOGEWOOD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HOGEWOOD:

Q Mr. Seery, let me ask you about the letters that came from our firm, and especially from me, beginning on December 22nd. I think you spoke about those generally. If you need them to be called up, I think my questions will be crisp as to the letters generally, but we could certainly look at them specifically, if need be.

There was initially a letter dated December 22nd, 2020, that's Debtor's Exhibit DDDD, at Docket 39. I take it you've read that letter?

A I have, yes.

Q And it's fair to say that was a request you had seen before?

A I don't think that's fair to say, no.

Q You had not seen a request to discontinue trades until the confirmation hearing?

A I don't believe so, no.

Q Okay. So that, that was the first time a request had been made not to trade in the CLO securities prior to confirmation?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

THE WITNESS: I --

THE COURT: Go ahead. You can answer.

THE WITNESS: I don't recall you sending me a letter before that, but I -- if you have, then I apologize. I thought I was pretty familiar with them, but I don't recall you sending me that request previously.

BY MR. HOGEWOOD:

Q Okay. I'm sorry. That was the first request you had received from me, is that -- that's correct?

A Yes.

Q But there had been prior requests of a similar nature?

A Not to my recollection. Is there a letter?

Q All right. Well, let me -- let me move on. You weren't intimidated by my letter, were you?

A Was I intimidated by your letter? No, I was not intimidated.

Q And it didn't cause -- the letter itself did not cause you or the Debtor to alter your investment strategy?

A It did not, no.

Q And it did not cause you or the Debtor to refrain from operating the company in the manner that you perceived to be in its best interest?

A It did not.

Q It did not cause you to change any of your trading

decisions?
A No.
Q You and your counsel responded -- or, your counsel responded to the letter a couple of days later; isn't that correct?
A Yes.
Q And the response rejected the request that had been made and demanded that the letter be withdrawn; is that right?
A Yes.
Q So the range of communication is a set of lawyers representing adverse parties asserting their respective positions? Is that a fair characterization of that set of communications?
A No.
Q Okay. Would you characterize it differently?
A Yes.
Q All right. How so?
A I believe you sent a letter with no good-faith basis, knowing what the contracts say as an experienced lawyer, knowing there was not cause, yet still making the same threats, basically couching them as a request. But I don't think there was any good-faith exchange of ideas. No one even asked me why I was making the trades. I think you were aware of that.
Q You -- but you testified that, nonetheless, the letter did

not cause you to conduct yourself in any other manner than you would have conducted had you not received the letter; isn't that right?

A That's correct.

Q So I think there's some confusion, then, and I just want to clear this up. There was earlier testimony, both at your deposition, that -- that my clients actually interfered with and caused trades not to occur on or around December 22nd and 23rd of 2020. And that's not correct.

MR. MORRIS: Objection. Your Honor, the evidence is in the record.

MR. HOGEWOOD: Okay. Well, let me --

THE COURT: All right. You're going to have to rephrase.

BY MR. HOGEWOOD:

Q Yeah. Let me -- let me say it differently. Focusing solely on December of 2020, every trade that you initiated closed; isn't that correct?

A Every trade. Yes. We did not fail one trade.

Q Okay. And so the issue that you have raised in your pleading is that there were -- there was an expectation that employees of my clients would book trades, which is essentially a backroom operation, after the trade has closed. Isn't that right?

A That's incorrect.

Q Okay. So, once again, let me just get -- there were no trades that you initiated that failed to close; is that right?
A That's correct.
Q And nothing that was done by the Defendants resulted in a trade that you wished to make in December of 2020 to fail to occur or fail to close; isn't that right?
A That incorrect.
Q So you initiated a trade that did not close?
A Yes.
Q In December of 2020? And when was that?
A I believe that's the case, yes.
Q And specifically what trade did not close that you initiated?
A I'd have to check the notes, but the specific trades were my attempt to initiate the trade with the desk. Then the trading desk goes into the market and makes the sale. Once it's inputted into the order management system, referred to as an OMS, then it gets processed for closing. In November and in December, Mr. Dondero instructed those employees not to initiate those trades. So there was never an agreement. When I initiated a trade, which was the workaround you saw referred to, I quite simply called Jefferies directly and I had the back-office folks manually input it instead of the trading desk.
Sorry. I just wanted to make sure we cleared that up.

Q No, just -- that -- that's helpful to understand. But I think, focusing again solely on December, every trade you initiated closed?

A Every trade that I actually went and made in the market closed.

Q And indeed, if --

MR. HOGEWOOD: I observed your demonstrative exhibits, and if I could ask that the one related to the Avaya trades be called up, Mr. Morris. is that possible?

MR. MORRIS: Yeah, sure. Is that the first one with Mr. Dondero's trades, or do you want the chart?

MR. HOGEWOOD: The -- the -- I think it was your Demonstrative #2 that showed the timeline of the trades.

MR. MORRIS: Yeah. You bet.

(Pause.)

MR. HOGEWOOD: Thank you. Thank you very much.

BY MR. HOGEWOOD:

Q So, just so I understand this document, the bottom axis is the passage of time, and when we get into the period between November of 2020 and the end of 2020, 12/31/2020, there are -- there's a green bar that has the numbers 50,000 at the top of it. That reflects what, Mr. Seery? The number of shares or the dollar amount of the trades?

A Number of shares.

Q And while this is not date-specific, do you know when

those sets of $50,000 trades happened? Or --
A I don't --
Q -- 50,000 shares trades happened?
A I don't know the specific dates off the top of my head, no.
Q But looking at it just in comparison to the calendar, that -- that's awfully close to December 22nd and 23rd, is it not?
A It appears to be, yes.
MR. HOGEWOOD: And Mr. Morris, if the I guess it's the SKY document could be pulled up as well? I just want to be clear --
MR. MORRIS: Demonstrative #3, please.
MR. HOGEWOOD: Yes. Thank you.
BY MR. HOGEWOOD:
Q The timeline on this demonstrative is similar, is it not?
A Yes, it is.
Q It's showing trades by day throughout the course of the year?
A That's correct.
Q And again, there are a significant number of trades in SKY on what looks awfully close to the few days before Christmas of 2020; is that right?
A That's correct.
Q Okay. And this is the period of time that we're talking about there being interference by the Defendants' employees;

is that right?
A Yes.
Q Okay. I'll move on. So, the next letter in question was one that came the day after, on December 23rd. Again, that was a letter from me to your counsel. Do you recall that letter?
A Yes.
Q And the letter of the 23rd, if we need to look at it, is the EEEE, Docket 39. You read that letter as well?
A Yes.
Q And you disagreed with the position taken in the letter?
A I'm trying to remember the specific position in that one. Was that the one threatening to try to terminate the CLOs without having checked whether there's cause? I just don't recall.
Q Why don't we call it up, if we can?
MR. HOGEWOOD: Mr. Morris, if you could help us, because it's one of your exhibits, that would be great. But Ms. Mather has got it up, so that's great.
BY MR. HOGEWOOD:
Q Mr. Seery, can you see the December 23rd letter?
A I can, yes.
Q And I think you referred to it as a threat to terminate the portfolio management contracts?
A I wasn't sure. That's why I was just asking if this was

that one. I don't -- I don't recall.
Q Right. And if you review the first page and the second page, does that confirm your recollection that that is the one related to portfolio management contracts?
A I can't see the second page. I believe it is. I'm not trying to --
Q Yeah, no, --
A If you represent, I'll accept it.
Q Take your time.
A (Pause.) Yes.
Q Okay. And I think you already said this: You strenuously disagreed with the positions stated in the letter?
A Yes.
Q But again, you were not intimidated by the letter?
A Intimidated? No.
Q The letter didn't cause you to change your investment strategy?
A No.
Q It didn't cause you to trade or not trade in a particular manner?
A No.
Q You continued to function the Debtor's operations as you deemed appropriate?
A Yes.
Q To your knowledge, no CLO or Issuer has taken any steps to

remove the Debtor as the portfolio manager?
A The CLO or the Issuers?
Q Yeah. No one's -- no one's taken a position that you should -- that the Debtor should be removed as a portfolio manager?
A Not -- not from the Issuers, no.
Q And -- or, I'm sorry. And so when you -- when you brought a distinction between the Issuer and the CLO, are you -- are you referring to CLO Holdco?
A No.
Q Okay. Has a CLO taken steps to remove the Debtor as a portfolio manager?
A The CLO is the Issuer.
Q Okay.
A So the answer is no.
Q Okay. So no one has -- no one has acted to take any -- to do anything as it relates to the removal of the Debtor as the portfolio manager?
MR. MORRIS: Objection to the form of the question.
THE COURT: Overruled.
THE WITNESS: I'm quite sure the CLO Issuers haven't, as they agreed and we've been working with them on an assumption. With respect to what your clients have done, I don't know.
BY MR. HOGEWOOD:

Q But you don't have any evidence that my clients have taken any action in violation of the automatic stay to -- to move or encourage the removal of the Debtor as the portfolio manager, do you?
A Other than the letter? No.
Q Other than the letter between me and your counsel?
A Correct.
Q All right. So, and that letter expressly states that any of those actions that would be taken are subject to the automatic stay and the Bankruptcy Code; is that right?
A That's correct.
Q And as we sit here today, the Debtor is not in breach of any contract with any of the Issuers; is that right?
A That's correct.
Q And the letter didn't cause the Debtor to breach any contract with any Issuer, did it?
A Did not.
Q And I think you've already testified today and you also testified in deposition that you anticipate that the -- all of the CLOs will consent to the assumption of the portfolio management agreements in the context of confirmation; is that right?
A Yes.
Q And the plan supplement that you recently filed, you provide a mechanism by which the issue of for-cause

termination is to be resolved, do you not?
A I don't recall if there's a specific provision in the plan supplement. We certainly have, either in the plan or in the plan supplement, a provision related to the gatekeeper function.
Q And that's similar to the settlement that you entered into with CLO Holdco in terms of resolving both their objection to confirmation and the lawsuit against them today; is that right?
A I believe it's similar.
Q Okay. And the gatekeeper is the Bankruptcy Court to determine, short of a full-blown trial, that if cause exists, isn't that correct, under the plan?
A Among other functions, yes.
Q So if the Court confirms the plan, then the concerns that you have are resolved by the gatekeeper function that is the subject of this motion; is that right?
A I think it depends on the contents of the confirmation order.
Q And if the Court denies confirmation, then the stay remains in effect and the letter related to the removal of the portfolio manager was expressly subject to the stay; isn't that right?
A If the letter says it's subject to the stay? It does say that, but it says other false things as well, so I'm not sure

-- I don't know exactly what you're asking me there.
Q All right. It wasn't a very good question, frankly.
Your counsel responded to the December 23rd letter as well and demanded a retraction; isn't that right?
A Yes.
Q And that was sort of a separate (audio gap) with counsel?
A I'm sorry. You broke up for a second there, sir. I'm sorry.
Q I'm sorry. That -- that' -- let's just skip that. You had testified that neither letter was withdrawn?
A I believe that's correct, yes.
Q Are you familiar -- and -- are you familiar with the fact that, in the response letters, your counsel insisted that there be a response and withdrawal by not later than, I believe, 5:00 on December 28th? Do you recall that?
A I don't recall that specifically, but I accept your representation.
Q And do you know whether or not there was a response dated December 28th?
A I don't believe there was a written response. I don't -- I don't recall.
Q All right.
MR. HOGEWOOD: Ms. Mather, can you call up Defendant's Exhibit 84, which is at Docket 45, please? Thank you.

BY MR. HOGEWOOD:

Q So, Mr. Seery, have you ever seen this letter dated December 28?

A I believe I have, yes.

Q And this letter was not attached to the complaint nor your declaration nor the request for a TRO or preliminary injunction, was it?

A If you say it wasn't. I don't recall specifically.

Q Okay. So, you, by seeing this, you realize now there was a response by the 28th. Is that right?

A Yes.

Q And in the -- let me just direct your attention to the final sentence of the first paragraph. It says -- it makes once again clear that the -- any efforts to remove the Debtor as manager would be subject to applicable orders of the pending bankruptcy case, provisions of the Bankruptcy Code, and specifically, the automatic stay. Do you see that?

A I apologize. I don't see it. Which paragraph?

Q I'm at the very last sentence of the first paragraph. There's a sentence that --

A (reading) Subject to applicable orders in the pending bankruptcy case, provisions of the Bankruptcy Code, specifically, the automatic stay.

I read that, yes.

Q Yes. Okay. There was some testimony about the letter

related to Mr. Dondero's eviction. I don't intend to belabor that. But once again, that was a letter between counsel, was it not?

A I believe it -- I believe it was. I don't recall specifically now. I assume -- I assume all of these were directed to counsel.

Q Right. And again, the fact that counsel wrote a letter requesting that the eviction not occur did not change your process and you proceeded with the eviction, did you not?

A I think the letter came after Mr. Dondero was no longer permitted. Eviction is an odd word. He was no longer an employee, so employee not being able to come into the office and hang around and disrupt business isn't exactly an eviction. So I disagree with your characterization there.

Q Okay. Well, so I'll just leave that. I mean, the -- since this exchange of letters, are you aware -- I mean, there was some testimony about the Debtors presenting the Defendants with the choice of either filing a motion for relief from stay or this injunction proceeding would be brought. Isn't that right?

A Yes.

Q And no motion for relief from stay was filed, and therefore this injection proceeding was brought. Is that correct?

A Yes.

Q So the other thing that you know was filed by the Defendants was an objection to confirmation, which was due on January 5th of 2020, correct?
A I'm sorry, Mr. Hogewood. You broke up. Did you say the other paper or pleading that was filed?
Q The pleading that was filed by the -- these who are Defendants as well as other parties to this case was an objection to confirmation, the deadline for which was January 5, 2020. Are you familiar that an objection to confirmation was filed?
A I'm familiar that one was filed, yes.
Q And so the objection to confirmation raised many of these same issues regarding the circumstances under which the various CLO agreements could be assumed; isn't that right?
A I'm not aware of the specifics of the objection.
Q Okay. But nonetheless, my client was under no obligation to initiate yet another motion or lawsuit or pleading against the Debtor beyond objecting to confirmation, was it?
A An obligation? No.
Q And since the objection to confirmation has been filed, there have been a number of pleadings filed in the case. We obviously were required to respond to the motion for preliminary injunction, and it says there's been an objection filed to that. Are you aware of that?
A That -- that you objected to the preliminary injunction?

Q Yes.
A Yes, yes, I'm aware of that.
Q And --
A I'm very aware.
Q And you're aware that there was a proposed settlement with HarbourVest; is that correct?
A We have an approved settlement with HarbourVest.
Q Right. And there were objections filed to that particular -- or, to that particular settlement agreement, were there not?
A Yes.
Q But none of my clients participated in that objection, did they?
A I don't recall the specifics of your clients versus the other Dondero entities, but I'm certain Mr. Dondero participated.
Q But the De... the parties that we represent did not object to the settlement?
A I don't recall specifically.
Q Okay. And another motion that was filed was for an examiner. Isn't that correct?
A I believe that's the case, yes.
Q Yeah. And my clients didn't join that motion, either?
A No. It's a bit of whack-a-mole, but they did not -- they did not -- I don't -- I don't know. To be honest, I don't

know if they did or not.
Q All right. Toward the end of your testimony, you were giving some information about the value of these management contracts in terms of income over the course of the coming year or two. What is the projected revenue with respect to these management contracts?
A Do you mean the CLO 1.0 management contracts?
Q Yes.
A They generate about four-and-a-half to five million dollars a year, depending on the asset base in total, but that's accrual, as I mentioned earlier. It doesn't all come in in cash. It depends on the waterfall. Expect about two-and-a-half to 2.7 million to come in per year during the course of the projected time period.
(Echoing.)
Q Have you done any sort of profitability analysis on the management contracts?
A Not specifically on those contracts, no. We look at the --
Q Okay.
A -- aggregate of the Debtor's receipts versus its costs.
Q Can you -- so, --
MR. HOGEWOOD: Ms. Mather, can you call up the disclosure statement? This is Docket 1473. And in particular, Page 176.

BY MR. HOGEWOOD:

Q So, I'm, Mr. Seery, I'm trying to square the 779 for the month ended -- month period ended in March '21 and no further revenue coming in on management fees with what you just said.

A I'm not -- I'm not sure why. This should -- certainly should have the management fees according to the CLOs if this was included in the assumption of those. We have revenue, they do generate revenue, they currently generate and they will continue to generate.

Q But this is the disclosure statement approved by the Court, right?

A Yes. I'll have to come back and check why that for the year doesn't have it, unless we were assuming that we wouldn't receive any into the -- into this vehicle. I just, I don't know the answer.

MR. HOGEWOOD: Your Honor, that's all the questions I have. Thank you very much.

THE COURT: All right. Redirect?

MR. MORRIS: Can we just leave this up on the screen for a second, very quickly, for Mr. Seery? Can we put the document back?

REDIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Seery, do you recall that the disclosure statement was approved back in November?

A Yes.

THE COURT: Could you repeat the question? I couldn't hear it.

MR. MORRIS: Yeah. That is -- I don't know if somebody's phone is not on mute.

THE COURT: Yes. Please put your device on mute if you're not the one talking. Okay. Someone did. Go ahead.

MR. MORRIS: Thank you.

BY MR. MORRIS:

Q Mr. Seery, do you recall that this disclosure statement was approved back in November?

A Yeah. What I'd said earlier was that I'm not sure if the -- this plan projection conforms with our decision to maintain the CLO management contracts, and so there certainly should be revenue, while it comes in quarterly on the management fee, the base management fee. And it's not always -- each CLO is not always able to pay it in cash. It will depend on our ability to monetize assets, because they don't -- a lot of the assets are not cash-generative. Some are. For example, the Trussway loan is cash generative. The CCS loan is not.

But I'm just not sure why this doesn't show the management fees at all. At least for the whole year, we certainly will have them, unless this is prior to the determination to assume those agreements.

Q Okay. So if the assumption in November was that the

agreements would be assigned, there would be no revenue shown. Is that fair?

A That would have been the assumption prior to us determining that we wanted to assume them, yes.

Q Okay. And do you recall whether the Debtor became more convinced that it would assume the contracts rather than assign them before or after the disclosure statement was approved?

A I don't recall the specific timing, but a number of things happened around this time. First, the Dondero entities were unwilling to even engage on assignment because they were on a much more aggressive, quote, blow up the place strategy. That's Mr. Dondero's quote.

Number two, we settled with HarbourVest, and that significantly increased the value of maintaining the CLO management. The HarbourVest -- or the HCLOF entities own significant preferred shares in the 1.0 CLO structures, and having management of those and being able to monetize those in accordance with the agreement, maximizing value for the benefit of HCLOF, would be far, far better for the estate than letting these assets just sit. We're not trying to drive the price down, because we wouldn't be in the business of trying to buy back those securities on the cheap. We're in the business of trying to maximize value.

Q All right.

MR. MORRIS: I have nothing further, Your Honor.

THE COURT: Any recross on that redirect?

MR. HOGEWOOD: No, thank you, Your Honor. Appreciate the opportunity to appear before you.

THE COURT: All right. Thank you.

Mr. Seery, before we let you go, I have a couple of follow-up questions.

EXAMINATION BY THE COURT

THE COURT: These CLOs, I mean, you've said a couple of times they're not really traditional CLOs, except for the Acis 7 one. But I have this question. I've learned back in the Acis case most of what I know about CLOs, I suppose. And what the witnesses told me there were they typically had a 12-year life, and then, yeah, there was some period, you know, the first five years, seven years, something like that, where it was in a reinvestment/refinancing phase, but then after that, you know, we couldn't do that anymore and it was kind of heading towards wind-down.

Anyway, my long-winded question is: Do these CLOs work generally like that or not? Because you said they're atypical.

THE WITNESS: They -- they --

THE COURT: Go ahead.

THE WITNESS: They used to.

THE COURT: Okay.

THE WITNESS: So these are extremely old. These go back to 2006, '07, '08. These are very old CLOs. So they're far beyond their investment periods. Some of them are coming up on their maturities on their debt. Many of them don't have any debt at all.

So you'll recall, Your Honor, that a CLO is a vehicle where you take x-hundred million -- we'll use 400 for fun -- million dollars. You ramp up $400 million of assets. You sell off, for our purposes, $350 million of securities. You have the AAA securities, the AAs, all the way down. And then you have these preference shares.

During a period of time, as cash is generated in the CLO, the CLO is entitled to reinvest it. And that keeps it going. And then it gets beyond its reinvestment period and it's in what folks usually refer to as its harvest period. That's when oftentimes, depending on where rates are, depending on asset value, the rates for the debt obligations or the rate you can receive on your assets, you may see refinancings or resets. Otherwise, the CLOs begin to wind down. They have -- they don't have a life, like a partnership with a final date, but there's maturities on the debt and then there's an expectation that they would wind down.

These CLOs -- which typically CLOs only invest in performing loans, and oftentimes, particularly Highland -- and I could regale you with stories how Highland would take

virtually non-interest-bearing, seventh lien debt -- that's a bit of an exaggeration -- but just to keep the fees going, and not actually convert to equity. A lot of these, that wasn't an option, so they've converted to equity. So I just have one that I happen to have on my screen, Your Honor, Gleneagles. The assets in Gleneagles (echoing) are 16 -- MGMs.

THE COURT: Okay. Someone needs to put their phone on mute. All right. I'm sorry.

THE WITNESS: So it has -- it has -- the specifics aren't particularly important, but its assets are -- just this one I just pulled up; they're all a little different, and -- but mostly the same -- MGM stock. This is MGM Studios, which you read about with James Bond, a very valuable asset. Across the Highland platform, there's roughly $500 million worth of stock. It doesn't pay off any income. So if it had debt -- and I'm not sure if Gleneagles still has any; I'd have to switch screens; I don't believe it does; if it does, it's small -- it wouldn't get any income-generating -- that's not income generating asset.

Vistra, which is the TXU stock I talked about before, is the next biggest asset. Skyline Corporation, which was the one we were selling. That's no longer in there. TCI portfolio, which is a Dondero real estate asset it has, it's an old Las Vegas and Phoenix, Arizona real estate developments. Not income-generating. Not that they don't

have value, but this is much more like what would be referred to as a closed-end fund. It's not going to go out and buy anything. It can't. It can only generate cash by selling assets, give that cash to the trustee, and then the trustee pays it through the waterfall. And that's the way all of these CLOs work.

Now, some of them do have debt. And some of them have a lot of debt, and the preferred shares will never be worth any money, so we refer to those as being underwater. No surprise, the Dondero-related entities don't own any of those junior securities.

The -- some do have debt. A lot of that debt is going to get paid off in the first half of the year because there'll be refinancings at Trussway and a refinancing at Cornerstone. They own debt, and that'll generate cash. It'll go to the CLOs, go to the trustee. First it goes to pay the obligations for the outstanding debt of the CLO, and then the asset dollars, they get put through the waterfall to pay the more junior securities.

THE COURT: Okay. And --

THE WITNESS: And I --

THE COURT: The --

THE WITNESS: I was going to give you -- I contrast that to a more typical CLO, which is whether it's beyond its investment period or not, will have something like 150 to 250,

sometimes more, loans in it. 150 would be on the loan side. It'll own -- own those in smaller amounts. It has requirements as to what its concentrations are in different buckets of types of assets. It has to return -- it has to have an income-generating ability to satisfy certain covenants in its debt obligations and in the indenture. And then it will, once it gets past its investment period, it will start to harvest those assets.

There are different ways for the CLO manager to swap assets, to stay in compliance, to extend out the tenure, but usually markets start to move and there's some reason for the CLO manager to do something like a reset or a refinancing or to call the CLO.

So you'll see a number -- there was one this week, and there'll be a number because of the conditions in the market -- of CLOs called by the, effectively, the equity, saying, Great time to sell, I don't need the short income, call the CLO, do a BWIC or some other way to get dollars for all of the assets, pay off all of my debt, and give me the balance of the proceeds.

THE COURT: Okay. All right. And the plan contemplates that these will all be wound down over a two-year period, correct?

THE WITNESS: It's not a hard -- it's not a hard period.

THE COURT: Okay.

THE WITNESS: So it's not a two-year period. We're going to -- we're going to manage these assets, as any asset manager would, and we've had direct discussions with some of the underlying holders, including one of the biggest investors in the world who's an investor in the CLO but also has a couple separate accounts which they want us to manage, and we'll look for opportunities, depending on the market. We're not going to -- we're not going to just sell. It's not a liquidation. We're going to find opportunities where, if we believe it's the right value, we'll sell. That doesn't mean we'll sell it all in a big chunk. We may manage pieces. We may hold on to some.

Some of them may perform -- some of the assets may actually do things differently than others. For example, Cornerstone, for unknown reasons, has $60 million of MGM stock, not an asset that you'd think you'd stuff into a healthcare business, but this is Highland. That may be sold before, for example, Gleneagles sells its MGM. It'll just depend on, you know, market and the need of the specific investor.

THE COURT: All right. Thank you. That's all the questions I have.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. So, Mr. Seery, I think we're

done with you, but we hope you'll stick around for however longer this goes.

THE WITNESS: I will indeed.

THE COURT: Okay.

THE WITNESS: Thank you.

THE COURT: Does the Debtor rest, Mr. Morris?

MR. MORRIS: Yes, Your Honor. There were those couple of documents that we had used from the different docket that we'll certainly put on the docket with the supplement witness and exhibit list. I just wanted to point that out. And I, you know, I don't recall, frankly, if I moved into evidence each of those extras, and I'm happy to go through it, but it's very important to me that those documents be part of the record. So --

THE COURT: Okay. I think what you added was TTTTT, and I think I admitted it. You moved to admit it, and I said yes, but you're going to have to file it on the docket --

MR. MORRIS: Yeah.

THE COURT: -- as a supplemental exhibit.

MR. MORRIS: Right. And then there were the couple from the other -- let me see if I can get them.

THE COURT: I admitted everything else that you filed on the docket except UUUU, VVVV, and AAAAA.

MR. HOGEWOOD: Yeah. And that's fine.

Can we, Ms. Canty, going from Docket No. 46, can we just

call up Exhibit K to make sure that that's in evidence? Docket 46 from the Dondero adversary proceeding.

Okay. So this was the letter, Your Honor, that I used earlier today with Mr. Dondero. If you scroll down, where I examined him on the trading. This is what led into the December 22nd trading, if you go to the next page. So if it's not in evidence, I would respectfully request that this document be admitted into evidence, Your Honor.

MR. RUKAVINA: Your Honor, I object. This document is hearsay of Mr. Pomerantz.

THE COURT: Okay.

MR. MORRIS: Mr. Dondero has already -- I'm sorry, Your Honor.

THE COURT: Okay. So this is -- I wholesale-admitted all of your exhibits with those three carved out that I mentioned. So you're saying I've not admitted this one yet?

MR. MORRIS: I just don't recall, because this wasn't on the exhibit list. I will point out that we had no objection to the entry into the evidence of all of K&L Gates letters, and I'm really a little surprised, having heard the testimony from Mr. Dondero on this particular letter, that there would be an objection. But I would respectfully request that it be admitted as an exception to the hearsay rule.

THE COURT: All right. Well, I'm going to overrule the objection. I'll admit it.

So, again, it has to be supplemented on the docket.

(Debtor's Exhibit K is received into evidence)

MR. MORRIS: Yes. And there's just one other document, Your Honor, from that same docket. It's Exhibit D, Ms. Canty. I just want to make sure that's in the record as well. And I do apologize again, Your Honor.

THE COURT: Okay.

MR. MORRIS: I didn't realize until I was reading --

THE COURT: We're getting terrible distortion. I don't know where it's coming from, but --

MR. MORRIS: Okay. And this is, this is the email that I -- it's Mr. Dondero's own statement, so it's not even hearsay, but I just want to make sure this is part of the evidentiary record, Your Honor. So I move for the admission of this document as well to our exhibit list.

MR. RUKAVINA: I believe this document has been admitted. I believe -- I believe --

(Echoing.)

MR. RUKAVINA: Is that us? Testing.

THE COURT: All right. Mike, where is that coming from?

(Clerk advises.)

THE COURT: Okay. Mike thinks it's Mr. Morris, but -- so put yourself on mute.

Mr. Rukavina, go ahead.

MR. RUKAVINA: Your Honor, I think this exhibit is in already. If it's not, no objection.

THE COURT: All right. So it will be admitted, and again, you need to file it as a supplement, Mr. Morris.

(Debtor's Exhibit D is received into evidence)

MR. MORRIS: Yeah. Thank you, Your Honor. The Debtor rests.

THE COURT: All right. Mr. Rukavina, I want to go a while longer, so let's at least -- do you have Mr. Dondero as well as Mr. Post?

MR. RUKAVINA: I do, Your Honor. I have both.

THE COURT: Okay. Well, let's go. You may call your witness.

MR. RUKAVINA: Your Honor, we'll call Jason Post.

THE COURT: All right. Mr. Post, I swore you in earlier and I consider you still under oath. Do you understand that?

MR. POST: I do.

THE COURT: All right. Go ahead.

JASON POST, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

MR. RUKAVINA: Oh, turn on the video. Can you see how to do that? Is Jason on the video? Okay. All right. Mr. Post? Hold on a second. I'm hearing myself.

THE WITNESS: I'm hearing the same.

MR. RUKAVINA: Let me turn down my volume. Testing.

Okay. Mr. Post, can you hear me?

THE WITNESS: Yes.

MR. RUKAVINA: Okay.

DIRECT EXAMINATION

BY MR. RUKAVINA:

Q You were asked about some of your background and qualifications. Just so that the record is clear, you are the chief compliance officer for both two Advisors and each of the Funds, correct?

A Correct.

Q And I think we refer to these three defendant funds as retail funds; is that correct?

A Correct.

Q Describe what we mean or what you mean by a retail fund.

A I look at it two ways. There's private funds, which are institutional in nature, and retail funds, which are comprised of open-end funds, closed-end funds, BDCs, ETFs, and that constitutes the suite of funds that are advised by Highland Capital Management Fund Advisors and NexPoint Advisors. And they generally have a broad swath of investors, including institutional investors, but also, you know, just regular mom-and-pop investors.

Q Okay. So, for the Highland -- I'm sorry, for the three retail funds, how much in ballpark investments do they have in the CLOs that are at issue today? Ballpark.

A Maybe call it a hundred million, ballpark. Or a hundred million, give or take.
Q Okay. And for all of the CLOs that Highland manages that the Advisors and other Funds have an interest in, do you have an estimate of how much it manages of CLO assets?
A I believe it's approximately a billion, a little over a billion that HCMLP manages for its CLO assets.
Q Do you have an estimate of how many individual investors there are in the three retail funds?
A I -- thousands. I don't have an exact number.
Q Okay. And I think you mentioned some of the types. Do you have any names of the types of investors that Her Honor might know or have heard of before?
A Off the top of my head, I do not, just -- but they're generally constituted or characterized of the investor types that I mentioned earlier.
Q Okay. Now, these three retail funds, do they own voting preference shares in any of the CLOs that the Debtor manages?
A Yes.
Q Okay. Do they own a majority in any of those CLOs' voting preference shares?
A In aggregate, across the three, they would.
Q Okay.
A With other CLOs.
Q What are those three CLOs, sir?

A I believe it's Greenbrier, Graceland, and Stratford, if I recall correctly.

MR. RUKAVINA: Your Honor, have you received a couriered binder of our exhibits?

THE COURT: I have. I've got them right here.

MR. RUKAVINA: Now I can't hear the judge. What's she saying?

THE COURT: Yes. I've got them.

MR. RUKAVINA: I think you're on mute, Judge.

MR. VASEK: No, you turned your volume down.

MR. RUKAVINA: Oh. I apologize, Your Honor.

So, Mr. Vasek, if you'll please put Exhibit 2 up.

BY MR. RUKAVINA:

Q Mr. Post, are you the custodian of records for the Funds and Advisors?

A Yes. We're required to keep records of ownership and trades for the Funds involved.

Q And you are an actual officer of these Funds and Advisors, correct?

A Correct.

Q Okay. Are you familiar with this Exhibit 2?

A I am.

Q Did you participate in pulling together the underlying information with others to prepare Exhibit 2?

A I did.

Q Does Exhibit 2 accurately reflect the current ownership of the various CLOs by the three retail funds that are --

A At the time it was put together, I believe it did.

Q And approximately when was that?

A I believe it was in the November time frame, middle of November, end of November.

Q Do you have reason to believe that the numbers we're referring to would be materially different today?

A I don't believe they would be materially different.

MR. RUKAVINA: Your Honor, I move for the admission of Exhibit 2 as a summary of underlying data.

THE COURT: All right. Any objection?

MR. MORRIS: Yes, Your Honor. It's hearsay. I understand that the witness has testified to it, but just as I put in the backup for my demonstrative, where's the backup? We're just supposed to take his word for it? There's no ability to check this. This is not evidence. It's a demonstrative.

THE COURT: All right. Mr. Rukavina, do you have backup?

MR. RUKAVINA: Let me ask the witness a couple more questions.

BY MR. RUKAVINA:

Q What would be the backup for this Exhibit 2?

A We'd have to pull the holdings from the intranet and that

would identify the quantity that's held by each of the respective funds and then an aggregate that, over the preference shares outstanding, would give you the percentages that are outlined in this exhibit.

Q Okay. And is that a database that you have personal access and authority over?

A I have personal access to it. Yes.

Q Okay.

MR. MORRIS: Your Honor, *voir dire*?

BY MR. RUKAVINA:

Q Can you easily take that data from a computer and show it to the Court here today?

A Yes. It would just require the CUSIPs for each of the preference shares and then plug it into the intranet and then that would provide a screenshot of the ownership of the CLOs.

Q And is this what that is, basically?

A This is an aggregation -- or, this is a percentage of the shares outstanding, the preference shares. So what would be shown on the intranet would be the quantity and then you'd have to tie that back to the shares outstanding and that would give you the percentages that are shown on this exhibit.

MR. MORRIS: *Voir dire*, Your Honor?

THE COURT: I'm sorry?

MR. MORRIS: May I inquire before this --

THE COURT: Mr. Morris, is that you? Okay. You want

to take him on *voir dire*?

MR. MORRIS: Yes.

THE COURT: Go ahead. Uh-huh.

VOIR DIRE EXAMINATION

BY MR. MORRIS:

Q Yes. Mr. Post, did you prepare this document?

A I provided information and the document was ultimately prepared by counsel.

Q So you didn't personally prepare this, right?

A I didn't personally put this chart together.

Q And you didn't personally make the calculations on this chart, right?

A I would have supplied or assisted in supplying the holdings with reference to the shares outstanding and then they would have done the math to place the percentages.

Q I'm asking a very specific question. You didn't do the calculations necessary to come up with the percentages on this chart, right?

A Me personally, no, I did not.

Q And you can't verify that this chart is accurate, can you?

A I provided, provided the information. Then it's a mathematical calculation.

Q Okay. You didn't take any steps to determine the accuracy of this chart, right? You relied on others?

A There's a -- I would have cross -- you know, maybe cross-

referenced some of the percentages against another spreadsheet that was -- that we had internally.

Q Sir, I didn't want to know what you would have done. You didn't do anything to confirm the accuracy of all of the numbers on this page, correct?

A I believe I may have spot-checked a couple of them. I can't recall specifically.

MR. MORRIS: Your Honor, not only don't we have the backup, but this witness isn't even competent to testify to the accuracy of the chart. I renew my objection.

THE COURT: All right. I sustain the objection.

MR. RUKAVINA: Your Honor, I'll --

THE COURT: It's not allowed.

MR. RUKAVINA: Going back to the -- take that down.

THE COURT: All right. Mr. Rukavina, we're -- our connection to your office is suddenly not very good. Both you and Mr. Post are very hard to hear. So let's see what we can to improve.

MR. RUKAVINA: Is it a question of loudness or quality?

THE COURT: Quality. And I heard you fine just then, but -- so let's try again.

DIRECT EXAMINATION, RESUMED

BY MR. RUKAVINA:

Q Mr. Post, let's go back to those retail funds. How are

those funds managed at the top level?
A They're overseen by a board of trustees.
Q Okay. Do you interact with that board of trustees periodically?
A I do.
Q Okay. Approximately how often?
A At least quarterly, and generally intervening periods. I'd probably say anywhere from every five to six weeks, if not more frequent.
Q Have you been communicating with them more frequently recently?
A Yes.
Q As the CCO of the funds, who do you ultimately report to?
A The board.
Q Is Mr. Dondero on any of those boards?
A He is not.
Q Okay. Are those boards capable, to your experience, of making independent decisions?
MR. MORRIS: Objection to the form of the question.
THE COURT: Overruled.
THE WITNESS: I think the question, is are they capable of making independent determinations? Yes.
BY MR. RUKAVINA:
Q Okay. Explain the interaction between the Fund Advisors and the retail funds. What -- what does the one do for the

other, if you will?
A I'm sorry. Can you repeat that? I didn't -- I didn't hear the question.
Q So, we have the three retail funds.
A Yes.
Q What relationship, if any, is there between the two Advisor defendants and any retail fund defendants?
A So, there's an investment advisory agreement that the Funds have entered into with the investment advisor, and the investment advisor performs investment functions on behalf of those Funds, along with other noninvestment functions.
Q Okay. So is it fair to conclude that, for investment purposes, the Advisors make pretty much all, if not all, decisions for the three Funds?
A Yes.
Q Okay. What about other matters that the board might consider? Do the Funds make -- I'm sorry. Do the Advisors make other decisions for the Funds, or is it an advisory role?
A The Advisors may make other decisions or recommendations, which they then set forth to the board for their approval, if needed.
Q Okay. Does the board have independent counsel?
A They do.
Q Okay. Have you interacted before?
A I have.

Q And is it fair to conclude that the board not only is capable of making independent decisions but has made independent decisions recently?

MR. MORRIS: Objection. Leading.

THE COURT: Sustained.

THE WITNESS: They have.

MR. RUKAVINA: Okay.

THE COURT: That was --

MR. RUKAVINA: And we'll get --

THE COURT: You don't answer.

MR. RUKAVINA: Go into that in another bit.

THE WITNESS: Oh. Sorry.

MR. RUKAVINA: Okay.

BY MR. RUKAVINA:

Q Explain to the Court what your role as the chief compliance officer for the Advisors and the Funds is.

A I think, as you mentioned earlier, it's interaction with the board. Also with regulatory bodies to the extent examinations occur. It could be to ensure oversight and compliance with a fund's prospectus and SAI limitations, and then it's establishing policies and procedures and ensuring that those policies and procedures are adequate to detect any sort of violations that could occur by the Funds.

Q And are you an attorney?

A I am not.

Q Do you frequently work with attorneys?
A I do.
Q Both in-house and external?
A Yes.
Q Good. And do you frequently rely on the advice of counsel?
A I do. At times will present, you know, if there is a question or an issue, present the background to either internal or external counsel and then request their advice on certain matters.
Q So when counsel was asking about why you wouldn't appear at a hearing or listen to a hearing or read a transcript of a hearing, are those the kinds of things that you would rely on counsel?
A Yes. If counsel were to tell me to, you know, attend the hearing, I would have attended the hearing.
Q Okay. Does -- do the Funds and Advisors also have in-house counsel?
A Yes.
Q I think we established that's D.C. Sauter?
A He's been the primary point of in-house counsel more recently, I'd say, within the past three to four months.
Q Okay. And would you expect that perhaps he would be attending hearings and reading transcripts instead of you for some of these litigated matters?

MR. MORRIS: Objection to the form of the question.
THE COURT: Overruled.
MR. MORRIS: Leading.
THE COURT: Overruled.
THE WITNESS: I believe he would be.
BY MR. RUKAVINA:
Q Okay. Well, the implication was made, Mr. Post, that somehow you were negligent as CCO by not following the December 16th hearing. I'd like to know, --
THE COURT: Okay. Could you -- could you repeat --
BY MR. RUKAVINA:
Q -- Did you have counsel at the hearing and did you hear from --
THE COURT: Mr. Rukavina, start over with your question. It was a little hard to hear.
MR. RUKAVINA: Okay.
BY MR. RUKAVINA:
Q Mr. Post, the implication had been made that, because you weren't at the December 16th hearing and because you had not read the transcript, that you were somehow deficient as a CCO. I'd like to know, Did you have the benefit of outside counsel's views both before and after that hearing as to that hearing and what happened?
A Yes.
Q It's not that you put your head in the sand and ignored

what's happening, is it?
A That is correct.
Q Okay. And is it fair to say that when you deal with compliance, you deal with complicated statutes and regulations?
A That is correct.
Q Okay.
MR. RUKAVINA: Mr. Vasek, if you'll please pull up (garbled).
(Pause.)
BY MR. RUKAVINA:
Q Okay. Taking you back to Mr. Morris's questions, do you recall Mr. Morris asking you whether you believe that any of the trades that were being discussed were deceptive?
MR. MORRIS: Hold on one second, Your Honor. What exhibit is this?
THE COURT: I don't know. What is it?
MR. RUKAVINA: Can you hear me, Mr. Post?
THE WITNESS: They're asking a question as to what exhibit this is.
MR. RUKAVINA: Your Honor, this is not an exhibit. This is a Commission Interpreting Regarding Standard of Conduct for Investment Advisors, an SEC regulation in conjunction with 17 CFR 276.
THE COURT: Okay. How are we --

MR. RUKAVINA: So, Your Honor, these are the actual regulations.

THE COURT: I mean, it's -- okay. The answer to the question is it's not an exhibit. You have pulled up 17 CFR part 276. Is that what the answer is?

MR. RUKAVINA: Yes, Your Honor. And I haven't offered this as an exhibit.

THE COURT: All right.

MR. MORRIS: You have -- Your Honor, I don't know why this is being put up on the screen now. It's not an exhibit. It's not in the record like a couple of those that I had. I used the statute that he relied on to cross-examine him with the 206. I don't know what this is. I don't know if it's accurate. I don't know anything about it.

MR. RUKAVINA: Your Honor, this is a rule and regulation. This is not an exhibit. If it is an exhibit, I haven't moved to admit it yet. I'm going to use this to refresh his memory and explain why he believed that the actions were deceptive, a door opened solely by Mr. Morris.

MR. MORRIS: His recollection hasn't -- there's no need to refresh it yet. He hasn't even answered a question where he says, "I don't remember."

THE COURT: Okay. I sustain the objection here. I mean, you can ask him a question, but, again, it's kind of hard for us to tell what this is, actually. I mean,

Commission Interpretation Regarding Standard of Conduct for Investment Advisors. I mean, is this actually a -- I mean, it's not a statute. I'm not even sure it's a reg. It's --

MR. MORRIS: Okay.

THE COURT: I don't know what it is. So, --

MR. RUKAVINA: Your Honor, we'll lay a predicate later. First, let me ask some other questions.

BY MR. RUKAVINA:

Q Again, you recall that you were asked whether, pursuant to Section 206 of the Advisers Act, you believed the trades that have been discussed were deceptive. Do you recall?

A Yes.

Q Okay. And you answered that you believed that they were deceptive?

A Correct. I did.

Q As the CCO, do you have an understanding of what role, if any, conflicts of interest play in an advisor's duties under the Advisers Act?

A Yes.

Q Okay. What is your understanding?

A All -- all known material conflicts of interests need to be disclosed -- need to be disclosed by the advisor to the underlying investors.

Q Okay. And why, why do those conflicts of interests have to be disclosed?

A Because an advisor could have a view that may deviate from the underlying investors' view of how the portfolio could be managed and in contradiction to it.

Q And do you have an understanding as to whether, pursuant to your experience as the CEO [sic], the Advisers Act and the SEC regulations (garbled) it require an advisor to adopt the principal's goals as opposed to his or her own goals?

MR. MORRIS: Objection to the form of the question. Your Honor, he has not been offered as an expert. He shouldn't be permitted to provide -- this is -- this would be, at best, expert testimony. I asked him 30 different questions about his background. He's got no training. He's got no licenses. He's taken no special courses. He doesn't have anything except on-the-job training. This is not right.

MR. RUKAVINA: Your Honor, Mr. Morris got to ask yes-and-no questions all day, leading questions, and the witness was told that he could explain his answers. The Court told him that. And I am trying to explain his answer as to why he believed that these transactions were deceptive, especially because the allegation is that we willfully and intentionally violated the stay by sending letters that this witness authorized. So understanding his understanding is very important to Your Honor's determination of the actual --

THE COURT: Well, I sustain the objection.

MR. RUKAVINA: And Mr. Morris opened this door.

THE COURT: You can ask him why he thought the actions were deceptive, but he's starting to go into what may or may not be CFRs and conflicts of interest. No. This is going well beyond asking him, Why do you think it was deceptive? And I agree: It's straying into expert testimony.

BY MR. RUKAVINA:

Q Mr. Post, you are familiar with the December 22nd AVYA and SKY sales and transactions which you were asked about by Mr. Morris and that you previously have testified about, correct?

A Correct.

Q Okay. How are you familiar with those sales and transactions as they were occurring? How did you learn about them?

A There was some internal email correspondence. If I recall from memory, at the bottom it provided fill information that Jefferies provided to, I believe, Mr. Seery and others on the email. And then it kind of worked its way up to get the trades that had been executed administratively booked into the OMS.

Q Why did you get involved with those transactions?

A They were requesting that employees of HCMFA book those -- I'm sorry, Highland Capital Management Fund Advisors -- book those into the system. And those employees were not a party to the trade. I don't believe --

Q Well, let me pause you. Let me pause you. Those two employees, who were they?
A Joe Sowin and Matt Pearson.
Q Were they at that time employees of the Debtor?
A They were not.
Q Okay. So, how did you come to learn about this ask that those two employees book -- book it?
A I believe there was an email that was sent to me, or I was on it. I can't recall specifically.
Q Okay. And did you undertake any review as to whether those two employees should or should not do what was being asked of them?
A Once it was brought to my attention, I discussed with -- I looked at it. It looked like, pursuant to prior correspondence with -- that Joe Sowin made, he wasn't aware of the trades.

You know, I also had a discussion with K&L based off of -- our legal counsel based off of a prior letter that was sent, and just it didn't -- it didn't look right that they would be booking trades on behalf of the two Advisors that are named in the letters when they had nothing to do with it and weren't -- weren't a part of any of the pre-trade compliance checks, et cetera.

Q What is a pre-trade compliance check?
A Well, there's an electronic system, a -- or a management

system we have, the OMS, which is called Verda (phonetic). And generally, trades are entered into the system by the portfolio manager, and they then go through pre-trade compliance checks. And once those compliance checks are passed, they're then routed to the trading desk for direction or execution, where the executing brokers and the trading desk will then monitor that execution over the course of the day. And at the conclusion of the trading day, those trades, if they weren't already allocated, would be allocated, and then a trade would be sent to custodian prime brokers to identify the trades that occurred in the respective Funds for those -- or, on that day, and then they would then be dropped into the database and our -- the settlement team would kind of work to settle those trades or ensure that those trades were settled based off of the stipulated time frame for settlement on the trades.

Q So, in all that course of a transaction, what exactly was it that those two employees of the Advisors were being asked to do on behalf of the Debtor? What exactly were they being asked to do?

A To just book them in the system because they are trades that already have been executed.

Q Did you stop that?

A I believe I responded and said, you know, it -- they're employees of, if I recall, employees of one of the named

Advisors, and believe those trades are in the best interest of those Advisors, and separately, you know, the Debtor has designated operators/traders that should be able to enter those trades as well, aside from Mr. Sowin and Matt Pearson.

Q So can you think of any reason why Mr. Seery would ask your employees, as with his own employees, to book these trades?

A I believe based off of past practice.

Q Okay. But nevertheless, those two trades did not comply with internal compliance?

A They weren't run through the OMS. We try and route trades through the order management system because there's pre-trade compliance checks that can be performed, and it reduces any sort of back-end reallocation or trade errors that may occur as a result of, you know, trades being entered after the fact, because quantities could be, you know, referenced incorrectly or funds could be identified incorrectly.

Q Based on prior practices, have these internal policies been followed when perhaps employees of the Debtor asked employees of the Advisors to take a particular action in the course of a transaction?

A Yes.

Q When internal practices are not followed, what is your job? What are you supposed to do?

A When internal practices are followed, --

Q Are not followed.
A Oh. Not followed? To the extent that they're not followed, we would question, you know, number one, why weren't they followed? You know, we -- we try and have all trades booked in the OMS so that the necessary checks could be performed, and as I mentioned earlier, to avoid any reallocation or trade errors. So I would then question, you know, why was this done outside of the system?
Q And if you did not get an appropriate response back to your question, what are you supposed to do?
A If I didn't get an appropriate response, would, you know, research it further and elevate it to senior management and/or any of the board if it was ultimately an issue.
Q Are you supposed to stop trades or stop the process if you see something that you believe is not compliant with your obligations and the fiduciary obligations of the Advisors?
A Yes.
Q Have you done that in the past?
A Yes.
Q Have you done that frequently, or infrequently?
A I would say it's -- it's infrequent, but they do occur. For example, if a fund is trading in a security that it's not permitted to invest in based off of a prospectus limitation, it would get flagged in the OMS and we would then not permit the trade to go forward because it could cause the breach to

go further offsides or it could cause it to go offsides.
Q Okay. And these December 22nd trades, were they the type of, in your past experience, problematic trades like you have interfered or stopped or intervened to stop in other situations in the past? Do you understand my question? That was an inartful question. Do you understand it?
A If the question is because they were done outside of the system?
Q Yes.
A And repeatedly?
Q Yes.
A I would have raised the question with the trading desk or the portfolio manager as to why that's being done, because it was not in -- not consistent with how we instruct trades be booked.
Q Did Mr. Dondero, for these December 22nd transactions, tell these two employees not to book the trades?
THE COURT: Okay. Please repeat the question. It was garbled.
MR. RUKAVINA: Thank you, Your Honor.
BY MR. RUKAVINA:
Q For these December 22nd trades, did Mr. Dondero tell those two employees not to book the trades?
MR. MORRIS: I object, Your Honor. No foundation. This witness has no personal knowledge to testify to this --

to answer this question.

THE COURT: Overruled. If he knows.

THE WITNESS: I do not know.

BY MR. RUKAVINA:

Q Okay. Do you have a reason to believe that he did?

A I don't know. I just saw the email traffic and Mr. Sowin, I believe, was questioning the trades, you know, more in the sense that he wasn't aware of them. So, I don't -- I don't know what kind of conversations, what happened in the background, just that he -- he didn't recognized that rates.

Q Let me try it this way. You determined that these trade would have violated the Advisors' policies and procedures, correct?

A Yes, because they were done outside of the OMS.

Q Did Mr. Dondero tell you to come to that conclusion?

A He did not.

Q Did Mr. Dondero pressure you to come to that conclusion?

A He did not. He had indicated that there -- there are these trades, and you should take a look at it from a legal compliance perspective, which I did.

Q And you talked to K&L Gates?

A Correct.

Q And when Mr. Dondero told you to look at these trades, did he suggest to you in any way, shape, or form what you should conclude or decide to do, if anything, with respect to these

trades?
A I don't believe so.
Q Okay. Let's go back to that question about your view that some of what Mr. Seery was doing was deceptive under the 1940 Investors Act. When did you form that view?
A I believe it was after it was identified that there was not (inaudible) on certain of the trades that were entered into at the end of the November time frame, the SKY and AVYA trades.
Q And why did you form the opinion that those trades that Mr. Seery was attempting to do or had done were deceptive under the statute that Mr. Morris asked you about?
A It was pursuant to reviewing them and supplemental discussion. A review with the portfolio managers and then supplemental discussion with K&L be it from a (inaudible) perspective, through, you know, perform in the best interest of your clients, it was expressed that, at least with respect to preference shareholders, they were supposed to maximize value, and those sales, they're not really maximizing value.

And it was also identified that the Debtor was planning to liquidate the CLOs based off of a filing within the Court within a few-year period. And the investors -- or, the Funds that invested and the preference shareholders, or preference shares, had a longer-time view in those assets.

So the sales, coupled with the short duration, or the

anticipated, you know, two-year duration, didn't line up with the investment objective that they were seeking to maximize returns.

Q To your understanding and your experience, does the servicer of the CLOs owe fiduciary duties to anyone?

THE COURT: Okay. I cannot -- someone is flipping paper. Please stop flipping paper. Okay. Repeat your question, Mr. Rukavina.

MR. RUKAVINA: Thank you, Your Honor.

BY MR. RUKAVINA:

Q In your experience and in your knowledge, does the servicer of the CLOs owe fiduciary duties to anyone?

A They should, yeah, the underlying investors in the CLO, whether it be the Debtor or the equity holders.

Q Do the Advisors owe fiduciary duties to anyone?

MR. MORRIS: Your Honor, I'm sorry, I apologize. I really do move to strike. He's not a lawyer. There is no foundation. He's not here as an expert. There's no basis for this witness to be talking about who owes who fiduciary duties. I don't even think that's the law, what's just been stated.

THE COURT: Okay. I sustain.

MR. RUKAVINA: Okay.

BY MR. RUKAVINA:

Q Well, let me make it very easy, then. Do you have an

understanding as to whether Advisors subject to the 1940 Act owe a fiduciary duty?
A Yes.
Q Do you have an understanding of how a conflict of interest plays into a fiduciary duty?
A Yes.
Q What is your understanding?
A If there's a material conflict of interest, it should be disclosed.
Q And what did you conclude with respect to Mr. Seery and the Debtor once the Debtor stated that it will liquidate within two years?
A That's not the investment horizon that the underlying preference shareholders have, especially with respect to the underlying assets held in those CLOs. More or less, you're -- they're now put on a clock, and those preference shareholders may have a longer-term view on the underlying assets of those CLOs.
Q Let's move on to those December 22nd and December twenty -- well, let me strike that. You heard Mr. Seery testify that those December 22nd trades closed, correct?
A I did.
Q And did you independently look at whether that's true?
A I did.
Q And what did you conclude?

A They showed a sale in the -- on the intranet.
Q Okay. Let's move on to the December 22nd and December 23rd letters. Are you familiar with those letters from K&L Gates to counsel for the Debtor?
A I am.
Q And did you participate in preparing those letters?
A I did.
Q Okay. And I think Mr. Morris asked you and I think you testified you supported or agreed with the sending of those letters. Is that generally accurate?
A Yes.
Q Why? Why did you support sending those letters?
A It wasn't in the best interest of the Funds pursuant to discussions with the portfolio managers and the investment objectives that they were looking to seek any of those investment in the preference -- preference securities and CLOs.
Q Was that a purpose that you were trying to achieve by sending those?
THE COURT: Repeat the question.
THE WITNESS: Ah, --
THE COURT: Repeat the question.
BY MR. RUKAVINA:
Q Was that a purpose that you were trying to achieve by sending those letters?

A Yes. I believe there was something towards the end of one or both letters that said, to the extent, you know, transactions occur, if, for lack of better words, a courtesy heads up could be given to the Funds and the Advisor.

Q Did you intend in any way to intimidate the Debtor by authorizing or supporting the sending of those letters?

A No.

Q Did you intend in any way to violate the automatic stay by sending those letters?

A No.

Q Were you trying to engage the Debtor in a dialogue at that time as to what to do with these CLO management agreements?

A Yes. I believe that was stated at one -- at the end of one or both of the letters.

Q And I think Mr. Morris discussed with you that the Debtor sent back letters asking you to withdraw these two letters. Do you recall that discussion?

A Yes.

Q And do you recall saying that we never withdrew these letters, right?

A Correct.

Q Why did we not withdraw these letters?

A Because we don't believe that the trades that are being entered into are in the best interest of the shareholders -- *i.e.*, the Funds.

Q To your knowledge, did we ever, or did you ever, communicate to the Trustees or Issuers anything in the nature of instructing them to terminate the CLO management agreements with the Debtor?
A I did not.
Q To your knowledge, did anyone, for the Funds or Advisors?
A I don't believe so.
Q Did you or anyone to your knowledge communicate to the Issuers or Trustees that the process of removing the Debtor as manager should commence?
A I don't believe so.
Q Okay. To your knowledge, have any of the Issuers or Trustees undertaken any steps to remove the Debtor or terminate these contracts?
MR. MORRIS: Objection to the extent it calls for the conduct or knowledge of the Issuers.
THE COURT: Overruled. He can answer if he knows.
THE WITNESS: I don't believe so.
BY MR. RUKAVINA:
Q Had they, is that something that you would have expected them to inform the Funds of?
A Yes. The Funds would have received some type of notification if there was a new Advisor on the CLOs.
Q So, other than these two letters -- let me stop there. Did any discussion of trying to terminate these contracts

basically cease with the sending of these two letters and the Debtor's responsive letters?

A That's my understanding, yes.

Q Okay. And we never did file a motion for lift stay. Can you explain to the judge why we didn't file a motion for relief from the stay?

A It's my understanding that the intent was that the management of the CLOs was going to be heard in conjunction with the confirmation hearing.

Q And do you recall when that confirmation hearing was originally set for?

A I believe it was supposed to start today. Or tomorrow.

Q Well, wasn't it earlier in January? Around January 11th?

A Uh, I -- I don't recall specifically.

MR. RUKAVINA: Mr. Vasek, if we could pull up the Form CLO agreement. What exhibit is that?

(Pause. Counsel confer.)

MR. RUKAVINA: No, that's not.

THE COURT: Can I ask what we're about to start doing?

MR. RUKAVINA: Eight.

THE COURT: Can I ask what we are about to start doing?

MR. RUKAVINA: Your Honor, I apologize. I'm trying to find one of the CLO portfolio management agreements. I'm

trying to pull it up for you.

THE COURT: Okay.

MR. RUKAVINA: It should be in your binder.

THE COURT: All right. Well, --

MR. RUKAVINA: Where is it, Julian?

MR. VASEK: It should be 8.

MR. RUKAVINA: I'm sorry?

MR. VASEK: 8.

MR. RUKAVINA: Your Honor, it's Exhibit 8 in your binder.

THE COURT: Exhibit --

BY MR. RUKAVINA:

Q And Mr. Post, you have that in front of you, right?

MR. RUKAVINA: Mr. Vasek, if you'll go to Page 14, please. Section 14. Termination by the Issuer for Cause.

MR. VASEK: Okay.

MR. RUKAVINA: Your Honor, the contract speaks for itself, and I'm not about to read the contract to the Court. The Court can read. I want to ask him certain questions about this. And you'll note that the contract gives the requisite holders of voting preference shares certain rights.

MR. MORRIS: Your Honor, respectfully, the witness has testified that he hadn't seen any of these contracts for five or six years, until the lawyers asked him to look at it, and they told him which specific provisions to look at.

The document does speak for itself. Counsel should just make it part of his closing argument. There's no evidence that there's a quote/unquote Form CLO Management Agreement. And I would just respectfully suggest that this is better saved for closing argument.

THE COURT: Yes. What are we going to do here? He did not seem like he was an expert on these CLOs in his earlier testimony. He hadn't read much of them until recently. So where are we going with this?

MR. RUKAVINA: Well, Your Honor, the question, again, is -- can you hear me? The question again is, Are we going to be enjoined from exercising any rights in the future, so I would like to take the witness through the importance from a regulatory perspective and a fiduciary perspective of some of these rights. If Your Honor thinks that that's for closing argument, that's fine. But I will note that that Your Honor allowed Mr. Morris for some forty minutes to read prior testimony into the record.

MR. MORRIS: I'm happy to respond if Your Honor needs me to.

THE COURT: Go ahead.

MR. MORRIS: There is a complete difference, Your Honor. To read statements against interest, to read defense's own sworn statements that they made at a prior proceeding, as opposed to trying to get a witness who has admitted that he's

not familiar with these documents, to try to convince the Court that they said something that the witness doesn't have any personal knowledge or expertise about. It's completely different.

THE COURT: All right. I sustain the objection. You can make whatever argument you want in the closing arguments about whatever provisions of whichever CLO agreements justify actions. I guess that's where we're going.

MR. RUKAVINA: Then, if you could pull up Exhibit 78, and if Your Honor could turn to Exhibit 78.

THE COURT: All right.

MR. RUKAVINA: Is this a confidential -- Julian, what does it mean, it's confidential? 78. Is this confidential?

MR. VASEK: It says confidential on the --

MR. RUKAVINA: Your Honor, apparently this is a confidential document, so how does the Court want to proceed on this WebEx?

THE COURT: All right. We're stopping. We're stopping. We have protocols in place in this case, and people usually file motions to present things under seal or redactions. My patience is shot, so we're going to stop. Let's talk about where we go from here.

MR. MORRIS: If I may, Your Honor?

THE COURT: Yes.

MR. MORRIS: John Morris from Pachulski Stang --

THE COURT: Uh-huh.

MR. MORRIS: -- for the Debtor.

MR. RUKAVINA: We filed this under seal, right?

MR. MORRIS: We were --

MR. RUKAVINA: Oh, I thought we had.

MR. MORRIS: -- hoping that we would get this finished today, Your Honor, and the Debtor was really hoping to get a ruling before confirmation. But given all that's in front of us, including the contempt hearing next Friday, just a couple of days after the confirmation hearing, I think the Debtor at this point is prepared to agree, if it's okay with the Defendants' counsel, to push this to the following week, since the -- you know, with the understanding that everybody stipulate on the record that the TRO stays in place. And if we could have this particular motion heard, I guess, somewhere -- it's the week of February 8th, the Debtor would consent to that.

THE COURT: All right. Do we already have a --

MR. RUKAVINA: Your Honor, can the Court --

THE COURT: -- setting that week? Because I know we have confirmation, what, are we set for the 2nd, 3rd, and 4th? Three days next week.

MR. MORRIS: I believe -- yeah. I think it's just two, Your Honor. I think --

THE COURT: Okay.

MR. MORRIS: -- confirmation is the 2nd and the 3rd, and then I think the 5th is the contempt hearing. I'm not aware, but I don't -- I don't profess to know the entirety of the calendar. I'm not aware of anything that's on for the following week.

THE COURT: Does it make sense to continue this to the 5th? Because the issues are so overlapping here. I feel like it's been a contempt hearing half of today, actually.

MR. MORRIS: Yeah.

THE COURT: So, shall we just set it for -- is it Friday, the 5th?

MR. MORRIS: It is.

THE COURT: At 9:30?

MR. MORRIS: And I think that's a great idea, yeah. Yeah.

THE COURT: What do you want to say about that, Mr. Rukavina?

MR. RUKAVINA: Thank you, Your Honor. We're fine with that.

Let me just point out, so that if the Court is impatient or frustrated, we did move Exhibit 78 to be filed under seal. The Court did enter an order allowing it to be filed under seal. So that the Court doesn't think that somehow we were negligent in that.

But February the 5th works for us.

THE COURT: Okay. All right. So I have an unredacted clean copy up here, which, if and when I admit it, we will put it under seal in our exhibit room, or I guess our electronic exhibit room.

So, we'll come back on the 5th at 9:30. But I am not -- I am not done. Yes, I am frustrated. Yes, I'm impatient. I have asked myself "Why are we here?" so many times today. Why are we here? I mean, I've had this conversation before. I mean, we had a, as you know, a very lengthy hearing on the motion for a TRO or preliminary injunction against Mr. Dondero personally. And I think it was Mr. Morris who said, it's a little bit like Groundhog Day. You know, that was actually a more flattering way of describing it than I might have. I might have said this is reminding me of Albert Einstein's definition of insanity. You all know what I'm talking about? When you're doing the same thing over and over again and expecting a different result.

And, you know, no offense, Mr. Dondero, if you're still there listening, but that's what it feels like to me. I mean, it is -- it's the same thing over and over again. And we've spent very, very, very little time talking about the January 9th, 2020 corporate governance settlement agreement. Of course, it was mentioned extensively in the pleadings, at least by the Debtor. But, you know, I've heard all of this evidence today, and I'm going to hear more evidence,

apparently, on the 5th. But Paragraph -- was it 9? -- Paragraph 9 of the January 9th, 2020 settlement agreement. The order directed Mr. Dondero not to "cause any related entity to terminate any agreements with the Debtor."

And, you know, I thought to myself as I was reading, preparing for this hearing, that, you know, I seem to remember those words meant so, so much to me. And then this reply brief was filed by the Debtor at 6:00 or 7:00 o'clock last night, and it gave an excerpt of the transcript, the hearing where I approved this corporate governance settlement agreement, and I said, that language is so important to me because of my history in the *Acis* case, I want it in the order. I don't even -- I don't want it merely in the term sheet, and then, of course, the order cross-references, approves the term sheet. I want that in the order. Because, you know, I knew, even with this highly-qualified independent board of directors, and even with this very sophisticated Creditors' Committee with very sophisticated professionals monitoring everything that happened, and having not just the monitoring rights but the standing to pursue things, I knew, even with this great system that had been negotiated in the January term sheet, there was the possibility of things happening through Dondero-controlled entities indirectly. And so that's why we had that Paragraph 9. So, --

(Interruption.)

THE COURT: I don't know what that was I just heard, but someone needs to put me on mute.

So, I mean, we've heard a lot. We've heard a lot, but --

MR. DONDERO: Hello? Your Honor? Your Honor?

THE COURT: Okay. I --

MR. DONDERO: Hi. Jim Dondero.

THE COURT: Oh, okay. I'm still talking. I'm still talking. But I --

MR. DONDERO: Okay.

THE COURT: But I said --

MR. DONDERO: I'm sorry.

THE COURT: I said at the hearing on the preliminary injunction as to Mr. Dondero personally, do you remember what I said, I said life changed when you put your company in Chapter 11. And, you know, even if you had stayed on as president of the Debtor, life changed. Okay? Because you're a debtor-in-possession. You have to say, "Mother, may I?" to the Court. Creditors get to object to things. So things changed.

But things really, really, really changed, you know, they changed in October 2019, and then they changed dramatically in January 2020, when independent board members were put in place and you were taken out of management.

So, the reason I'm coming back to that concept is this: I've heard a lot about the preferred shareholders didn't like

the trades Mr. Seery was implementing, the sale of AVYA, the sale of SKY. They didn't like it. Well, I mean, I hate to say something flippant like tough luck, but really: Tough luck. Okay? We all know that with a company like this, with a company like Acis, it's complicated, right? Because you've got a fiduciary duty to your creditors to maximize value of the estate so creditors get paid in Chapter 11, right? But meanwhile, you know, you've got to have fiduciary duties, I don't know if it's directly to preferred shareholders or just to the CLOs. But whatever it is, you know, there may be differing views that individual preferred shareholders have. But Mr. Seery is in charge. The Debtor is in charge. You don't like it, I'm sorry, but he's in charge.

So, you know, I thought, am I going to come in here today and see all kinds of specific contractual references, where, I don't know, somehow you have an argument that you can control buys and sells? Of course, in this case, it would just be sells at this point. You know, no. I knew I wasn't going to see that. And I haven't.

So I don't know what I'm going to hear more on the 5th that is going to tilt me a different way, but right now, if I had to rule right now, this would be a total no-brainer to issue this preliminary injunction. Okay? I feel like it's been teed up almost like find Dondero in contempt, find these entities in contempt. What I'm here on today is whether I

should issue a preliminary injunction, and the December letters, the emails, the communications, they lead me to believe that this preliminary injunction is needed because someone doesn't understand that Mr. Seery is in charge and the preferred shareholders, the Funds, the Advisors, they don't have the ability to interfere with what he's doing in running the company.

And the threats of we're going to, you know, direct -- we may direct the CLO Issuer to terminate the Debtor: I mean, it's just -- there's no sound business justification for that. Okay? I don't know what we're doing, where we're going.

Mr. Dondero, I said to you in December, you know, I really wanted to encourage good-faith negotiations on your possible pot plan because I thought you wanted to save your baby. But the more I hear, the more I feel you're just trying to burn the house down. Okay? Maybe it's an either/or proposition with you: I'll either get my company back or I'll burn the house down. That's what it feels like. And I have no choice but to enter preliminary injunctions with this kind of behavior.

So, I'm very frustrated. I'm very frustrated. I don't know if anyone wants to say anything or we just end it on this frustrating note.

Mr. Rukavina, did you want to let your client speak, or no?

MR. RUKAVINA: Your Honor?

THE COURT: Not your client.

MR. RUKAVINA: No, but --

THE COURT: The client representative.

MR. RUKAVINA: Your Honor, I take issue with what the Court has said, but we did file a motion yesterday to file a plan under seal. It is -- Mr. Dondero, can you mute your phone? The Court should have seen that by now. It is a pot plan with much more cash consideration. We have discussed it with the Debtor and the Committee. We are in earnest negotiations. I have no reason to believe or disbelieve that we're close to a settlement.

But recall what I said at the beginning. We asked the Debtor to continue this hearing. We said, You have a TRO that ends February the 15th. Why are you doing this? Well, the Debtor did it to smear Mr. Dondero on a very carefully crafted record, without telling you the other half of it. And when I tried to have Mr. Post explain it, opposing counsel won't let me even tell you our views. So there is a competing plan. We want to try --

THE COURT: You tried to get him to testify about comments to CFRs when he has shown no expertise whatsoever --

MR. RUKAVINA: That's fine.

THE COURT: -- to permit that.

MR. RUKAVINA: And I understand, Your Honor. I don't

want -- Your Honor has made her evidentiary rulings. I'm not here to second-guess them.

I'm telling you that Mr. Dondero -- and more importantly, the other companies, *i.e.*, NexPoint -- we heard you loud and clear. We did not just send forward some cocktail-napkin term sheet. I spent the weekend and Friday preparing a comprehensive plan and disclosure statement. I hope that the Court will allow it to be filed under seal. Exclusivity has expired. I am asking to file it under seal only.

THE COURT: Tell me what utility that has. What utility does that have if you don't have one plan supporter? I mean, where are we going with this? I have invited, I have encouraged, I have directed good-faith negotiations with the Committee. If you don't have the Committee on board, what utility is there in allowing you to file a plan under seal?

MR. RUKAVINA: Well, if it's filed under seal, Your Honor, then, really, no one is going to be prejudiced or hurt. But we have not been told --

THE COURT: Then why --

MR. RUKAVINA: -- from the Committee --

THE COURT: Then why are we doing it? Help me to understand the strategy. Maybe I'm just naïve.

MR. RUKAVINA: Your Honor, there is no strategy and the Court is not naïve. Pursuant to an agreement of the Committee and the Debtor, I sent that draft plan to them over

the weekend, and they agree it's not solicitation. It has not gone to the creditors. No one has seen it.

The reason why we sent it to the Committee and the Debtor was to foster ongoing negotiations. We had negotiations last night. The Committee and the Debtor had negotiations last night. We've been promised a response in the next couple of days, and we have a follow-up meeting scheduled for Thursday.

The reason why I wanted the plan filed under seal is so that there is a record of what is being discussed so the U.S. Trustee can see it, if she wants to, and so that other key constituents, if they want to or have a reason to, can see it.

But I agree with you: That plan ain't going nowhere if we don't have some material creditor support. We won't know that for a couple more days.

So my only point in saying this to Your Honor is that we are working earnestly, we are increasing our consideration, we have heard you loud and clear, and all the parties are negotiating.

Again, we did not want this hearing to happen today because it's a step backwards from negotiations, not a step forward. Thank you.

MR. POMERANTZ: Your Honor, may I be heard?

THE COURT: Go ahead, Mr. Pomerantz. Go ahead.

MR. POMERANTZ: Mr. Rukavina sent us over the plan, and we had no problem with it being sent to the Committee. He

then sent us over the motion. Now, aside from the fact that the motion contains some statements which the Debtor strongly disagrees with, with respect to the ability of administrative claims or other claims to be assumed, but putting that aside, we were concerned that the filing of a plan on the docket, unsealed, would be a distraction.

Having said that, we also saw utility in the plan being put in the hands of the largest creditors so that they can evaluate what was being proposed.

We told Mr. Rukavina we have no problem if the plan was filed under seal, stayed under seal until after confirmation, and then, in exchange, we would agree to something that we don't think we had to agree: That he could send the plan to UBS, to Acis, to Redeemer, to Meta-e, to HarbourVest, and Daugherty. Essentially, all the players in the case. Mr. Rukavina said he would consider that, and then just filed his motion.

We don't have any problem with him doing that still, sending it to the six creditors so they can look at it. We don't think it should be unsealed on the docket.

And the discussion of status of negotiations, Your Honor, as we've told you many times before, we would love there to be a plan. We would love there to be support of a plan. Mr. Dondero asked to approach the board and speak to the board yesterday. We heard him out. The plan essentially is the

same document and the same term sheet, I think, that has been floating around for several weeks.

Having said that, we said, We are not going to stand in the way of Mr. Dondero and the Creditors' Committee. And if the Creditors' Committee and Mr. Dondero have a meeting of the minds, if there's any desire of them to have more time, we would be supportive of it. I'll let Mr. Clemente respond as to whether there's any negotiation -- (echoing.) But when Mr. Rukavina said that last night there were negotiations between the Debtor and Mr. Dondero, that's just not accurate. We, we look at ourselves as the honest broker. But at the end of the day, as Your Honor has remarked many times throughout this case and just remarked a few moments ago, unless the Creditors' Committee supports this plan, it is DOA. And we have communicated that several times to Mr. Dondero and his team.

So, I just wanted to speak to correct the record. We're, again, supportive of a plan if there can be one. But at this point, we haven't seen anything, the parties coming any closer or any more negotiations, and we just have to get confirmed sooner rather than later (echoing), prepared to go forward.

MR. CLEMENTE: Your Honor, it's Matt Clemente at Sidley. I'm happy to make some comments to Your Honor, --

THE COURT: Okay.

MR. CLEMENTE: -- if you -- if you wish.

THE COURT: Please do.

MR. CLEMENTE: I think it's fair to say that the Committee believes the plan needs to go forward next week, Your Honor. We have, of course, taken your direction very seriously, and we very seriously consider all of the communications we get from Mr. Dondero. There exists still a material value gap in what is being offered under Mr. Dondero's plan, as well as a quality of the value.

So, Your Honor, while we continue to consider the plan and what we receive from Mr. Dondero, I do not want to leave Your Honor with the impression that the Committee feels like we are close to an agreement, and we anticipate going forward with the plan next week.

That being said, we of course will respond to Mr. Dondero as we review the plan, but as I sit here today, I don't believe that we are close. But, again, the Committee will continue to review it, and we should anticipate going forward with confirmation next week.

THE COURT: All right. So, you don't have any problem with the plan being filed under seal?

MR. CLEMENTE: Your Honor, we -- the Committee does have the plan, and I guess I'm not sure I'd see the point of having it filed it under seal. I think it serves to confuse issues. But, you know, hearing what Your Honor said earlier, I don't think we need to continue to bring different fights in

front of Your Honor, so I'm not sure that I see necessarily the harm in a plan being filed under seal, again, with the idea that, you know, why bring -- continue to bring fights to Your Honor if we don't need to?

THE COURT: All right.

MR. CLEMENTE: But what I do think is clear, Your Honor, that I do want to express to you is that the representations in that motion the Committee do not believe are accurate. We do not believe that there's been a significant value increase. We do not believe that we are close. That would be the point that I would make in connection with a response to that motion. So, but in terms of filing it under seal, I'm not sure the Committee has a strong feeling that that should not happen.

THE COURT: Yes.

MR. RUKAVINA: And Your Honor, very quickly, --

THE COURT: The words --

MR. RUKAVINA: -- I never represented that we're close.

THE COURT: The words I remember in the motion were significant value increase, something to that effect. But also more recovery than the plan that's on file.

(Echoing.)

THE COURT: So I was kind of darn curious to see it just for that.

MR. RUKAVINA: And Your Honor, obviously, because there's many people on this call, I don't want to run afoul of any kind of procedures. I'd be happy to walk Your Honor through, but I can't, not with 90 people on the call.

THE COURT: Right.

MR. RUKAVINA: I did not represent that we're close to a settlement in that motion, and I did not send the plan to those people that Mr. Pomerantz mentioned.

So, right now, the Committee, the Debtor, and the employees, because they requested it after Mr. Pomerantz approved it, have what I would like to file under seal. I'm not suggesting here today that it go any farther than being filed under seal, but at least it be there for some record.

THE COURT: Well, didn't you -- did I dream this? -- didn't you say that there would be something like 48 hours for people to object or then it would be filed not under seal? Did I dream that?

MR. RUKAVINA: Your Honor, that was my proposal, and Your Honor can certainly reject that. Mr. Pomerantz asked that the plan should never be unsealed pending confirmation of the Debtor's plan. I have a different proposal. Your Honor will rule and we'll comply with Your Honor's ruling.

MR. DONDERO: Jim Dondero here. Can I have two -- two quick minutes and just say two quick things?

THE COURT: Well, only if your counsel permits it. I

don't want to get in --

MR. RUKAVINA: I just don't -- yeah. Mr. Dondero, if you would please just not describe the substance, the economic substance of our proposed plan, not with so many people on the line.

MR. DONDERO: Sure. I just want to make two quick points. I couldn't apologize more for taking the Court's time today. It wasn't our 'druthers. You heard, I think, at least five or six hours from the Debtor. You never once heard them say that their activities didn't violate the Advisers Act. And they never once said that violating the Advisers Act wasn't a big deal. You know, they never said that.

What they tried to say, oh, we have these other contracts. Let's try and turn this into an injunction against Dondero interfering. But they never -- they never denied that Dondero and the NexPoint team was trying to do what was in the best interest of investors and that they had violated the Advisers Act.

I think, in normal course, each side would have had an expert and you could have opined on whether it was a violation of the Advisers Act, but they know they did something wrong so they're trying to make it an injunction against me. Okay. That's all I have to say about that point.

As far as the alternative plan, Your Honor, we heard you loud and clear. And the economics that we put forward, I

can't talk them about specifically, but they're at least 20 percent better than what the Debtor has put forward as far as a plan. And what we put forward is elegant, it's simpler, it treats the employees fairly, it gives the business continuity, it gives investors continuity, and it's not just a harsh, punitive liquidation that's going to end up in a myriad of litigation.

We're paying a premium, it's a capitulation price, to try and get to some kind of settlement. And I encourage you to look at it. It's elegant. It's straightforward. It's simple. And now that you've encouraged and gotten us up to a number that's well in excess of the Debtor, maybe a little pressure on other people to treat employees fairly, maybe not liquidate a business that's important in Dallas, that has been a big business for a number of years, doing enormous good things for a lot of people.

You know, we went into bankruptcy with $450 million of assets and almost no debt. And we've been driven into the ground by the process. And then the plan is to just harshly liquidate going forward. I -- I -- it's crazy. I don't know what else to do to stop the train other than what we've offered.

THE COURT: All right. Well, I hear what you're saying, and I do, just because -- I don't know if you left the room or not, but we did have discussion of Section 206 of the

Investment Advisers Act today. It was put on the screen. Mr. Post was asked what was unlawful as far as what had happened here, what was going on here, what was fraudulent, deceptive, or manipulative, in parsing through the words of the statute. And he said Mr. Seery engaged in deceptive acts because he wasn't trying to maximize value. Okay? I'm not an expert on the Investment Advisers Act, but I know that that was not a deceptive act.

And so I'll allow the plan to be filed under seal, but it's not going to be unsealed absent an order of the Court. Okay? So we'll just leave it at that for now. And while I still encourage good-faith negotiations here, I've said it umpteen times, where you're tired of the cliché, probably: The train is leaving the station. And if you want the Court to have patience in the process and if you want the parties to cooperate in good faith, it might help if we didn't have things like Dugaboy and Get Good Trust filing a motion for an examiner 15 months into the case.

I mean, it feels to me, Mr. Dondero, whether I'm right or wrong, that it's like you've got a twofold approach here: I either get the company back or I burn the house down. And I'm telling you right now, if we don't have agreements, --

MR. DONDERO: That's not true.

THE COURT: -- if we don't have agreements and we come back on the 5th for a continuation of this hearing and a

motion to hold you in contempt, you know, I'm leaning right now, based on what I've heard so far, and I know I haven't heard everything, but I'm leaning right now towards finding contempt and shifting a whole bundle of attorneys' fees. That, to me, seems like the likely place we're heading.

I mean, I commented at the December hearing on the preliminary injunction against you personally that it had been like a $250,000 hearing, I figured, okay, just guesstimating everybody's billable rate times the hours we spent. Well, here we were again, and I know we've got all this time outside the courtroom preparing, taking depositions. I mean, what else is a judge to think except, by God, let's drive up administrative expenses as much as we can; if we can't win, we're going to go down fighting? That's what this looks like. Okay? So if it's not really what's going on, then you've got to work hard to change my perceptions at this point.

MR. RUKAVINA: Your Honor, I hear everything what you're saying, and I'm going to discuss it very bluntly with my clients. But we're being asked not to exercise contract rights in the future. This is not a contempt hearing. And Your Honor, we did ask and offered the estate a million dollars, found money, plus to waive almost all our plan objections, if they would just put this case on pause for 30 days.

So we are trying. We are trying creative solutions here.

We know that the train is leaving. We've put our money where our mouth is. We will continue trying. But Your Honor, this is not a contempt proceeding, and my clients are not Mr. Dondero. You've heard they're independent boards.

MR. POMERANTZ: I can't leave that last comment without a response. Yes, there was an offer of a million dollars, by an entity that owes the estate multiples of that. So they are offering to pay us something that they already owe us. So Mr. Rukavina continues try to do this. We will not stand for it.

MR. RUKAVINA: That is not a fair statement, sir. I misrepresented nothing. We were offering you a million dollars, with no conditions, earned upon receipt, with no credit, no deduction for any of our liability. So you're free to say no, sir, but you're not going to tell the judge that I misrepresented something.

THE COURT: All right.

MR. POMERANTZ: Should tell the Court --

THE COURT: You know what?

MR. POMERANTZ: -- that that entity owed the Debtor.

THE COURT: You know what? You know what? I am more focused on, Mr. Rukavina, your comment that this Court can't enjoin your clients from exercising contractual rights when, again, in January of 2020, the representation was made and it was ordered, "Mr. Dondero shall not cause any related entity

to terminate any agreements with the Debtor." Okay? That was -- go back and look at the transcript. That was so meaningful to me.

We were facing a possible trustee. And that's what I did in the *Acis* case. Okay? I had a Chapter 11 trustee. And it was not a perfect fit, to be sure. But it is where we were heading in this case, had the lawyers and parties not negotiated what they did. That was a very important provision, convincing me that, you know what, I think the structure they've got will be better than a trustee. And it has, for the most part. But the fees have gone out the roof, and I lay that at the feet of Mr. Dondero, for the most part. Okay? We have a bomb thrown every five minutes by either him personally or the Dugaboy or the Get Good Trust or the Funds or the Advisors or I don't know who else. Okay?

So the train is leaving the station, unless you all come to me and say, okay, we've maybe got a -- Mr. Pomerantz's word -- grand solution here. Okay? If you get there in the next few days, wonderful. Okay? But I don't know what else to say except I'm tired of the carpet-bombing, and if I had to rule this minute, there would be a huge amount of fee-shifting for what we went through today, for what we went through in December, for the restriction motion that, after I called it frivolous, the lawyers were sending letters pretty much regurgitating the same arguments. All right. So, not a happy

camper.

But upload your order on the motion to seal the plan. And, again, it's not going to be unsealed absent a further order of the Court. And if you all come to me next week and say, hey, we've got something in the works here, okay, I'll consider unsealing it and letting you go down a different path. But I'm not naïve. I feel like this is just more burning the house down, maybe. I don't know. I hope I'm wrong. I hope I'm wrong. But all right. So I guess we'll see you next week.

MR. POMERANTZ: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

MR. RUKAVINA: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 6:08 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 **01/28/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBIT 8

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

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

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

WEBEX/TELEPHONIC APPEARANCES:

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

DALLAS, TEXAS - JANUARY 8, 2021 - 9:41 A.M.

THE COURT: All right. We are here for Highland Capital Management, L.P. versus James Dondero, a preliminary injunction hearing. This is Adversary 20-3190.

All right. Let's start out by getting appearances from counsel. First, for the Plaintiff/Debtor, who do we have appearing?

MR. MORRIS: Your Honor, John Morris; Pachulski Stang Ziehl & Jones. I'm here with my partner, Jeff Pomerantz, and others.

THE COURT: All right. Good morning. All right. For Mr. Dondero, who do we have appearing?

MR. LYNN: Michael Lynn, together with John Bonds, for Mr. Dondero.

THE COURT: Good morning.

All right. I know we have a lot of parties in interest represented on the video or phone today. I'm not going to go through a roll call, other than I'll see if we have the Committee, the Unsecured Creditors' Committee counsel on the line. Do we have anyone appearing for them?

MR. CLEMENTE: Yes, good morning, Your Honor. Matthew Clemente from Sidley Austin on behalf of the Committee.

THE COURT: Okay. Thank you. All right.

MR. CLEMENTE: Thank you, Your Honor.

THE COURT: Well, as I said, I'm not going to do a roll call. I don't think we had any specific parties in interest, you know, file a pleading, or any other parties other than the Debtor and Mr. Dondero in this adversary. So I'll just let the others kind of listen in without appearing.

All right. Mr. Morris, are you going to start us off this morning with, I don't know, an opening statement or any housekeeping matters?

MR. MORRIS: I have both an opening statement and housekeeping matters. I just wanted to see if Mr. Pomerantz has anything he wants to convey to the Court before I begin.

MR. POMERANTZ: (garbled)

THE COURT: Mr. Pomerantz, if you could take your device off mute, please.

THE CLERK: He's off mute. I don't know what --

THE COURT: Okay. Well, we're showing you're not on mute, but we can't hear you. What now?

THE CLERK: He's not on mute now. He's --

THE COURT: Okay. Go ahead, Mr. Pomerantz.

(Pause.)

THE CLERK: He's not coming through.

THE COURT: We're -- you're not coming through, and we're not sure what the problem is. We're not showing you on mute.

(Pause.)

THE COURT: All right. Should we have him call back in on his phone? All right. If you could, if you have a phone, maybe you can try calling in on your phone and speak through your phone, not your computer.

MR. MORRIS: You know what, Your Honor? I'm going to proceed, and Mr. Pomerantz will address the Court at the conclusion of the hearing on the motion.

THE COURT: Okay. Very good. We usually hear him loud and clear, so I don't know what's going on this morning. Go ahead, Mr. Morris.

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

MR. MORRIS: Yes. Thank you very much, Your Honor. John Morris; Pachulski Stang; for the Debtor.

We are here this morning, Your Honor, on the Debtor's motion for preliminary injunction against Mr. Dondero. We filed last night also an emergency motion for an order to show cause as to why this Court should not hold Mr. Dondero in contempt of court --

THE COURT: All right.

MR. MORRIS: -- for violating a previously-issued TRO.

THE COURT: Yes. Let me just interject, in case there's any confusion by anyone. I am not going to hear the motion for show cause order this morning. While I understand you think there might be some efficiency and overlap in

evidence, it's not enough notice. So we'll talk about scheduling that at the end of the presentations this morning. All right?

MR. MORRIS: Thank you for addressing that, Your Honor.

THE COURT: Okay.

MR. MORRIS: Your Honor, then let's just proceed right to the preliminary injunction motion. There is ample evidence to support the Debtor's motion for a preliminary injunction. There would have been substantial evidence to support it based on the conduct that occurred prior to the issuance of the TRO, but the conduct that did occur following the TRO only emphasizes the urgent need for an injunction in this case.

I want to begin by just telling Your Honor what evidence we intend to introduce here today. We filed at Docket 46 in the adversary proceeding our witness and exhibit list. The exhibit list contains Exhibits A through Y. And at the appropriate time, I will move for the admission into evidence of those exhibits.

The exhibit list and the witness list also identifies three witnesses for today. Mr. Dondero. Mr. Dondero is here today. Notwithstanding Your Honor's comments on December 10th and on December 16th, when I deposed him on Tuesday he was unsure whether he was going to come here today to testify.

And he will inform Your Honor of that on cross-examination. And so the Debtor was forced to prepare and serve a subpoena to make sure that he was here today. But Mr. Dondero is here today.

Following the conclusion of Mr. Dondero's deposition on Tuesday, and based in part on the evidence adduced during that deposition, the Debtor terminated for cause Scott Ellington and Isaac Leventon. We had asked counsel for those former employees to accept service of a trial subpoena so that they would appear today. We were told that they would do so if we gave them a copy of the transcript of Mr. Dondero's deposition.

We thought that was inappropriate and we declined to do so, and they declined to accept service of the subpoenas. We have spent two days with a professional process server attempting to effectuate service of the trial subpoenas for Mr. Ellington and Mr. Leventon, but we were unsuccessful in doing that. So we'll only have one witness today, unless we have cause to call anybody on rebuttal, and that witness will be Mr. Dondero.

I want to talk for a few moments as to what Mr. Dondero will testify to and what the evidence will show. Mr. Dondero will testify that he never read the TRO, Your Honor. He will testify that he didn't participate in the motion on the hearing for the TRO, that he never read Mr. Seery's

declaration in support of the Debtor's motion for the TRO, that he never bothered to read the transcript of the proceedings on December 10th so that he could understand the evidence that was being used against him. He had no knowledge of the terms of the TRO when he was deposed on Tuesday.

And that's the backdrop of what we're doing here today, because he didn't know what he was enjoined from doing, other than speaking to employees. He actually did testify and he will testify that he knew he wasn't supposed to speak with the Debtor's employees, but he spoke with the Debtor's employees in all kinds of ways, as the evidence will show.

The evidence will also show that Mr. Dondero violated the TRO by throwing away the cell phone that the company bought and paid for after the TRO was entered into. He's going to be unable to tell you who threw it away. He's going to be unable to tell you who gave the order to throw it away. He's going to be unable to tell you when after the TRO was entered the phone was thrown away.

But we do have as one fact and as I believe one violation of the TRO --

MR. POMERANTZ: So, I'm on a WebEx.

MR. MORRIS: Jeff, --

THE COURT: Mr. Pomerantz, we heard you. We heard you say something. So, apparently, you got your audio working.

All right. Mr. Morris, continue.

MR. MORRIS: Yeah. And what Mr. Dondero may tell you, Your Honor, is that it's really Mr. Seery's fault that the phone got thrown away, because Mr. Seery announced that all of the employees were going to be terminated at the end of January, and because Mr. Seery did that, he and I believe Mr. Ellington thought it was appropriate to just throw their phones away, without getting the Debtor's consent, without informing the Debtor, and switching the phone numbers that were in the Debtor's account to their own personal names. So that's Item No. 1.

Item No. 2 -- and this is in no particular order, Your Honor. I don't want you to think that I'm bringing these things up in terms of priority. But they're just the order in which they came up in the deposition, and so I'm just following it as well.

Item No. 2 is trespass. On December 22nd, you will hear evidence that Mr. Dondero personally intervened to yet again stop trades that Mr. Seery was trying to effectuate in his capacity as portfolio managers of the CLOs. He did that just six days after Your Honor dismissed as frivolous a motion brought by the very Advisors and Funds that he owns and controls.

Therefore, the very next day, the Debtor sent him a letter, sent through counsel a letter, evicting him from the

premises, demanding the return of the phone, and telling him that he had to be out by December 30th.

I was stunned, Your Honor, stunned, when I took his deposition on Tuesday and he was sitting in Highland's offices. He hadn't asked for permission to be there. He hadn't obtained consent to be there. But he just doesn't care what the Debtor has to say here. He just doesn't.

I don't know when he got there or when he left. I don't know if he spoke to anybody while he was there. But he just took it upon himself to show up in the Debtor's office, notwithstanding the very explicit eviction notice that he got on December 23rd.

Mr. Dondero, as I mentioned, clearly violated the TRO by knowingly and intentionally and purposely interfering with the Debtor's trading as the portfolio manager of the CLOs. This has just gone on too long. There have been multiple hearings on this matter, but he doesn't care. So he gave the order to stop trades that Mr. Seery had effectuated. That's a clear violation of the TRO, and it certainly supports the imposition of a preliminary injunction.

Mr. Seery -- Mr. Dondero is going to testify that multiple letters -- that I'm going to refer to them, Your Honor, as the K&L Gates Parties, and those are the two Advisors and the three investment funds and CLO Holdco that are all owned and/or controlled by Mr. Dondero -- after that hearing on the

16th, K&L Gates, the K&L Gates Parties sent not one, not two, but three separate letters. They said they may take steps to terminate the CLO management agreements. After we evicted Mr. Dondero, sent a letter suggesting that we would be held liable for damages because we were interfering with their business.

And Mr. Dondero is going to tell you, Your Honor, that he encouraged the sending of those letters, that he approved of those letters, that he thought those letters were the right things to send to the Debtor, even after -- even with the knowledge of what happened on December 16th.

He's going to tell you he knew about that hearing and he still, he still approves of those letters, and never bothered to exercise his control to have those letters withdrawn upon the Debtor's request. We asked them to withdraw it, and when they wouldn't do it, Your Honor, that's what prompted the filing of yet another adversary proceeding. And we're going to have another TRO hearing next Wednesday because they won't stop.

Next, a preliminary injunction should issue because Mr. Dondero violated the TRO by communicating with the Debtor's employees to coordinate their legal strategy against the Debtor. The evidence will show, in documents and in testimony, that on December 12th, while he was prohibited from speaking to any employee except in the context of shared services, you're going to see the documents and you're going

to hear the evidence that on December 12th Scott Ellington was actively involved in identifying a witness to support Mr. Dondero's interests at the December 16th hearing.

You will receive evidence that on December 15th Mr. Ellington and Mr. Leventon collaborated with Mr. Dondero's lawyers to prepare a common interest agreement.

You will hear evidence that on the next day, December 16th, the day of that hearing, that Mr. Dondero solicited Mr. Ellington's help to coordinate all of the lawyers representing Mr. Dondero's interests, telling Mr. Ellington that he needed to show leadership, and Mr. Ellington readily agreed to do just that.

You will hear evidence that on December 23rd Mr. Ellington and Grant Scott communicated in connection with calls that were being scheduled with Mr. Dondero and with K&L Gates, the very K&L Gates Clients who filed the frivolous motion that was heard on December 16th and that persisted in sending multiple letters threatening the Debtor thereafter.

You will hear evidence that late in December Mr. Dondero sought contact information for Mr. Ellington and Mr. Leventon's lawyer, and he will tell you that he did it for the explicit purpose of advancing their mutual shared interest agreement, while they were employed by the Debtor. While they were employed by the Debtor.

Finally, you will hear evidence, and it will not be

disputed, you will see the evidence, it's on the documents, that Mr. Dondero personally intervened to stop the Debtor from producing the financial statements of Get Good and Dugaboy, two entities that he controls, that the U.C.C. had been asking for for some time, that the Debtor had been asking of its employees for some time to produce. And it was only when we got, frankly, the discovery from Mr. Dondero when there's a text message that says, Not without a subpoena.

The documents are on the Debtor's system. We just don't know where they are because they're hidden someplace. But Mr. Dondero knows where they are. He can certainly force -- he can certainly get them produced. And one of the things we'll be asking for when we seek the contempt motion is the production of those very documents.

So, Your Honor, that's what the evidence is going to show. I don't think there's going to be any question that a preliminary injunction ought to issue. But I do want to spend just a few minutes rebutting some of the assertions made in the filing by Mr. Dondero last night.

Of course, they offer no evidence. There is no declaration. There is no document. There is merely argument. It's been that way throughout this case. For a year, Mr. Dondero has never stood before Your Honor to tell you why something was wrong being done to him, why -- he hasn't offered to be here at all, and he's here today, again, only

because he got a subpoena. That's the only reason we know he's here today.

So let's just spend a few minutes talking about the assertions made in the document last night. Mr. Dondero complains about the scope of the injunction, and I say to myself, in all seriousness, Are you kidding me? You didn't even read the TRO and you're going to be concerned about what the scope of the injunction is? You didn't even have enough respect for the Court to read the TRO and we're going to worry about the scope of some future injunction? Doesn't make any sense to me.

But let's talk about the specific arguments that they make.

Third parties. They're concerned that somehow third parties don't have notice of the injunction. Your Honor, third parties are not impacted by the injunction. The only third parties that are impacted by the injunction are those that are owned and/or controlled by Mr. Dondero. If he doesn't tell them, that's his breach of duty. He created the Byzantine empire of over 2,000 entities, and he wants the Debtor to have the burden of notifying all of them so that they can all come in here and make 2,000 arguments as to why they shouldn't be enjoined?

He owns and controls them. They are the only third parties who are impacted by this proposed preliminary

injunction, and he has the responsibility, he has the duty to inform them, because he owns and controls them.

We know of the K&L Gates Parties. We know Get Good and Dugaboy are in this courtroom. We know CLO Holdco. So many of these parties have been so -- they're on the phone now. They don't have notice? It is insulting, frankly, to suggest that the Debtor somehow has some obligation to figure out who Mr. Dondero owns and controls. He should know that. That's number one.

Number two, there is a statement in there about employees and how he should be able to speak with them about personal and routine matters. As to that, Your Honor, he has forfeited that opportunity. He cannot be trusted. There cannot be any communication because nobody can police it. And so we think a complete bar to any discussion with any employee, except as it relates to shared services -- because we do have a contractual obligation; that's what was in it -- ought to be barred. That's number one.

Number two, there's a reference in the objection to Mr. Dondero's personal assistant. I'd like to know who that is, Your Honor. I wasn't aware that he still was using a personal assistant at the Debtor. I want to know specifically who that is. I don't know that they -- you know, I just -- we need to cut that off. And he should not be communicating with any employee. The Debtor should not be paying for his personal

assistant.

It's offensive to think that he's still doing that, particularly after he was terminated or his resignation was requested back in October precisely because his interests were adverse to the Debtor.

Number three, he's concerned that the Debtor is somehow preventing him from speaking to former employees. We now know, Your Honor, that that's a, I'm sure, a very specific reference to Mr. Ellington and Mr. Leventon. Right? He wants a green light to be able to do that. And you know, I'll leave it to Your Honor as to whether that's appropriate. I'll leave it to their counsel as to whether, going forward, colluding together against the Debtor at this point in time is in anybody's best interest. But I will -- what I will demand in the preliminary injunction is a very explicit statement that Mr. Ellington and Mr. Leventon are not to share any confidential or privileged information that they received in their capacity as general counsel and assistant general counsel of the Debtor.

The pot plan. He's afraid somehow the order is going to prevent him from pursuing the pot plan. He's had over a year to pursue this pot plan, Your Honor. Frankly, I don't, you know, I don't know what to say. He has never made a proposal that has gotten any traction with the only people who matter. And it's not the Debtor. It's the creditors. It's the

Creditors' Committee.

If you want to put in an exception that he can call Matt Clemente, I don't mean to put this on Mr. Clemente, he can decide whether or not that's appropriate, but the creditors are the only ones who matter here. Your Honor, it's not the Debtor.

And I'll let Mr. Dondero's counsel explain to Your Honor why he thinks he still needs to pursue a pot plan, and Your Honor can decide. I trust Your Honor to decide what boundaries and what guardrails might be appropriate for him to continue to pursue his pot plan.

That's all I have, Your Honor. Not much.

THE COURT: All right.

MR. MORRIS: But I think there's going to be -- there's going to be an awful lot of evidence. This is going to be a lengthy examination. I ask the Court for your patience.

THE COURT: I've got --

MR. MORRIS: But that's all I have.

THE COURT: I've got all day, if we need it.

MR. MORRIS: Okay.

THE COURT: I hope we don't, but I've got all day if we need it. All right.

MR. MORRIS: That's what I have, Your Honor.

THE COURT: All right. Mr. Dondero's counsel, your

opening statement?

MR. BONDS: Your Honor, I would reserve my opening statement to the end of the hearing.

I would also point out that anything that Mr. Morris just said was not evidence, and we think that the evidence will show completely differently than argued or articulated by Mr. Morris.

THE COURT: All right.

MR. BONDS: That's all.

THE COURT: Thank you, Mr. Bonds.

Mr. Morris, you may call your witness.

MR. MORRIS: The Debtor calls James Dondero.

THE COURT: All right. Mr. Dondero, this is Judge Jernigan. I would ask you to say, "Testing, one, two," so we pick up your video so I can swear you in.

All right. Mr. Dondero, if you're speaking up, we're not hearing you, so please make sure you're unmuted and have your video --

(Echoing.)

MR. DONDERO: Hello. One, two.

THE COURT: Okay. We got you.

MR. DONDERO: One, two three.

THE COURT: We got you now.

JAMES D. DONDERO, PLAINTIFF'S WITNESS, SWORN

THE COURT: All right. Thank you.

Mr. Morris, go ahead.

MR. MORRIS: Thank you, Your Honor.

(Echoing.)

THE COURT: I'm going to ask everyone except Mr. Dondero and Mr. Morris to put your device on mute. We're getting a little distortion.

All right. Go ahead.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good morning, Mr. Dondero. Can you hear me?

A Yes.

(Echoing.)

THE COURT: Ooh. Okay. We're having a little echo when you speak, Mr. Dondero. Do you have -- well, first, you have headphones. That always helps.

(Echoing.)

THE COURT: Okay. That may help as well.

(Pause.)

THE COURT: Okay. Let's try again. If you could say, "Testing, one, two."

THE WITNESS: Is that better?

THE COURT: That is better, yes.

All right. Go ahead.

THE WITNESS: Okay. Great.

MR. MORRIS: Thank you.

BY MR. MORRIS:

Q Can you hear me, Mr. Dondero?

A You're a bit faint. Give me one second. Okay. Got you.

Q Okay. Thank you. Who is in the room with you right now?

A Bonds, Lynn, and a tech.

A VOICE: Bryan Assink.

THE WITNESS: Oh, is Assink here? Oh, okay, I'm sorry. All right. I'm sorry. Bonds, Lynn, and Bryan Assink.

BY MR. MORRIS:

Q Okay. You're testifying today pursuant to a subpoena, correct?

A Yes.

Q Okay.

MR. MORRIS: And Your Honor, that subpoena can be found at Docket No. 44 in the adversary proceeding.

THE COURT: All right.

BY MR. MORRIS:

Q In the absence of a subpoena, in the absence of a subpoena, you didn't know if you would show up to testify at this hearing; is that right?

A I -- I do what my counsel directs me to do, and I didn't know at that time whether they would direct me to come or not.

Q Okay. And when I -- when I deposed you earlier this week, you agreed that you may or may not testify; is that right?

A It depends on what counsel instructs me to do, correct. I

didn't know at the time.

Q Okay. And you didn't mention anything about counsel when I asked you the questions earlier this week, correct?

A That was the undertone in almost all my answers, that I relied on counsel.

MR. MORRIS: Your Honor, I move to strike. I'm asking very specific questions. And if I need to go to the deposition transcript, I'm happy to do that.

THE COURT: All --

MR. MORRIS: Just going forward, Your Honor, this is cross-examination. It's really yes or no at this point. That's what I would request, anyway.

THE COURT: All right. Mr. Dondero, do you understand --

(Echoing.)

THE COURT: Do you understand what Mr. Morris was raising there? We really need you to give specific answers -- and usually they're going to be yes or no answers -- to Mr. Morris's questioning. Okay? So let's try again. Mr. Morris, go ahead.

THE WITNESS: Yeah.

BY MR. MORRIS:

Q Mr. Dondero, you're aware that Judge Jernigan granted the Debtor's request for a TRO against you on December 10th, correct?

A Yes.
Q But you never reviewed the declaration that Mr. Seery filed in support of the Debtor's motion for a TRO, correct?
A I relied on counsel.
Q Sir, you never reviewed the declaration that Mr. Seery filed in support of the Debtor's motion for a TRO, correct?
A Correct.
Q You didn't even know the substance of what Mr. Seery alleged in his declaration at the time that I deposed you on Tuesday, correct?
A Correct.
Q And that's because you didn't even think about the fact that the Debtor was seeking a TRO against you; isn't that right?
A No.
Q That's not right?
A No.
Q All right.

MR. MORRIS: Your Honor, could I ask my assistant, Ms. Canty, to put up on the screen what had been designated as the Debtor's Exhibit Z in connection with the motion for contempt? Exhibit Z is the transcript from Tuesday's hearing.

THE COURT: All right.

MR. MORRIS: And I would like to -- I'd like to cross-examine Mr. Dondero on his testimony on Tuesday.

THE COURT: All right. You may.

MR. MORRIS: Can we put up Page 15, please? And go to Lines 15 through 17.

BY MR. MORRIS:

Q Sir, you recall being deposed on Tuesday by my -- by me, correct?

A Yes.

Q Okay. Did you hear this question and did you hear this answer?

"Q Did you care that the Debtor was seeking a TRO against you?

"A I didn't think about it."

Q Is that -- is that your testimony from the other day?

A Yes.

Q You didn't dial in to the hearing when the Court considered the Debtor's motion for a TRO against you, did you?

A I -- I don't recall. I don't think so.

Q You never read the transcript in order to understand what took place in this courtroom when Judge Jernigan decided to enter a TRO against you; isn't that right?

A I relied on counsel, which has been my testimony all along.

MR. MORRIS: Can we go to Page 13 of the transcript, please? Beginning at Line 24.

BY MR. MORRIS:

Q (reading)

"Q Did you read a transcript of the hearing?

"A No."

Q Did you testify on Tuesday that you did not read a transcript of the hearing?

A Yes.

Q In fact, as of at least last Tuesday, you hadn't even bothered to read the TRO that this Court entered against you. Isn't that right?

MR. BONDS: Your Honor, I'm going to object.

(Echoing.)

THE COURT: Okay. We're getting that echo from you now, Mr. Bonds. So maybe you need to turn your volume down a little. But what is the basis for your objection?

(Echoing.)

MR. BONDS: Leading and rhetorical.

MR. MORRIS: I think it's because they're in the same room.

THE COURT: Okay. Do you have -- I don't know what you're doing. I guess you're moving to a different room?

MR. BONDS: I am, Your Honor.

THE COURT: Okay.

(Echoing.)

THE COURT: Okay. I'm waiting for the objection basis.

MR. BONDS: The basis of the objection, Your Honor, is that --

(Echoing.)

THE COURT: Okay. We're going to have to do something different here. We can't have this issue for the entire hearing. Do you need to get a tech person in there, or maybe call in on your phone? I don't know.

MR. BONDS: Your Honor, I'm going into the conference room.

(Pause.)

THE COURT: Okay. Are we going to try again here?

MR. BONDS: Yes. Is this working?

THE COURT: Yes.

MR. BONDS: Perfect. Your Honor, my objection is that Mr. Dondero has already testified that he relied on his lawyers. I don't know where Mr. Morris is going with this, but it's pretty clear that Mr. Dondero simply relies on his lawyers to tell him what happened. I don't know that that's that different than any other layperson.

MR. MORRIS: Your Honor, if this is --

THE COURT: Well, --

MR. MORRIS: If I may?

THE COURT: Yes.

MR. MORRIS: I believe it's terribly relevant to know how seriously Mr. Dondero takes this Court and this Court's

proceedings and this Court's orders. If the Court decides that it doesn't matter whether or not he read the transcript, you're the fact-finder and you'll make that decision. But I believe it's at least relevant.

THE COURT: Okay. I agree and I overrule the objection.

Go ahead.

BY MR. MORRIS:

Q Mr. Dondero, as of at least Tuesday, you never bothered to read the TRO that was entered against you, correct?

A I'm sorry. We're dealing with some tech stuff here for a second. Can you repeat the question?

Q Yes.

(Echoing.)

Q As of Tuesday, you had not bothered to read the TRO that was entered against you?

(Echoing.)

MR. MORRIS: Your Honor, can we take a break? I can't do this. I just --

THE COURT: Okay. I agree. Okay. Mr. Bonds, what do we need to do to fix these technical problems? Do I need to get my IT guy in here and help you? This is terrible. This connection is terrible. And I understand people have technical problems sometimes, but we've been doing these video hearings since March, so --

MR. BONDS: Your Honor, I have simply gone to another conference room. The Debtor (garbled) I think that Mr. Dondero should be fine.

THE COURT: Okay. I don't know what you said except that you think Mr. Dondero should be fine. I --

MR. MORRIS: Is there anybody in that room with a cell phone on, Mr. Dondero?

THE WITNESS: No.

MR. BONDS: And I'm completely over in --

THE COURT: Okay.

MR. MORRIS: Can I try and proceed?

THE COURT: Try to proceed.

MR. MORRIS: Okay.

(Echoing.)

BY MR. MORRIS:

Q Mr. Dondero, as of Tuesday you only had a general view of what this Court restrained you from doing; is that correct?

(Echoing.)

MR. MORRIS: I'd still -- I -- there's too much noise, Your Honor. I can't do it.

THE COURT: Okay. We're going to take a five-minute break. Mr. Bonds, can you get a technical person there to work through these problems?

And Mike, let's get Bruce up here to --

THE CLERK: It's because they're in the same room.

That's the problem.

THE COURT: They're -- they're --

THE CLERK: Judge Jernigan, this is Traci. Bruce is on his way up there.

THE COURT: Thank you.

Mike, explain it to me, because I don't understand. You're saying if they have two devices on in the same room?

THE CLERK: The same -- that's the problem. They're so close. And they're trying to use the same device, give it back to you.

A VOICE: He has a phone on in the room.

MR. MORRIS: I asked that question.

THE COURT: Okay.

MR. MORRIS: Please instruct the witness to exclude everybody from the room, to turn off all electronic devices except the device that's being used for this (garbled). At least have --

THE COURT: All right. So, the consensus of more technical people than me is you've got two devices on in the same room and that's what's causing the distortion and echo. So I don't know if it's somebody's phone that needs to be turned off or if you have two iPads or laptops.

(Court confers with Clerk.)

(Pause.)

MR. BONDS: I think I'm unmuted. Can people hear me?

THE WITNESS: Yes.

(Pause.)

THE COURT: Okay. Bruce, can you walk their office through? They have, I think, two devices in the same room. It's a horrible echo. So, Mr. Bonds or some --

MR. BONDS: Yes, Your Honor.

THE COURT: We have a lawyer and the lawyer's client who is testifying right now in the same room.

I.T. STAFF: Uh-huh.

THE COURT: And --

I.T. STAFF: Yeah. Yeah. Because -- is one a call-in user on a telephone?

THE COURT: I don't know. I don't --

I.T. STAFF: Yeah. Whatever's coming -- the audio is feeding back in. They need to separate if they're both on. Or just use one and the attorney can slide over and the client can --

THE COURT: Okay.

I.T. STAFF: -- go in his place. Just use one --

THE COURT: Our IT person is confirming what everyone else has been saying, that you really can only have one device in the same room. It's just unavoidable, the echoing.

I.T. STAFF: Unless everybody has --

THE COURT: Unless everyone has headphones on.

I.T. STAFF: Right.

THE COURT: So we either need everyone to have headphones on, or one device in the room. And you all, awkward as it is, just have to share. Or I guess you could have two laptops, but one person has to --

I.T. STAFF: Has to have a headset.

THE COURT: Has to --

I.T. STAFF: Because the other one, the audio is going to be feeing into the microphone of the other one.

THE COURT: Okay. So, Mr. Bonds, I don't know if you've heard any of that, but --

THE CLERK: He needs to unmute himself.

THE COURT: You're on mute, Mr. Bonds.

MR. BONDS: I'm sorry, Your Honor. I'm going to sit next to Mr. Dondero and answer any questions that may come up.

THE COURT: Okay.

MR. BONDS: If any objections --

THE COURT: Okay. So we're going to have one device?

MR. BONDS: Yes.

THE COURT: Okay. Let's try again.

Okay. Go ahead, Mr. Morris.

BY MR. MORRIS:

Q Mr. Dondero, is Mr. Ellington listening to this hearing?

THE COURT: I didn't hear you, Mr. Morris. What?

BY MR. MORRIS:

Q Mr. Dondero, is Mr. Ellington listening to this hearing?

A I have no idea.
Q Is Mr. Leventon listening to this hearing?
A I have no idea. I haven't spoken with him.
Q Okay. So let's try again. At least as of today, you never bothered to read the TRO that was entered against you, correct?
A Correct.
Q As of Tuesday, you only had a general understanding of what the Court restrained you from doing, correct?
(Echoing.)
A I had an adequate understanding.
Q You had a what?
A Adequate understanding.
Q Your understanding --
A VOICE: Your Honor?
BY MR. MORRIS:
Q -- was that you were prohibited from speaking to the Debtor's board without counsel and from speaking to the Debtor's employees; is that right?
A No.
Q Okay.
MR. MORRIS: Can we go to Page 13, Line 8, please?
BY MR. MORRIS:
Q Were you asked this question and did you give this answer?
"Q Tell me your understanding of what the temporary

restraining order restrains you from doing.

"A To talk to Independent Board directly or talking directly with employees.

"Q Is there any other aspect of the temporary restraining order that you're aware of that would otherwise constrain or restrain your conduct?

"A Those are the points I (garbled)."

Q Did you give those answers to the questions that I asked?

A Yes.

Q And even with that general understanding, you went ahead and communicated directly (garbled) employees many, many, many times after the TRO was entered?

A Only with regard to shared services, pot plan, and Ellington, the settlement counsel.

Q Does the restraining order permit you to speak with Debtor's employees about the pot plan?

(Echoing.)

THE COURT: Mr. Morris, let me stop.

MR. MORRIS: Yeah. I appreciate that, Your Honor.

THE COURT: Even --

MR. MORRIS: It's not working.

THE COURT: Even your sound is not coming through clearly. And I think it's the echo coming out of their speakers, Mr. Dondero and Mr. Bonds' speakers. But before we conclude that, would you turn off your video and ask your

question again and see if it's any better, just to confirm it's not a bandwidth issue on your end? I doubt it is, but -- okay. So, try asking your question again, and I'm going to see if it's still distorted.

BY MR. MORRIS:

Q There's nothing in the TRO that permitted you to speak with Debtor employees about the pot plan, correct?

THE COURT: Okay. Mr. Morris, it's not at your end. It's -- it's their end. Okay. So you can turn your video back on.

Mr. Bonds?

MR. BONDS: Yes, ma'am.

THE COURT: You all are going to have to use earbuds, apparently. We're getting -- we're getting a feedback loop, okay? Whenever Mr. Morris talks or I talk, we're hearing ourselves echo through your speakers.

MR. BONDS: Can you check right now to see if it's true, if we're experiencing the same problem?

THE WITNESS: In other words, is this better? We unplugged the cord here.

THE COURT: Well, when you all speak, it's -- it's better now. But when --

MR. MORRIS: It is better.

THE COURT: But when Mr. Morris asks a question, it's echoing through your speakers. But I don't hear myself

echoing through your speakers.

I.T. STAFF: Can Mr. Morris say something, please?

THE COURT: Mr. Morris, say something.

MR. MORRIS: They may have solved the problem. They may have solved the problem. How's that?

THE COURT: Okay. I think the problem is solved, whatever you did, so let's try once again.

Go ahead, Mr. Morris. Repeat your last question. I didn't hear it.

BY MR. MORRIS:

Q Mr. Dondero, the temporary restraining order doesn't permit you to speak with the Debtor's employees about a pot plan; isn't that right?

A There was a presentation on the pot plan given to the Independent Board after the restraining order was put in place. What are you implying, that that wasn't proper?

MR. MORRIS: Your Honor, I move to strike. It's a very simple question.

THE COURT: Okay. Sustained. If you could just answer the specific question, Mr. Dondero.

THE WITNESS: I don't know.

BY MR. MORRIS:

Q Fair enough. Sir, let's talk about some of the events that led up to the imposition of the TRO. I appreciate the fact that you hadn't read Mr. Seery's declaration or any of

the evidence that was submitted in connection with the TRO, so let's spend some time talking about that now. CLO stands for Collateralized Loan Obligation, correct?

A Yes.

Q And the Debtor is party to certain contracts that give it the exclusive right and responsibility to manage certain CLOs, correct?

A Yes.

Q NexPoint Advisors, LP is an advisory firm. Do I have that right?

A Yes.

Q And we can refer to that, that firm, as NexPoint; is that fair?

A Yes.

Q You have a direct or indirect ownership interest in NexPoint, correct?

A Yes.

Q You're the president of NexPoint; isn't that right?

A Yes.

Q And as the president of NexPoint, it's fair to say that you control that entity, correct?

A To a certain extent.

Q Sir, as the president of NexPoint, it's fair to say that you control that entity, correct?

A To a certain extent.

MR. MORRIS: Can we go to Page 18 of the transcript, please? Lines 19 and 21.

BY MR. MORRIS:

Q Were you asked this question and did you give this answer?

"Q As the president of NexPoint, it's fair to say that you control that entity?

"A Generally."

Q Is that the right answer that you gave the other day?

A I think it's similar to what I just said, yeah, yeah.

Q Sir, you're familiar with Highland Capital Management Fund Advisors, LP; is that right?

A Yes.

Q And we'll call that Fund Advisors; is that fair?

A Yes.

Q And we'll refer to Fund Advisors and NexPoint together as the Advisors; is that okay?

A Yes.

Q Fund Advisors is also an advisory firm, correct?

A Yes.

Q You have a direct or indirect ownership interest in Fund Advisors, correct?

A Yes.

Q You're the president of Fund Advisors, correct?

A Yes.

Q And you also have an ownership interest in the general

partner of Fund Advisors; isn't that right?
A I believe so.
Q It's fair to say that you control Fund Advisors, correct?
A Generally.
Q NexPoint and Fund Advisors manage certain investments funds; is that right?
A Yes.
Q Among the funds that they manage are High Point Income Fund; is that right?
A I don't think that's a name that we manage.
Q Let's put it this way. There are three funds that are represented by K&L Gates that are managed by the Advisors, correct?
A I don't know.
Q Okay. You're the portfolio manager of the investment funds advised by NexPoint and Fund Advisors, correct?
A Largely.
Q And NexPoint and Fund Advisors caused the investment funds that they manage to invest in CLOs that are managed by the Debtors, correct?
A Years ago, they bought the equity interests, if that -- if that's what you're asking me, in various CLOs.
Q The two Advisors that you own and control caused the investment funds to purchase interests in CLOs that are managed by the Debtor, correct?

A Not recently. Not recently. Years ago. Yes.
Q And they still hold those interests today, correct?
A Yes.
Q And K&L Gates represents all of those entities, correct?
A Yes.
Q And we'll call those the K&L Gates Clients; is that fair?
A Yes.
Q Before the TRO was entered, the K&L Gates Clients sent two letters to the Debtor concerning the Debtor's management of certain CLOs, right?
A Yes.
Q Okay.

MR. MORRIS: Your Honor, I just want to take a moment now, because we're going to start to look at some documents. The Debtor would respectfully move into evidence Exhibits A through Y that are on their exhibit list.

THE COURT: All right.

MR. BONDS: Your Honor, we have no objection.

THE COURT: A through Y are admitted. And for the record, these appear at Docket No. 46 in this adversary.

(Plaintiff's Exhibits A through Y are received into evidence.)

MR. MORRIS: Okay. Can we please put up Exhibit B as in boy? (Pause.) Ms. Canty? If you need a moment, just let us know.

MS. CANTY: Yeah. I'm pulling it up right now.

MR. MORRIS: Thank you. (Pause.) Can you scroll down just a bit?

BY MR. MORRIS:

Q All right. Can you see this letter was sent on October 16th?

A Yes.

Q And we see the entities that are reflected on this letter. We've got Highland Capital Management, LP. That's the question that they're asking. And the questions and the statements are being asserted on behalf of NexPoint Advisors, LP. Do you see that?

A Yes.

Q And Highland Capital Management Fund Advisors, LP. Those are the two Advisors that you own and control, correct?

A Control to a large extent.

Q Okay.

MR. MORRIS: And can we put up Exhibit C, please?

BY MR. MORRIS:

Q This is a second letter sent by NexPoint on November 24th. Do you see that?

A Yes.

Q Okay. And you're familiar with the substance of these letters, correct?

A Yes.

Q And you were familiar -- you were aware of these letters before they were sent. Is that correct?
A Yes.
Q And you generally discussed the substance of these letters with NexPoint; is that right?
A Generally, yes.
Q And you discussed the substance of the letters with the Advisors' internal counsel; is that right?
A Yes.
Q That's D.C. Sauter?
A Yes.
Q And you have been on some calls with K&L Gates about these letters, right?
A I believe so.
Q And you knew these letters were being sent, correct?
A Yeah, they're -- they're reported.
Q You knew these letters for being sent; isn't that right, sir?
A Yes.
Q And you didn't object to the sending of these letters, correct?
A No.
Q In fact, you supported the sending of these letters. Is that right?
A Yes.

Q And you have never directed NexPoint to withdraw these letters, correct?
A No.
Q Around Thanksgiving, you learned that Mr. Seery had given a direction to sell certain securities owned by the CLOs managed by the Debtors, correct?
A Yes.
Q And when you learned that, you personally intervened to stop the trades, correct?
A Yes. I believe they were inappropriate.
MR. MORRIS: I move to strike the latter part of the answer, Your Honor.
THE COURT: It's stricken.
MR. MORRIS: Can we put up Exhibit D, please?
BY MR. MORRIS:
Q We looked at this email string the other day. Do you recall that?
A Yes.
MR. MORRIS: Can we start at the bottom, please?
BY MR. MORRIS:
Q There's an email from Hunter Covitz. Do you see that?
A Yes.
Q Now, this is November 24th. It's before the TRO. Is that fair?
A Yes.

Q Mr. Covitz is an employee of the Debtor, right?
A I believe so.
Q And Mr. Covitz helps manage the CLOs on behalf of the Debtor. Is that your understanding?
A Yes.
Q And Mr. Covitz in this email is giving directions to Matt Pearson and Joe Sowin to sell certain securities held by the CLOs. Is that correct?
A No. He's giving Jim Seery's direction.
MR. BONDS: And Your Honor, I'm going to object. This is all before the TRO was ever entered. It doesn't have anything to do with today's hearing.
THE COURT: Overruled.
MR. MORRIS: May I respond, Your Honor?
THE COURT: I --
MR. MORRIS: Okay. Thank you.
THE COURT: I think it's relevant. Go ahead.
MR. MORRIS: Thank you. Okay.
BY MR. MORRIS:
Q Mr. Seery is the CEO of the Debtor; is that right?
A Yes.
Q And the Debtor is the contractual party with the CLOs charged with the exclusive responsibility of managing the CLOs, correct?
A I don't believe so. The Debtor is in default of the

agreements.

MR. MORRIS: I move to strike, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q Sir, the Debtor has the exclusive contractual right and obligation to manage the CLOs, correct?

A I don't agree with that.

Q Okay.

MR. MORRIS: Can we scroll up to the -- just --

BY MR. MORRIS:

Q Do you see that Mr. Pearson acknowledges receipt of Mr. Covitz's email?

A Yes.

Q And you received a copy of Mr. Covitz's email, did you -- did you not?

A Yes.

MR. MORRIS: Can you scroll up a little bit, please?

BY MR. MORRIS:

Q And can you just read for Judge Jernigan your response that you provided to Mr. Pearson, Mr. Covitz, and Mr. Sowin on November 24th?

A (reading) No, do not.

Q You instructed the recipients of Mr. Covitz's email not to sell the SKY securities as had been specifically instructed by Mr. Seery, correct?

A Yes.
Q And you understood when you gave that instruction that the people on the email were trying to execute trades that Mr. Seery had authorized, correct?
A No. I -- no, that isn't how I would describe it.
MR. MORRIS: A second, Your Honor?
THE COURT: Okay.
(Pause.)
BY MR. MORRIS:
Q Sir, when you gave the instruction reflected in this email, you knew that you were stopping trades that were authorized and directed by Mr. Seery, correct?
A I don't think -- I -- I wasn't -- I wasn't sure at the moment I did that. I didn't find out until later that it was Seery who directed it.
MR. MORRIS: Can we please go back to the deposition transcript, Debtor's Exhibit Z, at Page 42? Line 12.
BY MR. MORRIS:
Q Were you asked this question and did you give this answer?
"Q At the time that you gave the instruction, "No, do not," you knew that you were stopping trades that had been authorized and directed by Mr. Seery, correct?
"A Yes."
Q Did you give that answer to my question on Tuesday?
A I'd like to clarify it, but yes, I did give that answer.

Q Okay. You didn't speak with Mr. Seery before sending your instructions interfering with his trade, the trades that he had authorized, correct?
A No, I did not.
Q And you took no steps to seek the Debtor's consent before instructing the recipients of your email to stop executing the SKY transactions that had been authorized by Mr. Seery, correct?
A I'm sorry. Can you repeat the question?
Q You took no steps to seek the Debtor's consent before stepping in to stop the trades that Mr. Seery had authorized, correct?
A I took other actions instead.
Q Okay. But you didn't seek the Debtor's consent? That's not one of the actions you took, right?
A No, I educated the traders as to why it was inappropriate.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
BY MR. MORRIS:
Q Sir, did you seek the Debtor's consent before stepping in to stop the trades that Mr. Seery had authorized?
A No, I did not seek consent.
Q In response to your instruction, Mr. Pearson canceled all of the trades that Mr. Seery had authorized, correct?
A Yes.

MR. MORRIS: Can we go back to the exhibit, please? And if we could just scroll -- stop right there.

BY MR. MORRIS:

Q That's -- that's Mr. Pearson's response to your email, confirming that he had canceled both the SKY and the AVAYA trades that had not yet been executed, correct?

A Yes.

MR. MORRIS: Can we scroll to the response to that?

BY MR. MORRIS:

Q Is this your response?

A Yes.

Q Can you read that aloud, please?

A (reading) HFAM and DAF have instructed Highland in writing not to sell any CLO underlying assets. There is potential liability. Don't do it again, please.

Q The writings that you're referring to are the two letters from NexPoint, Exhibits B and C that we just looked at, correct?

A Yeah. There might have been a third letter. I don't know. But, yes, generally, those letters.

Q Okay. And at this juncture, the reference to potential liability was a statement intended for Mr. Pearson. Is that correct?

A Um, I -- no. Pearson wouldn't have had any personal liability. It was -- it was meant for the -- there was

potential liability to the Debtor or to the compliance officers at the Debtor.

MR. MORRIS: Can we go to Page 45 of the deposition transcript, please? Line -- beginning at Line 11, through 18.

BY MR. MORRIS:

Q Did I ask these questions and did you give these answers?

"Q Do you see the reference there in the latter portion of your email, 'There is potential liability. Don't do it again'?

"A Yes.

"Q Who was the intended recipient of that message?

"A At this juncture, it's Matt Pearson, I believe."

Q Did you give those answers to my questions on Tuesday?

A Yeah. That's not inconsistent.

MR. MORRIS: Let's go back to the email, please.

BY MR. MORRIS:

Q Mr. Sowin responded to your email; is that right?

MR. MORRIS: Can we scroll up?

BY MR. MORRIS:

Q Okay. Who's Mr. Sowin?

A He's the head trader.

Q Who's he employed by?

A I believe he's employed by HFAM but not the Debtor.

Q Okay. So he's -- he's somebody who's employed by one of the Advisors; is that right?

A I believe so.
Q And Mr. Sowin responded to your email and he indicated that he would follow your instructions. Is that right?
A Yeah. He understands that it's inappropriate. That's what he's reflecting. Yes.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
BY MR. MORRIS:
Q Sir, Mr. Sowin responded and indicated that he would follow your instructions, correct?
A (no audible response)
Q Did you answer? I'm sorry.
A No, I didn't answer. It's -- I don't know if you could expressly say that from that email. Maybe we should read the email.
MR. MORRIS: Let's just move on, Your Honor.
THE COURT: Okay.
BY MR. MORRIS:
Q A few days later, you learned -- you learned that Mr. Seery was trying a workaround to effectuate the trades anyway, correct?
A I believe so.
Q Uh-huh. And when you learned that, you wrote to Thomas Surgent; is that right?
A I -- I believe so.

Q I don't -- I don't mean to -- this is not a test here.

MR. MORRIS: Can we just scroll up to the next email, please? Okay. Stop right there.

BY MR. MORRIS:

Q When you -- when you learned that Mr. Seery was trying a workaround, you wrote to Mr. Surgent when you learned that, right?

A Yes.

Q And Mr. Surgent is an employee of the Debtor; is that correct?

A I believe he's still the chief compliance officer of the Debtor.

Q Okay. Now, as a factual matter, you never asked Mr. Seery why he wanted to make these trades; isn't that right?

A I -- I did not.

Q Okay. And before the TRO was entered, there was nothing that prevented you from picking up the phone and asking Mr. Seery why he wanted to make these trades, correct?

A That's not true.

MR. MORRIS: One second, please, Your Honor.

THE COURT: Okay.

(Pause.)

MR. MORRIS: Can we go to Page 60 of the transcript? Mr. Bonds says -- beginning at Line 14. There is an objection there, Your Honor, and I would ask that the Court rule on the

objection before I read from the transcript.

THE COURT: Okay.

MR. MORRIS: There you go.

THE COURT: (sotto voce) (reading) Is there anything that you're aware of that prevented you from picking up the phone and asking Mr. Seery for his business justification for these trades prior to December 10. Objection, form.

I overrule the objection to the form of that question.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Mr. Dondero, were you asked this question and did you give this answer?

"Q Is there anything that you're aware of that prevented you from picking up the phone and asking Mr. Seery for his business justification for these trades prior to December 10, 2010?

"A No. I expressed my disapproval via email."

Q Is that right?

A I'd like to adjust that answer to the answer I just gave.

Q Okay.

MR. MORRIS: And I move to strike.

BY MR. MORRIS:

Q I'm just asking you if that's the answer you gave on Tuesday.

THE COURT: Sustained.

THE WITNESS: Yes.

BY MR. MORRIS:

Q Thank you. Now, you wrote to Mr. Surgent because you wanted to remind him of his personal liability for regulatory breaches and for doing things that aren't in the best interest of investors, correct?

A Yes.

Q And you actually thought about this and you -- because you didn't believe that Mr. Surgent had extra insurance and indemnities like Mr. Seery, right?

A No.

Q Didn't you testify to that the other day?

A I don't remember, but that isn't the only reason.

Q I didn't ask you if it was the only reason. Listen carefully to my question. Did you send this email because you -- because you wanted to remind him of his personal liability for regulatory breaches and for doing things that aren't in the -- I apologize. Withdrawn.

You did not believe at the time that you sent this email that he, Mr. Surgent, had insurance and indemnities like Mr. Seery, correct?

A Yes.

Q Okay.

MR. MORRIS: Can we go back to the email, please?

BY MR. MORRIS:

Q Can you just read the entirety of your email to Mr. Surgent out loud?

A (reading) I understand Seery is working on a workaround to trade these securities anyway, trades that contradict investor desires and have no business purpose or investment rationale. You might want to remind him and yourself that the chief compliance officer has personal liability.

Q Okay. That's -- that's the message you wanted to convey to Mr. Surgent, right?

A Yes.

Q And, again, you never bothered to ask Mr. Seery what his businessperson -- purpose or investment rationale was, correct?

A I -- I didn't believe I could talk to him directly.

Q This is before the --

A That's why I never picked up the phone.

Q Okay. You intended to convey the message to Mr. Surgent that, by following Mr. Seery's orders to execute the trades, that Mr. Surgent faced personal liability, correct?

A Yes, he does.

Q And that's the message you wanted to send to him, right?

A It's a true and accurate message, yes.

Q Okay. Just a few days earlier, you also threatened Mr. Seery, right?

A I wouldn't use the word "threatened."
Q Okay. Let's let -- let's let it speak for itself.
MR. MORRIS: Can we go to Exhibit E, please? Keep scrolling down just a bit.
BY MR. MORRIS:
Q This is an email that you sent to Mr. Seery on November 24th. And as always, Mr. Dondero -- this is the third time we're meeting -- if there's something in the document that you need to see, please just let me know, because I don't -- I don't mean to test your memory if the document can help refresh your recollection.
MR. MORRIS: Can we just scroll up a little bit further to the top to see the date?
BY MR. MORRIS:
Q Okay. So, Jim, there, JD, who is that?
A That's me.
Q Okay. And can you tell by the substance of the email, of the text messages, this is communications between you and Mr. Seery, right?
A Yes.
Q Okay. And you see that it's dated November 24th there?
A Yes. Right after we were discussing the pipeline. Or right when we were working on the pipeline.
Q Okay.
MR. MORRIS: Can you scroll down a little bit,

please?
BY MR. MORRIS:
Q At 5:26 p.m., you sent Mr. Seery a text, correct?
A Yes.
Q Can you read that, please?
A (reading) Be careful what you do. Last warning.
Q Okay. This was a warning telling Mr. Seery to stop selling assets out of the CLOs or the beneficial owners would take more significant action against him, correct?
A It was a general statement that what he was doing was regulatorily inappropriate and ethically inappropriate and he was in breach of the contracts he was operating.
Q Neither you nor any entity owned or controlled by you are parties to the contracts you just referred to; isn't that correct?
A I believe they're indirectly parties to those contracts, especially when they're in default.
Q Neither you nor any entity owned or controlled by you is a signatory to any CLO management contract pursuant to which the Debtor is a party, correct?
A I -- I don't know and I don't want to make legal conclusions on that.
Q Okay. At the deposition the other day, some of the things that you suggested the beneficial owners of the CLO interests might do against Mr. Seery and the Debtor are class action

lawsuits. Is that right?
A I -- I did not suggest the entities I control would do that. If anybody on this call were to call a class action lawsuit -- a class action law firm and tell them what's been going on with the CLOs, I think a class action law firm would file it on their own regard, not on the behalf of my entities.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
BY MR. MORRIS:
Q Let's talk about that cell phone. Okay? Until at least December 10th, the day the TRO was entered, you had a cell phone that was bought and paid by the Debtor, right?
A Yes.
Q But sometime after December 10th, your phone was disposed of or thrown in the garbage; is that right?
A Yes.
Q And you don't know when after December 10th the cell phone that was the Debtor's property was disposed of, right?
A I don't believe at that point it was the Debtor's property. I think I paid it off in full and the Debtor had announced that they were canceling everybody's cell phones so it was appropriate for me to get another one.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
MR. BONDS: Your Honor, at some point, I mean, Mr.

Morris just ought to go on and testify.

MR. MORRIS: No, this is Mr. Dondero's testimony, Your Honor. He gave it the other day. I'm just asking him to confirm it, basically.

THE COURT: Okay. I overrule the objection, if any there was, on the part of Mr. Bonds.

BY MR. MORRIS:

Q Sometime after December 10th, the cell phone that prior to that time had been owned and paid for by the Debtor was thrown in the garbage or otherwise disposed of, correct?

A Yes.

Q And you don't know when after December 10th that was -- the phone was disposed of, correct?

A It was on or about that date, I'm sure.

Q Well, we know it was after December 10th, right?

A Okay. Or about that date.

Q You testified the other day that you just don't know who made the decision to throw your phone away, right?

A I could find out, but I don't know. I would have to talk to employees.

Q Did you make any request of the Debtor since your deposition to try to find out the answer as to who made the decision to throw your phone away?

A No.

Q How did you learn that your phone was thrown away?

A As I testified, it's standard operating procedures every time a senior executive gets a new phone.
Q Hmm. You don't know exactly who threw the phone away; is that right?
A No, but I can find out.
Q Okay. I'm just asking -- I'm not asking you to find out. I'm just asking you if you know. Do you know who threw your phone away?
A No.
Q Do you know who made the decision to throw your phone away?
A It -- there wasn't a decision. It was standard operating procedure.

MR. MORRIS: I move to strike.

THE COURT: Sustained.

BY MR. MORRIS:
Q You and Mr. Ellington disposed of your phones at the same time, correct?
A I don't have specific awareness regarding what Mr. Ellington did with his phone.
Q It never occurred to you to get the Debtor's consent before throwing the phone that they had purchased away, right?
A I'm not permitted to talk to the Debtor.
Q Sir, it never occurred to you to get the Debtor's consent before throwing the phone away, correct?

A I'm going to stick with the answer I just gave.

MR. MORRIS: Can we go to Page 75 of the transcript? Lines 12 through 15. There is an objection there, Your Honor. I would respectfully request that the Court rule on the objection before I read the testimony.

THE COURT: Okay. Starting at Line 12?

MR. MORRIS: 12.

THE COURT: (sotto voce) (reading) Did it ever occur to you to get the Debtor's consent before doing this? Objection, form.

That objection is overruled.

BY MR. MORRIS:

Q All right. Mr. Dondero, did you give this answer to my question on Tuesday?

"Q Did it ever occur to you to get the Debtor's consent before doing this?

"A No."

A Yes, I gave that testimony.

Q Okay. And you also had the phone number changed from the Debtor's account to your own personal account; is that right?

A The phone number changed? The phone number stayed the same.

Q But you had the number changed from the Debtor's account to your own personal account, correct?

A The Debtor said they wouldn't pay for it anymore. Who

else could I change it to?

MR. MORRIS: Your Honor, I move to strike. It's a very simple question.

THE COURT: Sustained.

BY MR. MORRIS:

Q I'll ask it one more time, Mr. Dondero. You had the phone number changed from the Debtor's account to your personal account, correct?

A I didn't change the number. I had the billing changed to my personal account versus the company account.

Q And you never asked the Debtor for permission to do that, correct?

A No.

Q And you never told Debtor you were doing that, correct?

A No.

Q And nobody ever told Mr. Seery or anybody at my firm that the phone was being thrown in the garbage, correct?

A Well, --

MR. BONDS: To the extent he knows.

THE WITNESS: Yeah. I have no idea. But I didn't.

BY MR. MORRIS:

Q You didn't believe it was necessary to give the Debtor notice that you were taking the phone number for your own personal account and throwing the phone in the garbage, correct?

A Correct.
Q The phone --
MR. BONDS: Your Honor, I'm going to object. He -- Mr. Dondero did not testify he personally threw the phone in the garbage.
MR. MORRIS: Withdrawn.
THE COURT: Okay.
BY MR. MORRIS:
Q Mr. Dondero, the phone was in Highland's offices on December 10th, the date the TRO was in effect, correct?
A I -- I don't -- I -- I -- I don't know. You know, I don't know. It's -- I remember going over to -- well, anyway, I -- I don't know. We'll leave it at that.
MR. MORRIS: Can we go to Exhibit G, please?
BY MR. MORRIS:
Q Who's Jason Rothstein, while we wait?
A Jason, Jason is our -- is the Highland head of technology.
Q Okay. And did you text with him from time to time? On or about December 10th?
A Yes.
Q Okay.
MR. MORRIS: Can we just scroll up a little bit?
BY MR. MORRIS:
Q Is that Mr. Rothstein there?
A Yes. Yeah.

Q Okay. And do you see that there's a text message that you sent to him on December 10th, right at the top? Can you read -- can you read the text message Mr. Rothstein --

A He sent that to me. At the top.

Q I apologize. Thank you for the correction. Can you read what Mr. Rothstein told you on December 10th?

A That my old phone is in the top drawer of Tara's desk.

Q And who's Tara?

A My assistant.

Q Is she still your assistant today?

A Yes.

Q And has she been serving as your assistant since the TRO was entered into on December 10th?

A Yes.

Q Okay. Is it fair to say that you were informed on December 10th that the phone was not thrown in the garbage, had not been disposed of, but was instead sitting in Tara's desk?

A As of that moment, yes.

Q Okay. And it's also fair to say that, as of December 10th, Mr. Rothstein didn't take it upon himself to throw your old phone in the garbage, right?

A Not as of that moment. But like I said, I can find out how it was disposed of.

Q If you were curious to do that, would you have done that

before today?
A I haven't been curious.
Q Thank you very much. Someone you can't identify made the decision after December 10th to throw the phone in the garbage without asking the Debtor for permission or seeking the Debtor's consent, correct?
MR. BONDS: I'm going to object, Your Honor. To the extent that the witness knows, he can answer.
THE COURT: I -- I didn't hear --
THE WITNESS: I don't know.
THE COURT: I didn't hear what your objection was, Mr. Bonds. Repeat.
MR. BONDS: Your Honor, my objection was along the lines of to the extent that the witness knows, he could testify, but if he doesn't know, he doesn't need to speculate.
THE COURT: All right. Well, I don't hear an objection there, but go ahead, Mr. Dondero, if you have knowledge and can answer the question.
THE WITNESS: I don't know.
BY MR. MORRIS:
Q Do you recall that the Debtor subsequently gave notice to you to vacate its offices and to return its cell phone?
A I don't know.
Q Did you ever --
A I know I -- I know I was told to vacate the offices. I

didn't see the specific --
Q Uh-huh. Your lawyer -- your lawyers never told that Debtor that the cell phone had been disposed of or thrown in the garbage, consistent with company practice, right?
A I don't know.
MR. MORRIS: Can we put up Exhibit K, please?
BY MR. MORRIS:
Q This is the letter that my firm sent to your lawyer on December 23rd. Do you see that?
A Yeah, I see it.
Q Okay.
MR. MORRIS: Can we scroll down a little bit? Keep going. Okay. Stop right there.
BY MR. MORRIS:
Q Do you see that it says that, as a result of the conduct described above, that the Debtor "has concluded that Mr. Dondero's presence at the HCMLP office suite and his access to all telephonic and information services provided by HCMLP are too disruptive"?
A Yeah, I see it.
Q And this is the letter that gave you notice that you had to vacate the premises by December 30th, correct?
A I believe so.
MR. MORRIS: Can we scroll down a little bit?
BY MR. MORRIS:

Q You see at the bottom there's a reference to a defined term of "cell phones"?
A Yes.
Q And it says that the Debtor "will also terminate Mr. Dondero's cell phone plan and those cell phone plans associated with parties providing personal services to Mr. Dondero." Do you see that?
A Yes. Yeah.
Q Have I read that accurately?
A Yes.
Q And then my colleagues went on to write, "HCMLP demands that Mr. Dondero immediately turn over the cell phones to HCMLP by delivering them to you, Mr. Lynn." Do you see that?
A Yes.
Q Have I read that accurately?
A Yes.
Q The last sentence on the page begins, "The cell phones and."

MR. MORRIS: And let's scroll down further.

BY MR. MORRIS:
Q "The cell phones and the accounts are property of HCMLP. HCMLP further demands that Mr. Dondero refrain from deleting or wiping any information or messages on the cell phone. HCMLP, as the owner of the account and cell phones, intends to recover all information related to the cell phones and

accounts, and reserves the right to use the business-related information." Have I read that accurately?

A Yes.

Q Okay. We were a couple of weeks too late, huh?

A It sounds like it.

Q Yeah. Because the phones were already in the garbage, right?

A Yes.

Q Uh-huh. But that's not what Mr. Lynn told the Debtor on your behalf, right?

A I don't know.

Q Mr. Lynn -- all right. Let's -- let's see what Mr. Lynn said.

MR. MORRIS: Can we go to Exhibit U, please?

BY MR. MORRIS:

Q It took Mr. Lynn six days to write a one-paragraph letter in response, right? December 29th, he responded?

MR. MORRIS: Can we scroll down a bit?

BY MR. MORRIS:

Q Let me read beginning with the second sentence of the first substantive paragraph. "We are at present not sure of the location of the cell phone issued to Mr. Dondero by the Debtor, but we are not prepared to turn it over without ensuring the privacy of the attorney-client communications." And then he goes on.

Have I read that correctly?
A Yes.
Q Okay. So Mr. Lynn didn't say anything about the phone being thrown in the garbage, right?
A No.
Q He didn't say that it was disposed of, did he?
A No.
Q He didn't refer to any company practice or policy, right?
A No.
Q Mr. Lynn's not a liar, is he?
A No, he's not.
Q He's a decent and honest professional. Wouldn't you agree with that?
A Yes.
Q And is it fair to say that he conveyed only the information that he had at the time?
A I don't know.
Q Do you have any reason to believe that Mr. Lynn would withhold from the Debtor the information that the cell phone had been thrown in the garbage, consistent with company practice?
A No, I don't believe he would withhold whatever he knew.
Q All right. Let's talk about -- let's talk about other matters. You do know, sir, do you not, that the Debtor is subject to the Bankruptcy Court's jurisdiction?

A Yes.
Q Okay. And we just saw in the December 23rd letter that the Debtor demanded that you vacate their offices a week later, right?
A Yes.
Q And you knew that at or around the time the letter was sent on December 23rd, correct?
A I -- I don't remember when I knew.
Q Well, in fact, in fact, you or through counsel asked for an accommodation and asked for an extension of time to December 31st; isn't that right?
A I had to pack up 30 years of stuff in three days. I -- I know we asked for some forbearance. I don't think we got any. I don't remember the details. I don't understand why it's important.
Q Okay. It was actually -- withdrawn. The Debtor actually gave you seven days' notice, right? They sent the letter on December 23rd and asked you to vacate on December 30th, correct?
A I don't -- I don't remember. But, again, I think the initial response was it was inconsistent with shared services agreement. No Highland employees are coming into the office anyway. So kicking me out of my office was -- seemed vindictive and overreaching. And we tried to get some, you know, forbearance.

Q Okay.

MR. MORRIS: I move to strike, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q Mr. Dondero, you were given seven days' notice before -- before you were going to be barred from the Debtor's office, correct?

A I don't know.

Q Okay.

MR. MORRIS: Can we go back to Exhibit K, please? Oh, actually, it's okay.

BY MR. MORRIS:

Q We just read, actually, the piece from the Debtor's letter of December 23rd barring you from the Debtor's office. Do you remember that? And we can go back and look at it if you want.

A Yes.

Q Was there anything ambiguous that you recall about the Debtor's demand that you not enter their offices after December 30th?

A Ambiguous? I can tell you what my understanding was or I can tell you what the letter says. What would you like to know?

Q I'd just like to know if, as you sit here right now, you believe there was anything ambiguous about the Debtor's demand that you vacate the offices as of December 30th?

A I mean, I did vacate the offices as of December 30th.
Q Correct. And you knew that -- and you were complying with the Debtor's demand you do that, right?
A Well, with the Court's demand, I guess.
Q Okay. And it's your understanding that you would not be permitted in the Debtor's offices after that time, correct?
A Um, (pause), uh, I don't know how to answer that question. I knew I wouldn't be residing in the offices anymore. But for legitimate business purposes, to visit the people at NexPoint who were in the office, since there are no Highland people in the office, or to handle a deposition, you know, there was nothing I thought inappropriate about that.
Q Did the Debtor tell you that they would allow you to enter the offices any time you just believed that it would be appropriate to do that?
A I used my business judgment.
MR. MORRIS: I move to strike.
BY MR. MORRIS:
Q I'm asking you a very --
THE COURT: Sustained.
BY MR. MORRIS:
Q -- specific question, sir. Did the Debtor ever tell you that they -- that you would be permitted to enter their offices after December 30th if you, in your own personal discretion, believed it to be appropriate?

A No.
Q Did the Debtor provide you any exception to their demand that you vacate the offices, without access, by and after December 30th?
A I always do what I think is appropriate and in the best interests. I don't know. I didn't know the specifics of the Debtor's -- okay, yeah, what the specifics of the Debtor was.
Q Despite the unambiguous nature of the Debtor's demands letter, on Tuesday you just walked right into the Debtor's office and sat for the deposition, correct?
A I believe that was reasonable, yes.
Q Okay. But you didn't -- you didn't have the Debtor's approval to do that, correct?
A We didn't have technology to do it anywhere else, so if the deposition was going to occur, it had to occur there.
Q Sir, --
MR. MORRIS: Move to strike.
THE COURT: Sustained.
BY MR. MORRIS:
Q And I ask you to just listen very carefully. And if it's not clear to you, please let me know. You did not have the Debtor's approval to enter their offices on Tuesday to give your deposition, correct?
A No.
Q And you did not even bother to ask the Debtor for

permission, correct?
A I'm prohibited from contacting them, so no, I did not.
Q Okay. Let's talk about other events that occurred after the entry of the TRO. We talked earlier about how you interfered with Mr. Seery's trading activities on behalf of the CLOs around Thanksgiving. Do you remember that?
A Yes.
Q But after the TRO was entered, the K&L Gates Clients also interfered with the Debtor's trading activities, correct?
A No.
MR. MORRIS: Can we go to Exhibit K, please? Can we start at the first page? And scroll down just a bit.
BY MR. MORRIS:
Q Do you see there's an explanation there about the Debtor's management of CLOs?
A Yes.
Q And there's a recitation of the history that we talked about earlier, where around Thanksgiving you intervened to block those trades?
A Yes.
Q And then the next paragraph refers to the prior motion that was brought by the CLO entities? I mean, the K&L Gates entities, right?
A Yes.
Q And you were aware of that motion at the time it was made,

right?
A Yes.
Q And you were supportive of the making of that motion, right?
A Supportive? Yes.
MR. MORRIS: And scroll down to the next paragraph, please.
BY MR. MORRIS:
Q Okay. So, my colleague wrote that, "On December 22nd, 2020, employees of NPA and HCMFA notified the Debtor that they would not settle the CLO sale of the AVAYA and SKY securities." Have I read that right?
A Yes.
Q And that took place six days after the motion that the Court characterized as frivolous was denied on December 16th?
A Yes. I wasn't aware of that, for what that's worth.
Q Okay. You personally instructed the employees -- withdrawn. NPA -- that refers to NexPoint, correct?
A Yes.
Q That's an entity you own and control, right?
A I -- largely.
Q And that's one of the Advisors we defined earlier, right?
A Yes.
Q And HCMFA, that's Fund Advisors, another advisory firm that you own and control, correct?

A Yes.
Q And you personally instructed, on or about December 22nd, 2020, employees of those Advisors to stop doing the trades that Mr. Seery had authorized with respect SKY and AVAYA, right?
A Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions not to settle trades that occurred. But that's a different ball of wax.
Q Okay. But you did instruct them not to execute trades that had not been made yet, right?
A Yeah. Trades that I thought were inappropriate, for no business purpose, I -- I told them not to execute.
Q Okay. You actually learned that Mr. Seery wanted to effectuate these trades the Friday before, right?
A I don't know, but what did I do? When did I know it? What did I do? When I knew things are inappropriate, I reacted immediately. I don't -- I don't -- whenever -- whenever I found out about inappropriate things, I reacted to the best of my ability.
Q Okay.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
Mr. Dondero, I'm going to -- I'm going to interject some instructions once again here. Remember we talked about early

on, and I know you've testified before, but I'll repeat it: You need to just give direct yes or no answers.

And let me just say that we see witnesses all the time do what you're doing here, and that is they feel they need to say more than yes or no. They feel the need to clarify or supplement the yes or no answer they give. And just to remind you how this works, your lawyer, Mr. Bonds, is going to be given the opportunity when Mr. Morris is through to ask you all the questions he wants, and that will be your chance to clarify yes and no answers to the extent he asks you to revisit certain of these questions and answers. Okay?

So I'm going to remind you once again: yes or no or direct -- you know, other appropriate direct answers. Mr. Bonds can let you clarify later. All right?

Mr. Morris, continue.

MR. MORRIS: Okay. Thank you, Your Honor.

Can we please put up on the screen Exhibit L? And at the, I guess, the bottom of Page 1.

BY MR. MORRIS:

Q This is an email string. And --

MR. MORRIS: Go to the email below that, please. Yeah. Okay. Right there.

BY MR. MORRIS:

Q This is an email from Mr. Seery dated December 18th at (garbled) :30 p.m. Do you see that?

A Yes.
Q And in the substantive portion of his email, continuing on to the next page, he's giving instructions to sell certain SKY and AVAYA securities that are held by CLOs, correct?
A Yes.
Q And Mr. Sowin forwarded this email to you, right?
A Yes.
MR. MORRIS: If we can scroll up.
BY MR. MORRIS:
Q And you forwarded it to Mr. Ellington, right? I'm sorry. Let's just give Ms. Canty a chance.
MR. MORRIS: Keep scrolling up.
BY MR. MORRIS:
Q So, Mr. Sowin forwarded it to you at 3:34 p.m. Do you see that?
A Yes.
Q And if we scroll up, you turn around and give it to Mr. Ellington a few minutes later, right?
A Yes.
Q So that you and Mr. Ellington and Mr. Sowin are all aware that Mr. Seery wants to sell AVAYA and SKY securities on behalf of the CLOs, right?
A Yes.
Q Why did you decide to forward this email to Mr. Ellington?
A Ellington's role has been of settlement counsel that

supposedly everybody is able to talk to to try and bridge some kind of settlement. Ellington, I thought, should be aware of things that would make settlement more difficult or create liabilities for the Debtor. And so I thought it was appropriate for him to know.

Q Okay. This is the email that caused you to put a stop to the trades that Mr. Seery wanted to effectuate, correct?

A This is the -- I'm sorry. Ask the question again. This is the email that what?

Q This is -- this is how you learned that Mr. Seery wanted to effectuate rates in AVAYA and SKY securities, right?

A I -- I learned about it pretty early on of him trading it. I don't know if it was this email or -- or one of the others. But yes, it was from -- it was from Joe Sowin.

Q And you would agree with me, would you not, that you personally instructed the employees of the Advisors not to execute the very trades that Mr. Seery identifies in this email, correct?

A Yes.

Q At no time after December 10th, when the TRO was entered into, did you instruct the employees of the Funds that you own and control not to interfere or impede the Debtor's management of the CLOs, correct?

MR. BONDS: Can you repeat the question? I'm sorry.

BY MR. MORRIS:

Q At no time after December 10th, when the TRO was entered, did Mr. Dondero instruct any employee of either of the Advisors that he owns and controls not to interfere or impede with the Debtor's business and management of the CLOs, correct?

A I did not.

Q Okay. Neither you nor anybody that you know of ever provided a copy of the TRO to the employees of the Advisors that you own and control, correct?

A I don't know.

Q Okay. After the TRO was entered, the K -- after the TRO was entered, and after the hearing on December 16th, the K&L Gates Clients sent three more letters to the Debtor, right?

A Yes.

Q Okay.

MR. MORRIS: Your Honor, those are Exhibits M as in Mary, N as in Nancy, and X as in x-ray.

THE COURT: Okay.

MR. MORRIS: Unless the witness thinks there is a need to look at them specifically -- oh, let me just ask a couple of questions.

BY MR. MORRIS:

Q Mr. Dondero, in those letters, it's your understanding that the K&L Gates Clients again requested that the Debtor not trade any securities on behalf of the CLOs, right?

A Yes.
Q And it's your understanding that in those letters the K&L Gates Clients suggested that they might seek to terminate the CLO management agreements to which the Debtor was a party, correct?
A I don't know specifically, but that wouldn't surprise me.
Q Okay.
A So, --
Q Is it your understanding that the K&L Gates Clients also sent the letter a Debtor -- the Debtor a letter in which they asserted that your eviction from the offices might cause them damages and harm?
A I know there was objections to me -- I assume so. I don't know specifically.
Q And you were aware of these letters at the time that they were being sent, right?
A I'm sorry, what?
Q You were aware of these letters at the time they were being sent by the K&L Gates Clients, right?
A Generally, yes.
Q And you were generally supportive of the sending of those letters, right?
A I'm always supportive of doing what we believe is the right thing, yes.
Q And in this case, you were supportive of the sending of

these three letters, correct?
A I -- yes.
Q In fact, you pushed and encouraged the chief compliance officer and the general counsel to send these letters, right?
A I push them to do the right thing. I didn't push them specifically.
Q Okay. At the time the letters were sent, you were aware that the K&L Gates Clients had filed that motion that was heard on the 16th of December, correct?
A Yes.
Q And you were aware that they advanced the very same -- withdrawn. You're aware that in the letters they advance some of the very same arguments that Judge Jernigan had dismissed as frivolous just six days earlier, right?
A I wasn't at the hearing. I don't know if it was the same arguments or similar arguments. I -- I can't -- I can't corroborate the similarity or contrast the differences between the two.
Q All right. So it's fair to say, then, that you were supportive of the sending of these letters, you were aware of the December 16 argument, but you didn't take the time to see whether or not any of the arguments being advanced in the letters were consistent or any different from the arguments that were made at the December 16th hearing, correct?
A Correct. I wasn't directly involved, but still believed

that fundamentally Seery's behavior was wrong.
Q You never instructed the K&L Gates Clients to withdraw the three letters that were sent after December 10th, correct?
A No.
Q And you're aware that the Debtor had demanded that those letters be withdrawn or it would seek a temporary restraining order against the K&L Gates Clients, correct?
A I'm not aware of the back and forth.
Q Okay. Let's talk about your communications with Mr. Ellington and Mr. Leventon. You communicated with them on numerous occasions after December 16th, correct?
A No.
Q No, you didn't communicate with them many times after December 10th?
A You're lumping in Ellington and Isaac, and numerous times is a bad clarifier, so the answer is no.
Q I appreciate that. You communicated many times with Mr. Ellington after December 10th, right?
A Not -- not outside shared services, pot plan, and him being the go-between between me and Seery. I would say virtually none.
Q Okay. On Saturday, December 12th, two days after the temporary restraining order was entered against you, Mr. Ellington was involved in discussions with your personal counsel about who would serve as a witness at the upcoming

December 16th hearing, correct?
A I don't -- I don't remember.
Q Let's see if we can refresh your recollection.
MR. MORRIS: Can we please put up Exhibit P? Can we scroll down? Okay.
BY MR. MORRIS:
Q Do you see where Mr. Lynn writes you an email on Saturday, December 12th, and he says, among other things, it looks like trial?
A Yes.
Q And then if we scroll up a little bit, he wrote further, "That said, we must have a witness now." Have I read that accurately?
A Yes.
Q Okay.
MR. MORRIS: Can we scroll back up?
BY MR. MORRIS:
Q And this is Mr. Ellington's response, right?
A Yes.
Q Can you read Mr. Ellington's response for Judge Jernigan?
A (reading) It will be J.P. Sevilla. I'll tell him that he needs to contact you first thing in the morning.
Q Is it your testimony that this email relates to -- withdrawn. Mr. Ellington is not your personal lawyer, right?
A No. Mr. Ellington has been functioning as settlement

counsel, trying to bridge settlement, --
Q Okay.
A -- which is what this email looks like to me.
Q Okay. I'll let -- I'll let the judge --
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
BY MR. MORRIS:
Q So, after the TRO was entered, you and Mr. Ellington not only communicated but Mr. Ellington was actively involved in identifying witnesses to testify on behalf of your interests at the December 16th hearing, correct?
A I -- I don't know what the witness was for, but I believe Ellington was doing his job as settlement counsel, trying to facilitate settlement. I don't -- I have no reason to think this was anything more nefarious.
Q Okay. You looked to Mr. Ellington for leadership in coordinating with all of the lawyers who were working for you and your personal interests, right?
A I'm not agreeing with that.
Q No? All right.
MR. MORRIS: Let's look at the next exhibit. I think it's Exhibit Q. And if we could stop right there.
BY MR. MORRIS:
Q There's an email from Douglas Draper, do you see that, on December 16th?

A Yes.
Q So this is after the TRO was entered into, right?
A I believe so.
Q And Mr. Draper represents Get Good and Dugaboy; is that right?
A I believe so.
Q And he was new to the case at that moment in time, right?
A On or about, I believe so.
Q And he was looking to -- he was looking for a joint meeting among all of the lawyers representing your personal interests, right?
A No. I think he was trying to coordinate -- coordinate or understand whatever. But not everybody -- he doesn't just talk to lawyers around my interests. I mean, and he hasn't sought agreements with just lawyers reflecting my interests.
Q You forwarded Mr. Draper's email to Mr. Ellington, right?
A Yes.
Q But you can't remember why you did that, right, or at least -- withdrawn. You couldn't remember as of Tuesday's deposition why you forwarded this email to Mr. Ellington, right?
A Not specifically. But, again, Ellington is settlement counsel.
MR. MORRIS: I move to strike, Your Honor, after the initial phrase "Not specifically."

THE COURT: Sustained.

MR. MORRIS: Can we scroll up a little bit, please?

BY MR. MORRIS:

Q Mr. Lynn responded initially with a reference to the assumption that a particular lawyer was with K&L Gates, right?

A Yes.

MR. MORRIS: And if we could scroll up a little bit.

BY MR. MORRIS:

Q That's where you forward this email to Mr. Ellington, right?

A Yes.

Q And can you read to Judge Jernigan what you wrote at 1:33 p.m.?

A (reading) I'm going to need you to provide leadership here.

Q But at least as of Tuesday's deposition, you couldn't remember why you needed Mr. Ellington to provide leadership, right?

A Correct. Nor if he did.

MR. MORRIS: I move to strike the latter portion of the answer, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q So you have no --

(Echoing.)

MR. MORRIS: We're getting --

THE WITNESS: Can I -- can I hold -- can I hold on for one second here? Can I just put you guys on mute, please?

MR. MORRIS: Sure.

(Pause.)

THE COURT: All right.

THE CLERK: John, there's some feedback again. I'm sorry.

MR. MORRIS: That's okay.

THE COURT: Mr. Bonds, --

MR. MORRIS: We lost Mr. --

THE COURT: Mr. Bonds, what's going on?

MR. MORRIS: We've lost -- the screen --

THE COURT: You know you can't counsel your client in the middle of court testimony. I thought maybe Mr. Dondero had some non-legal thing going on in the background. Mr. Bonds?

MR. BONDS: Your Honor, I -- I did not in any way counsel Mr. Dondero.

THE COURT: Okay. Well, I'll take your representation on that. Are we ready to go forward?

MR. MORRIS: I'll readily accept Mr. Bonds' representation as well, Your Honor.

THE COURT: Okay.

MR. MORRIS: But I'd ask that it not happen again.

THE COURT: Well, fair enough. I think Mr. Bonds understands.

BY MR. MORRIS:

Q Mr. Dondero, you have no recollection of why you forwarded this email to Mr. Ellington and why you told him you needed him to provide leadership, correct?

A Correct.

MR. MORRIS: And if we can scroll up, can we just see how Mr. Ellington responded?

BY MR. MORRIS:

Q All right. And can you just read for Judge Jernigan what Mr. Ellington said on December 16th in response to your statement that you're going to need him to provide leadership here?

A (reading) On it.

Q Thank you. In your deposition, you testified without qualification that Scott Ellington and Isaac Leventon did not participate in the drafting of a joint interest or mutual defense agreement. Do you recall that testimony?

A Yes, as far as I knew.

Q And you also testified that you never discussed with either of them the topic of a joint defense or mutual defense agreement; is that right?

A Correct. That was Draper.

Q Okay.

MR. MORRIS: Can we put up Exhibit 11, please? I apologize. It's Exhibit W. Okay. Can we stop right there?

BY MR. MORRIS:

Q This is an email between some of your counsel and Mr. Ellington. Do you see that?

A Yes.

Q And a common interest agreement is attached to the communication. Is that a fair reading of the portion of the exhibit that's on the screen?

A Yes.

MR. MORRIS: And can we scroll to the top of the exhibit, please?

BY MR. MORRIS:

Q And do you see that there is an email exchange between Mr. Ellington and Mr. Leventon concerning the common interest agreement?

A Yes.

Q Okay. So it's your testimony that this email may exist but you had no idea that Mr. Ellington and Mr. Leventon were working with your lawyers to draft a common interest agreement? Is that your testimony?

A I wasn't part of this. It looks to me like they were just included in a -- a final draft. And, again, Ellington is settlement counsel. I -- but I don't want to speculate why or what they were doing.

Q Do you remember that I asked you a few questions the other day about Multi-Strat financial statements and whether or not you'd ever given -- you'd ever received any of those documents from Mr. Ellington and Mr. Leventon?

A Yes.

Q Okay. And you testified under oath that you never got any financial information, including balance sheets, concerning Multi-Strat from either of those lawyers, correct?

A I -- hmm. I -- I don't remember. Yeah, I don't remember. I may have to clarify that, but I don't remember.

Q You testified under oath the other day that you wouldn't even think to ask them for financial information relating to Multi-Strat because it's not natural for them to have it, right?

A I -- I'm sorry.

THE WITNESS: Your Honor, do I just have to answer these questions yes or no, or is that the -- can I clarify at all, or can I --

THE COURT: Well, I mean, if the question simply directs a yes or no answer, that's correct, you just answer yes or no. And I think this one did.

Again, your lawyer is going to have the chance to do follow-up examination later.

BY MR. MORRIS:

Q So let me try again. During your deposition, you

testified under oath without qualification that you never got any financial information, including balance sheets, concerning Multi-Strat from Scott Ellington or Isaac Leventon, correct?

A I believe I might have misspoken there.

Q Okay. But that was your testimony the other day, right?

A Yes.

Q And today, you believe you might have gotten that information from them, right?

A Only because Ellington was supposed to be the go-between and I couldn't go directly to somebody. But he wouldn't normally have that information, which is what I was saying.

MR. MORRIS: Your Honor, I have an exhibit that's not on the Debtor's exhibit list, and I was going to use it for impeachment purposes to establish the fact that Mr. Ellington and Mr. Leventon in fact gave to Mr. Dondero, after December 10th, financial information concerning Multi-Strat, which Mr. Dondero had previously denied receiving. May I -- may I use that document to impeach Mr. Dondero?

THE COURT: You may.

MR. BONDS: Your Honor, I'm going to object. This is pretty clearly something that should have been disclosed and it wasn't.

THE COURT: Well, he says it's purely to impeach the testimony that Mr. Dondero just now gave. So we'll -- we'll

see the document and, you know, I'll either agree with that being impeachment or not. So, he may proceed.

MR. BONDS: Your Honor, I think that the testimony -- Your Honor, I'm sorry. I think that the testimony that was (inaudible) given was that he thought that he may have talked to Scott or Isaac, not that he did not.

MR. MORRIS: Your Honor, if I may, the testimony the other day was unequivocal and unambiguous that not only didn't he get this information from the two lawyers, but that he had no reason to believe he would ever get the information from those two lawyers.

I appreciate the fact that Mr. Dondero today is suggesting that he may have, but I -- I would still like to use this document to refresh his recollection and to impeach even the possibility that he's giving this qualified testimony that he may have.

THE COURT: All right.

MR. MORRIS: There's no doubt that he did.

THE COURT: I overrule the objection. You can go forward.

MR. MORRIS: Can we please put up on the screen -- I believe it's Debtor's Exhibit AA. And if we can scroll down, please. And just stop, yeah, towards the top. All right. Stop right there.

BY MR. MORRIS:

Q Do you see in the first email Mr. Klos -- he's an employee of the Debtor, right?
A Yes.
Q And he provides Multi-Strat balance sheet and financial information to Mr. Leventon, Mr. Ellington, and Mr. Waterhouse. Do you see that?
A Yes. He's the person I would normally go to.
Q Okay. And they're all Debtor employees, right?
A Yes.
Q Okay. And then Mr. Leventon sends it to you and Mr. Ellington on February 4th, 2020; is that correct?
A Yes.
Q And this is confidential information; is that fair?
A No.
Q Okay. Let's -- let's talk about the next --
A No, it's not -- wait, wait, hold on a second. Judge, I need to clarify this. I -- it's not confidential information. It's available to every investor, of which I was one of them. Okay? So, let's -- let's not mischaracterize this as some corporate secret.
Q Okay. You interfered with the Debtor's production of documents; isn't that right?
A No.
Q Several times in the last year, various entities have requested that Dugaboy produce its financial statements,

correct?
A Dugaboy is my personal trust. It's not an entity of the Debtor in any form or fashion.
Q Sir, you're aware that several times in the last year various entities requested that the Debtor produce Dugaboy financial information, correct?
A The Debtor is not in a position to do it. I -- I don't know if it's been several times or whatever, but it's not appropriate.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
BY MR. MORRIS:
Q I'll try one more time. If we need to go to the transcript, we can. It's a very simple question. You knew and you know that several times in the last year various entities have requested that the Debtor produce Dugaboy financial statements, correct?
A Yes.
Q Do you recall at the deposition the other day I asked you whether you had ever discussed with Mr. Ellington and Mr. Leventon whether or not the Dugaboy financial statements needed to be produced, and you were directed not to answer the question by counsel and you followed those directions?
A Yes.
Q But you communicated with at least one employee concerning

the production of the Dugaboy financial statements, correct?
A Yes.
Q And that's Melissa Schroth; is that right?
A Yes.
Q She's an executive accountant employed by the Debtor, right?
A Yes.
Q And on December 16th, after the TRO was entered into, you instructed Ms. Schroth not to produce the Dugaboy financials without a subpoena, correct?
A That was the advice I had gotten from counsel, yes.
Q Okay. The Dugaboy and Get Good financial statements are on the Debtor's platform, correct?
A I do not know.
Q There is no shared services agreement between Dugaboy or Get Good and the Debtor, correct?
A I don't know.
Q You're not aware of any; is that fair?
A Yes.
Q Okay.
MR. MORRIS: Can we put on the screen Exhibit R? And can you scroll down a bit?
BY MR. MORRIS:
Q Okay. That's Melissa Schroth at the top there; is that right?

A Yes.
Q And these are texts that you exchanged with her after the TRO was entered into, correct?
A Yes.
MR. MORRIS: Can we scroll down a little bit?
BY MR. MORRIS:
Q And do you see on December 16th you sent Ms. Schroth an email -- I apologize -- a text that says, "No Dugaboy details without subpoena"?
A Yeah.
Q But you can't remember why you sent this text, correct? At least you couldn't as of Tuesday?
A I believe it was on advice of counsel.
Q But that's not what you said on Tuesday, correct?
A I don't remember.
Q You sent this text even though you knew that various entities had requested the Dugaboy financials, but you have no recollection of ever talking to anyone at any time about the production of those documents, right?
A Can you repeat the question?
Q I'll move on. Let me just -- last topic, and then I'm going to respectfully request that we just take a short break. You're familiar with the law firm of Baker & McKenzie; is that right?
(Echoing.)

A I'm sorry. You broke up on us there.
Q No problem. You're familiar with the law firm Baker & McKenzie, correct?
A Yes.
Q That firm has never -- never represented you or any entity in which you have an ownership interest, correct?
A Correct.
Q But in December, the Employee Group, of which Mr. Leventon and Mr. Ellington was a part, was considering changing counsel from Winston & Strawn to Baker & McKenzie, right?
A I believe so.
Q And you asked -- and because of that, you specifically asked Mr. Leventon for the contact information for the lawyers at Baker & McKenzie, right?
A I believe so.
Q Okay.
MR. MORRIS: Can we put up Exhibit S, please?
BY MR. MORRIS:
Q And who is that email sent from? I apologize. Withdrawn. Who is that text message exchange with?
A Isaac Leventon.
Q Okay. And Mr. Leventon was an employee of the Debtor after December 10th, correct?
A Yes.
MR. MORRIS: Can we scroll down a little bit?

BY MR. MORRIS:

Q And on December 22nd, you asked Mr. Leventon for the contact information at Baker & McKenzie, correct?

A Yes.

Q And the reason you asked Mr. Leventon for the contact information, that was in connection with the shared defense or mutual defense agreement, right?

A I -- I don't remember why. It might have just been for my records. I don't know.

Q The only reason that you could think of for asking for this information was for the shared defense or mutual defense agreement, correct?

A I -- no, it -- I don't know and I don't want to speculate. I don't want to -- I don't want to speculate. I -- did -- I don't think I ever got -- I don't know what your point is.

MR. MORRIS: May we please go back to the transcript at Page 136? At the bottom, Line 23.

BY MR. MORRIS:

Q Were you asked this question and did you give this answer?

"Q Do you recall asking Isaac Leventon for the contact information for the -- for the lawyers at Bakers & McKenzie?

"A I -- I don't -- I don't -- it might have been for part of the shared defense, mutual defense whatever agreement, but that's -- that's the only reason I would

have asked for it."
Q Did you give that answer to my question?
A Yeah. I shouldn't have speculated.
Q Okay. But that's the answer you gave the other day; is that right?
A I shouldn't have speculated. That's my answer today.
Q And today -- withdrawn. In fact, you wanted the Baker contact information in order to help Mr. Draper coordinate the mutual defense agreement, correct?
A I don't want to speculate.
MR. MORRIS: Can we go to Page 139, please? Lines 2 to 5.
BY MR. MORRIS:
Q Did you -- did you hear this question and did you give this answer on Tuesday?
"Q Why did you want the Baker & McKenzie contact information?
"A I was trying to help Draper coordinate the mutual shared defense agreement, period."
Q Did you give that answer to my question on Tuesday?
A Yes.
MR. MORRIS: Your Honor, I'd respectfully request a short break to see if I've got anything more.
THE COURT: All right. Well, I was going to ask you how much more do you think you have. We've been going almost

two hours.

So we'll take a break. Let's make it a ten-minute break. And then, depending on how much more you have and how much Mr. Bonds is going to have, we'll figure out are we going to need a lunch break in just a bit.

All right. So it's 12:00 noon Central. We'll come back at 12:10. Ten minutes.

MR. MORRIS: Your Honor, may I have an instruction of the witness not to check his phone for any purposes, not to make -- not to communicate with anybody until -- until his testimony is completed?

THE COURT: All right. Any -- any --

MR. BONDS: Your Honor, he's going to speak with me.

THE COURT: Pardon?

MR. BONDS: I assumed he will speak to me about just general events. I mean, I don't want to be in breach of some order.

MR. MORRIS: Yeah. I would -- I would -- I would ask for -- you know, it's not -- he's on the stand. He's still on the stand.

THE COURT: Yeah. He --

MR. MORRIS: He shouldn't be conferring with counsel, either. No disrespect to Mr. Bonds at all.

THE COURT: Exactly. I mean, you all can talk about, you know, the national champion football game or whatever, but

it would be counseling your client in the middle of testimony if you -- if you talk about this case at the moment. So, you know, --

MR. BONDS: I understand, Your Honor.

THE COURT: All right.

MR. BONDS: I just didn't want to be --

THE COURT: All right. So now we'll come back at 12:11.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(A recess ensued from 12:01 p.m. until 12:12 p.m.

THE CLERK: All rise.

THE COURT: Please be seated. This is Judge Jernigan. We're going back on the record in Highland Capital versus Dondero. We have taken an 11-minute break. It looks like we have Mr. Dondero and counsel back. And Mr. Morris, are you out there, ready to proceed?

MR. MORRIS: I am, Your Honor. And I do have just a few more questions.

THE COURT: Okay. I'm sorry. Mr. Lynn, I see you're there in the room with Mr. Dondero. Now, did you want to --

MR. LYNN: Here's Mr. Bonds. I apologize. He was in the restroom.

THE COURT: Okay. All right. Everyone ready to proceed?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay. Mr. Morris, go ahead.

MR. MORRIS: Thank you, Your Honor.

DIRECT EXAMINATION, RESUMED

BY MR. MORRIS:

Q Can you hear me, Mr. Dondero?

A Yes.

Q Did you ever discuss the request of any party to produce the financial statements of Get Good and Dugaboy with Scott Ellington?

A Not that I recall.

Q Did you ever communicate with Mr. Leventon on the subject matter of whether or not the financial statements for Get Good and Dugaboy needed to be produced by the Debtor?

A No.

Q Those are the two questions that you were directed not to answer the other day, right?

A I don't remember.

Q Okay. You mentioned that Mr. Ellington serves in some capacity as settlement counsel. Do I have that right?

A Yes.

Q Do you know if there's any exception in the TRO that permits you to communicate directly with Mr. Ellington in his so-called capacity as settlement counsel?

A There was no change in his status in the TRO. It's -- and

I think he was still used by both the Debtor and by me in that function.

Q You said that -- you testified earlier that you understood that you were prohibited from speaking with the Debtor's employees, correct?

A Except for -- except for with regard to the pot plan, shared services, and Ellington as settlement counsel. But I continued to talk to employees about the pot plan as recently as the end of the year, and I continued to talk to employees about shared services based on the shared services proposal that was sent to Ellington and forwarded to me as recently as two days ago.

Q You never -- you never read the TRO, right?

A No.

MR. MORRIS: Can we have it put up on the screen? I don't know the exhibit number, Ms. Canty, but hopefully it's clear on the exhibit list.

MS. CANTY: I'm sorry, John. Can you repeat what you're looking for?

MR. MORRIS: The TRO. (Pause.) Can we scroll down to Paragraph 2, please? Okay.

BY MR. MORRIS:

Q I appreciate the fact that you've never seen this before, Mr. Dondero, but let me know if I'm reading Section 2(c) correctly. "James Dondero is temporarily enjoined and

refrained from" -- subparagraph (c) -- "communicating with any of the Debtor's employees, except for specifically -- except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero."

Have I read that correctly?

A Yes.

Q Does that provide for any exceptions concerning the pot plan?

A The Independent Board requested a meeting on the pot plan.

Q Okay. But does it -- I appreciate that, and we'll talk about that in a moment, but my question is very specifically looking at the order. And I, again, appreciate that you've never seen it before. But looking at the order now, is there any exception for you to communicate with the Debtor's employees concerning the pot plan?

A I would think the pot plan would fall under that, since some of the pot plan value is coming from affiliated entities that are subject to the shared services agreement. I would think that would be reasonable, again, plus the -- well, it was the subject of a meeting with the Independent Board at the end of the month.

Q Okay.

A I still think it's the best alternative for this estate.

Q Okay. Did you -- did you ever -- did you ever ask anybody, on your behalf, have asked the Debtors whether they

agreed with what you believed was a reasonable interpretation of the restraining order?
A I did not.
Q Okay. And let's just deal with the notion of settlement counsel. Do you see anywhere in this TRO -- and if you want to read anything more, please let me know -- do you see anything in this TRO that would permit you to speak with Mr. Ellington in his so-called role as settlement counsel?
A Well, I would say, more importantly, I don't see anything that takes away his role as settlement counsel, which was formally done six months ago.
Q Okay. I did read Section 2(c) correctly, right?
A Yes.
Q And the only exception that's in Judge Jernigan's restraining order that she entered against you relates to shared services. Have I read that correctly?
A Yes.
Q Okay. Let's talk about the pot plan for a moment. After the TRO was entered, you were interested in continuing to pursue the pot plan; is that right?
A I still believe it's the best possible result for this estate.
Q And you sought a forum with the Debtor's board, correct?
A Yes.
Q And you knew that you couldn't speak directly with any

member of the Debtor's board unless your counsel and the Debtor's counsel was -- was present at the same time. Correct?

A Yeah. As a matter of fact, I didn't go. I just had counsel go.

Q And the Debtor's board gave Mr. Lynn a forum for him to present your pot plan after the TRO was entered. Isn't that right?

A I believe so.

Q And are you aware that the Debtor's board spent more than an hour and a half with Mr. Lynn talking about your pot plan after the TRO was entered?

A Yes.

Q And is it fair to say that, notwithstanding Mr. Lynn's goodwill and Mr. Lynn's efforts to try to get to a successful resolution here, the terms on which the pot plan were offered were unacceptable to the Debtor?

A I wasn't there. I -- I don't know.

Q The Debtor never made a counteroffer, did it?

A Not that I heard.

Q You'll admit, will you not, that over the last year you or others acting on behalf -- on your behalf have made various pot plan proposals to the Official Committee of Unsecured Creditors?

A Quite generous pot plans that I think will exceed any

other recoveries.
Q Okay. So you're aware that your pot plan was delivered either by you or on your behalf to the U.C.C., correct?
A I -- some were. Some, I don't know.
Q Okay. Has the U.C.C. ever made a counterproposal to you?
A Nope.
MR. MORRIS: I have no further questions, Your Honor.
THE COURT: All right. Pass the witness.
Mr. Bonds, do you have any time estimate for me, guesstimate?
MR. BONDS: My guess is, Your Honor, it'll be about an hour. I would hope that we could take some type of a break, just because I'm a diabetic and need to have some --
THE COURT: All right. Well, --
MR. MORRIS: I have no objection, Your Honor. Whatever suits the Court. I'm willing to accommodate Mr. Bonds always.
THE COURT: Okay. Let's take a 45-minute break. Forty-five minutes. So, it's 12:22. We'll come back at seven minutes after 1:00 Central time.
All right. We're in recess.
THE CLERK: All rise.
(A luncheon recess ensued from 12:23 p.m. to 1:15 p.m.)
THE CLERK: All rise.
THE COURT: Please be seated. This is Judge

Jernigan. We are going back on the record in Highland Capital Management versus Dondero. We took a lunch break. And when we broke, Mr. Bonds was going to have the chance to examine Mr. Dondero.

Let me just make sure we have, first, Mr. Dondero and Mr. Bonds. Are you there?

MR. BONDS: Yes, we are.

THE COURT: All right. Very good. I don't see your video yet, but -- there you are. All right. Mr. Morris, are you there?

MR. MORRIS: I am here. Can you hear me, Your Honor?

THE COURT: I can. All right.

MR. MORRIS: Thank you.

THE COURT: Well, we've got lots of other people, but that's all I'll make sure we have at this moment. All right. Mr. Bonds, you may proceed.

And, Mr. Dondero, I know you know this, but I'm required to remind you you're still under oath.

Okay, go ahead.

CROSS-EXAMINATION

BY MR. BONDS:

Q Before you resigned as portfolio manager, how long had you had with Highland Capital Management?

A Since inception in 1994.

Q Okay. And how long have your offices been at the

Crescent?
A Eight years.
Q Okay. Before you resigned as portfolio manager, did you spend a lot of time in the office?
A Yes. I spent every business day this -- or 2020, including COVID, in the office.
Q Okay. And this is the first time that you are not in the office, is that right, in decades?
A Yes.
Q Can you tell us about the shared services agreement that exists between the Debtor and the other entities in which you have an interest?
A NexPoint, NexBank, the DAF, HFAM, primarily. I don't know what other entities paid. Shared services, which is typical in finance, for centralized tax, accounting, RICO function, so that we don't have to have redundant, multiple high-paid people in different entities. We'd have them centralized and with collective experience and collective functionality. And so, historically and recently, they pay Highland for those -- fees for those services. And I, as a non-paid employee, or a non-employee of Highland but a paid employee of NexBank -- of NexPoint, was -- and my occupancy and support were part of those shared services agreement.
Q What do those agreements allow those entities to do?
A Would it allow those entities to do? Well, to access the

Highland functionality as appropriate, because most of those entities, as is typical in finance, did not have their own functionality, legal, tax, and -- legal, tax, and accounting, but although they've been -- they've been building it lately in anticipation of the pot plan not going through at Highland.

Q Okay. Do those agreements allow you to share office space with --

MR. MORRIS: Objection --

THE WITNESS: Yes.

MR. MORRIS: -- to the form of the question, Your Honor. I think the exhibits and the agreements themselves would be the best evidence. They're not in evidence. They haven't been offered in evidence. I have no way to challenge the witness on anything he's saying. And on that basis, I'd -- it's not fair to the Plaintiff.

THE COURT: All right. Mr. Bonds, can I ask you to repeat your question? It was muffled and I was about to ask you to repeat it before I got the objection. So, repeat the question so I can --

MR. BONDS: Okay. I'm going to repeat it and amend it.

THE COURT: Okay.

BY MR. BONDS:

Q Is it your understanding that those agreements allow you to share office space with the Debtor?

A Yes. Virtually all of NexPoint's employees share the Highland office space as part of a shared services agreement.
Q Do those agreements allow you to share -- I'm sorry, excuse me. Strike that. What else do they allow?
A Typically is used in coordination of systems, servers, software, cloud software, Internet software, office software, tax, accounting, and legal functionality are all part of the shared services agreement, although, you know, much of -- much of that was stripped, you know, four or five months ago, especially legal functionality and the accounting functionality, without the concurrent adjustment in the building.
Q Okay. And you previously testified that you generally control NexPoint; is that correct?
A Generally. And the distinction I was trying to make is, you know, following the financial crisis in '08, compliance and the chief compliance officer has personal liability. along with the rest of the C Suite, and operates independently, with primary loyalty to the regulatory bodies. And they're -- they're not controlled, bamboozled, or segued away from their responsibility. And at all times, they're supposed to be doing what they believe is right, regulatorily-compliant, and in the best interest of investors.

So that was the distinction I was drawing between, A, what I was trying to remind Thomas of, that he should be

independent of Seery, in terms of following what he believes is correct and regulatory-compliant. And I don't have to push the NexPoint compliance people and general counsel to do anything specific, nor could I. They are supposed to do what is right from a regulatory investor standpoint, and I believe that's what they've done.

Q All right. And what do you mean by the term or the usage of the word "generally"?

A Well, that's the distinction I was just drawing. I mean, generally, on regular business strategy, you know, major investments, you know, other business items, I'm in control of those entities. But in terms of the content and allegations, regulatory opinions that come from compliance and the general counsel, that is their best views on their own, knowing they have compliance obligations and personal liability.

Q Do you believe that NexPoint and its other owners and interest holders have rights independent from your own in this case?

A Right, yes, and obligations, and responsibilities to investors. I believe the attempt by the Debtor or Seery to hide behind contracts that the Debtor has with the CLOs are -- are a spurious, incomplete argument. You know, they're not in compliance with those contracts. Bankruptcy alone is an event of default. Not having the key man -- the key men, the required requisite professionals that they're obligated to

contractually have working at the Debtor is a clear breach, in violation of those CLO contracts. Not having adequate staff or investment professionals to analyze, evaluate, or follow the investments in the portfolio is a clear violation. And specifically telling investors in the marketplace that you plan to terminate all employees, a date certain January 24th, is a proclamation that you're not going to be in any form able to be a qualified registered investment advisor or qualified in any which way to manage the portfolio or be in compliance with the CLO contracts.

I would -- I would further add that the selling of the securities, and the SKY securities, represent incomplete intentional incurring of loss against the investors. You have securities that are less liquid with, you know, restructured securities that have been owned for ten years, and they were sold during the most illiquid weeks of the year, the couple days before and after Thanksgiving, couple days before and after Christmas, where the investors could have gotten 10 or 15 percent more on their monies if they were just sold in a normal week. It's -- it's preposterous to me. It's consistent with Seery not being an investment (garbled).

But it's preposterous to me that -- that this treatment of investors is allowed or being camouflaged as some kind of contractual obligation, when the investors have said these funds are clearly in transition and the manager clearly is

incapable of managing them. You know, please don't transact until the transition is complete. But Jim Seery has traded every day, including -- I don't know about today, but every day this week, selling securities for no investment rationale and no business purpose.

Q Are you also portfolio manager for NexPoint?

A Yeah, I'm a portfolio manager for the closed-end retail funds, which do have a higher fiduciary obligation than anything on the institutional side. I'm a portfolio manager for those '40 Act funds that are the primary owners of the CLOs that Seery is selling securities in for some unknown reason.

Q And what shared service agreements exist between NexPoint and the Debtor?

A Those are the shared service agreements I spoke of. I don't want to repeat myself.

Q And I'm going to call Highland Capital Management Fund Advisors, LP just Fund Advisors. Is that okay with you?

A Yes.

Q Okay. And you testified generally -- that you generally control Fund Advisors; is that correct?

A Yes.

Q Do you believe that Fund Advisors and its owners and interest holders have rights independent from your own in this case?

A Yes.
Q Are you the portfolio manager for Fund Advisors?
A Yes.
Q What shared services agreements exist between Fund Advisors and the Debtor?
MR. MORRIS: Objection, Your Honor. The agreements themselves are the best evidence of the existence in terms of any agreement between the Debtor and these entities.
MR. BONDS: Your Honor, I can fix that.
THE COURT: Okay.
BY MR. BONDS:
Q I'm just asking: What is your understanding, Mr. Dondero, of the shared service agreements between the Debtor and Fund Advisors?
A It's similar to the agreement I mentioned earlier. It covers a broad range of centralized services historically provided by Highland, but now those, while still paying smaller than historic fees, those entities now have been required to incur the expenses of duplicating those functions.
Q Okay. Do you recall the email string dated November 24th regarding SKY equity that the Debtor talked about?
A Yes.
Q What did you mean when you sent that email about the trade? What did you mean, I'm sorry?
A I was trying to inform the traders, and once they knew --

they weren't willing to do the trades anymore once they knew that the underlying investors had requested that their accounts not being traded until the transition be -- until the transition of the CLOs was effectuated.

It's -- it's standard by, you know, statute or understanding, in the money and management business, when you're moving accounts from one asset manager to another, and someone requests that you don't do anything to their account, you don't trade it whimsically. And so I was -- I was making sure the traders knew that the underlying investors had requested that no trades occur in their accounts.

And then I believed it was a clear violation of the Registered Investment Adviser's Act. I believe that people involved at a senior level or at a compliance level could have material liability, and could create material liability for the Debtor. And I think if, as I said before, I think if anybody on this call were to call the SEC, they would start on audit on this.

MR. MORRIS: Your Honor, I move to strike the first portion of the answer prior to when he started to describe what he believes and what he thinks. The first portion of the answer was devoted to testifying about what is in the knowledge of the people who he was communicating with. There's no evidence. Mr. Dondero, of course, was free to call any witness he wanted. He could have called the chief

compliance officer. He could have called the general counsel. He could have called all the people he's now testifying on behalf of, and he did not.

So I move to strike anything in the record that purports to reflect or suggest the knowledge on behalf of any party other than Mr. Dondero.

THE COURT: Okay. I'm --

MR. BONDS: Let me rephrase -- Your Honor, I'm going to rephrase the question.

THE COURT: Okay. Very well.

MR. BONDS: I'm sorry.

THE COURT: So the motion to strike is granted. If you're going to rephrase, go ahead.

MR. BONDS: Okay.

BY MR. BONDS:

Q Mr. Dondero, what did you mean when you said -- that the emails about the trade?

A Okay. I'll give my intention by sending emails to stop the trade and my basis for those emails. My intentions were to inform the traders and to inform the compliance people that I believe there was a trade that wasn't in the best interest of the employees that had no business purpose for its occurring. And the people involved weren't aware that the investors had sent over requests not to trade their accounts while they were in transition.

So I made the traders aware of that. I made compliance aware of that also. And it's my belief, based on 30 years' experience in the industry, that it is entirely inappropriate to trade the accounts of investors that are in transition, and especially when you're not -- you're not contractually -- you are contractually in default with that client, to trade their account whimsically, for no business purpose. And I thought it was a clear breach of both regulatory, ethical, and fairness with regard to the investors.

So I -- what did you know, when did you know it, what did you do? I did what I felt was the right thing, which I try and do every day, and made all the relevant parties aware of what was going on.

Q Mr. Dondero, do you recall the text message you sent to Mr. Seery in which you said, "Be careful what you do"?

A Yes.

Q What did you mean by that message?

A It's -- I even said, Last warning. I mean, I -- he's doing things against the interests of investors. He's purposely incurring losses by trading in days and weeks and time of the year, the day before and after Thanksgiving, where any novice knows the markets are illiquid and anybody who can read a computer screen can see you get ten percent less -- five or ten percent less than you would the week before or the week after. And with as much professional umbrage as

possible, I was recommending that he stop.
Q Did you intend to personally threaten Mr. Seery in any way?
A No. It was bad -- bad intentional professional acts against the interests of investors that flow through to '40 Act retail mom-and-pop investors. I was trying to prevent those losses and those bad acts from occurring. And I believe everybody who's -- everybody around that issue should be ashamed of themselves, in my opinion.
Q Do you now regret sending the text?
A No. No, I mean, I could have worded it differently. I was angry on behalf of the investors.
Q And Mr. Dondero, you have management ownership interest in that entity; is that right?
A Yes.
Q Do you believe the interests or other entities in which you are involved are independent from your personal rights in this case?
A Yes.
Q And do you believe you caused anyone to violate the TRO?
A No. I've been -- I've been very conscious to just try and champion the thing that -- things that I think are important and the things that I've been tasked to do, like an attractive pot plan to help resolve this case. I spend time on that. But every once in a while, do I have to access, let's say,

David Klos, who is the person who put the model together, who has been working on it for six or nine months, and no one else S has a copy of? Yes. Yeah, I have to -- I have to access him. I don't believe that's the -- inappropriate or in any way violating the spirit of the TRO.

I believe settlement in this case is only going to happen with somebody fostering communication. And Ellington's role, which I thought was a good one and I thought he was performing well as settlement counsel, was an important role. And I used him for things like -- and Seery also used him for things. As recently as two days before Ellington was fired, Seery gave him a shared services proposal to negotiate with me. Ellington has always been the go-between from a settlement and a legal standpoint. I think his role there was -- it was valued. To try to honor the TRO was things like Multi-Strat, that I didn't remember correctly. Ninety percent of the time or for the last 20 years I would have gone directly to Accounting and Dave Klos for it, but I purposely went to settlement counsel in terms of Ellington in order to get the Multi-Strat information which we needed in order to put the pot plan together that we went to the Independent Board with at the end of December.

Q (faintly) And do you recall the questions that Debtor's counsel had regarding the letters sent by K&L Gates to clients of the Debtor?

MR. MORRIS: I'm sorry, Your Honor. I had trouble hearing that question.

THE COURT: Please repeat.

MR. BONDS: Sure.

BY MR. BONDS:

Q Do you recall the questions Debtor's counsel had regarding the letters sent by K&L Gates to the clients of the Debtor -- to the Debtor?

A Yes.

Q You testified on direct that the letters were sent to do the right thing; is that correct?

A Yes.

Q What did you mean by that?

A I don't want to repeat too much of what I just said, but the Debtor has a contract to manage the CLOs, which in no way is it not in default of. It doesn't have the staff. It doesn't have the expertise. Seery has no historic knowledge on the investments. The investment staff of Highland has been gutted, with me being gone, with Mark Okada being gone, with Trey Parker being gone, with John Poglitsch being gone.

And there's -- there's a couple analysts that are a year or two out of school. The overall portfolio is in no way being understood, managed, or monitored. And for it to be amateur hour, incurring losses for no business purpose, when the investors have requested numerous times for their account

not to be traded, is crazy to me. Where the investors say, We just want our account left alone. We just want to keep the exposure. And Jim Seery decides no, there's -- I'm going to turn it into cash for no reason. I'm just going to sell your assets and turn them to cash and incur losses by doing it the week of Thanksgiving and the week of Christmas. I think it's -- it's shameful. I'm glad the compliance people and the general counsel at HFAM and NexPoint saw it the same way. I didn't edit their letters, proof their letters, tell them how to craft their letters. They did that themselves, with regulatory counsel and personal liability. They put forward those letters.

MR. MORRIS: Your Honor (garbled) the testimony that Mr. Dondero just gave about these people saw it. They're not here to testify how they saw it. We know that Mr. Dondero personally saw and approved the letters before they went out. He can testify what he thinks, what he believes. I have no problem with that. But there should be no evidence in the record of what the compliance people thought, believed, understood, anything like that. It's not right.

THE COURT: All right. That's essentially a --

MR. BONDS: Your Honor?

THE COURT: -- a hearsay objection, I would say, or lack of personal knowledge, perhaps. Mr. Bonds, what is your response?

MR. BONDS: Your Honor, my response would be that there are several exhibits the Debtor introduced today that stand for the proposition that the compliance officers were concerned. So I think there is ample evidence of that in the record.

THE COURT: I didn't --

MR. MORRIS: Your Honor, the letter --

THE COURT: I did not understand what you said is in the record. Say again.

MR. BONDS: Your Honor, I'm sorry. The -- there are -- there are references that are replete in the record that have to do with the compliance officers' understanding of the transactions.

THE COURT: I don't know what you're referring to.

THE WITNESS: Your Honor?

THE COURT: I've got a lot of exhibits. You're going to have to point out what you think --

THE WITNESS: Can I -- can I -- can I -- can I answer for -- that for a second? The letters that were signed by the compliance people or by the businesspeople at NexPoint and HFAM objecting to the transactions, those letters were their beliefs, their researched beliefs. They weren't --

THE COURT: Okay.

THE WITNESS: -- micromanaged by me. You know, they weren't -- I agree with them, but those weren't my beliefs

that they've stated. Those were their own beliefs and their own research, --

THE COURT: All right.

THE WITNESS: -- and the record should reflect --

THE COURT: This is clearly hearsay. I mean, it's one thing to have a letter, but to go behind the letter and say, you know, what the beliefs inherent in the words were is inadmissible. All right? So I strike that.

THE WITNESS: Maybe ask your question again.

BY MR. BONDS:

Q Yeah. What is your understanding of the rights that these parties had and what do you believe that was intended to be conveyed by the compliance officers?

MR. MORRIS: Objection. Calls -- calls for Mr. Dondero to divine the intent of third parties. Hearsay.

THE COURT: I sustain.

MR. BONDS: Your Honor, --

MR. MORRIS: No foundation.

MR. BONDS: -- I don't agree. I think that this is asking Mr. Dondero what he thinks.

MR. MORRIS: The letters speak for themselves, Your Honor.

THE COURT: Okay. I sustain --

MR. MORRIS: And Mr. --

THE COURT: I sustain the objection.

MR. MORRIS: All right. Thank you.

THE WITNESS: Ask me what I know. Or ask me what my concerns --

BY MR. BONDS:

Q Let me ask you this. What were your concerns relating to the compliance officers' exhibit?

A My concerns regarding the transaction, the transactions, which may repeat what I've said before, but I do want to make sure it gets in the record. So if we have to make a -- these were my concerns, whether or not they were the compliance people's concerns. I believe they were, and I believe they were similar, but I'm just going to say these are -- these were my concerns.

The Debtor, with its contractual -- with its contract with the CLOs, were in no way -- was in no way compliant with that contract or not in default of that contract. Bankruptcy is a reason for default. Not having the key men specified in the contract currently employed by the Advisor is a violation. Not having adequate investment staff to manage the portfolio is a violation of that contract. Announcing that you're laying off everybody and will no longer be a registered investment advisor is proclaiming that you, if you even have any -- any -- pretend that you're qualified or in compliance with the contract now, you're broadcasting that you won't be in three weeks, are -- are all mean that you're not in good

standing. Okay? Number one.

Number two, when the investors know that it's in transition, you're not in compliance as a manager, you're not going to be an RIA in three weeks, the accounts are going to have to transition to somebody else in three weeks, and the investors ask you, Please don't trade my accounts between now and then, that is -- that is a -- if it's not a *per se*, it's an ethical and a spirit violation of any relationship between an investor and an asset manager.

To then sell assets -- not replace assets, just sell assets for cash -- and purposely do it on the least liquid days of the year -- the day before Thanksgiving, the day after Thanksgiving, the week of Christmas, this past week, whatever -- to purposely incur losses so that the investors suffer ten or fifteen percent losses that other -- on each of those sales that they wouldn't otherwise have to incur, and for no stated business purpose, for no investment rationale, with no staff to even say whether the investment is potentially going up or down, is -- is -- is -- I've never seen anything else like it.

And I will stand up and say it every day: I'm glad the letters went out from HFAM and from NexPoint. I would never recommend they get retracted. And I believe everybody who signed those letters meant everything in those letters. And I believe the letters are correct. And I believe the whole selling of CLO assets is a travesty.

My personal opinion, we need an examiner or somebody here to look at this junk and look at some of the junk that occurred earlier this year. This -- this stuff is unbelievable to me.

Q Generally, who holds interests in the CLOs?

A A vast majority of the CLOs that we're speaking of that Seery has been selling the assets of are owned by the two mutual funds, the two '40 Act -- the two '40 Act mutual funds and the DAF. Between them, I think out of -- eleven out of the sixteen CLOs, they own a vast majority, and then I think, whatever, two or three they own a hundred percent, and I think two or three they own a significant minority.

And just because they don't own a hundred percent doesn't somehow allow a registered investment advisor to take advantage of an investor. And I -- I've never understood that defense. I wouldn't be able -- in my role of 30 years, I wouldn't be able to tell that to an investor, that, hey, you had a contract with us, we did something that wasn't in your best interest, but we got away with it because you didn't own a hundred percent, you only owned eighty percent.

MR. MORRIS: Your Honor, I move to strike. There's no contract between the Debtor and Mr. Dondero's -- and the entities that he owns and controls for purposes of the CLO. The only contract is between the Debtor and the CLOs themselves.

THE COURT: All right. Well, I overrule whatever objection that is. Again, if you want to bring something out on cross-examination or through Mr. Seery, you know, you're entitled to do that.

All right. Please continue.

BY MR. BONDS:

Q Do you believe these letters were sent by the Funds to the Advisors because they are trying to protect the independent entities?

A They're trying to protect their investors. They were trying to protect their regulatory liability for activities they see that are not in the best interests of investors.

MR. MORRIS: Objection, Your Honor. I move to strike. He's again testifying as to the intent of the people who sent the letters who are not here to testify today.

THE COURT: Sustained.

BY MR. BONDS:

Q Mr. Dondero, what is your belief as to the letters that were sent by the Funds and Advisor? Is -- are they trying to protect their independent interests?

MR. MORRIS: Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

THE WITNESS: Ask me --

BY MR. BONDS:

Q What is your understanding of why the letters were sent?

MR. MORRIS: Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

BY MR. BONDS:

Q Mr. Dondero, would you have sent the letters?

A I would have sent the letters exactly or very similar or probably even more strongly than the letters were stated, for the purposes of protecting investors, to protecting mom-and-pop mutual fund investors from incurring unnecessary losses by an entity that was no longer in compliance with their -- with their asset management contract and because the investors had requested that their account just be frozen until it was transitioned.

That's why I would have sent the letter. That's why I believe the letter should be sent. That's why I'm happy they were sent. That's why we've never retracted.

Q Mr. Dondero, who is Jason Rothstein?

THE COURT: I did not hear the question.

THE WITNESS: Jason -- Jason --

MR. BONDS: Who --

THE COURT: Please repeat.

MR. BONDS: Yes. I asked Mr. Dondero who Jason Rothstein was.

THE WITNESS: Jason Rothstein heads up our systems

department at Highland Capital.
BY MR. BONDS:
Q Can you explain what your text message to Mr. Rothstein was about?
A Which text message? The one where it was in the drawer?
Q Yeah.
A Uh, --
Q And that was actually from him, not you.
A Yeah. That was from him. I think he transferred icons or set up personal stuff to the new phone, and he was just saying that the old phone was in Tara's drawer.
Q And you don't know whether -- what's happened to the phones, do you?
A No. Like I said, I believe they've been destroyed, but I -- I can find out. I mean, I can query and find out who destroyed it, if that's important.
Q And you understood that you were not supposed to talk to the Debtor's employees; is that correct?
A Like I said, except for my roles regarding shared services, the pot plan, and trying to reach some type of settlement, I've had painfully few conversations with the Debtor's employees.
Q When you talked to certain employees, did you think it was an -- under an exception to the TRO, like shared services, related to the pot plan, or settlement communications?

A Yes.

MR. MORRIS: Your Honor, I move to strike. Mr. Dondero never read the TRO. He's got no basis to say what the TRO required and didn't require.

MR. BONDS: That wasn't the -- that wasn't the question.

THE COURT: Okay.

MR. BONDS: I'm sorry.

THE COURT: Okay. Rephrase the question, please.

MR. BONDS: Okay. I'm sorry.

BY MR. BONDS:

Q When you talked to these -- to certain employees, did you think it was under an exception to the TRO, like shared services, relating to the pot plan, or settlement communications?

A Yes. Absolutely.

MR. MORRIS: I object. No foundation.

THE COURT: Sustained.

BY MR. BONDS:

Q Mr. Dondero, do you understand -- did your lawyers explain to you the TRO?

A Yes.

Q And who was the lawyer that explained the TRO to you?

MR. MORRIS: Your Honor, I don't know if we're getting into a waiver of privilege, but I just want to tell

you that my antenna are up very high.

THE COURT: Okay. Mine are as well, Mr. Bonds. Are you about to waive the privilege?

MR. BONDS: No, Your Honor, I am not.

THE COURT: Okay. Well, it sounded like perhaps we were about to have the witness testify about conversations he had with lawyers.

MR. BONDS: I'm sorry, Your Honor. That was not my intention. Again, I'm asking Mr. Dondero to explain for us his contact with -- or, his impression of the TRO.

BY MR. BONDS:

Q What did the TRO mean to you?

A The TRO meant to me that I was precluded from talking to Highland employees -- which, again, very few, if any, were coming into the office. I was not talking to Highland employees with any regularity anyway. But there was an exception with regard to Scott Ellington regard -- Scott Ellington in terms of him functioning as settlement attorney to try and bridge the U.C.C., the Independent Board, Jim Seery, other people, and things that impacted me or other entities.

I also viewed that there was an exception for the pot plan, which had been presented and gone over as recently as December 18th and 20th. And -- or December 18th, I think, was the date.

And you know what, I want to clarify a characterization of the pot plan. I still believe it's the best and most likely alternative for this estate in the long run. I think what we've proposed numerous times is more generous than what anyone will receive in a liquidation and in a more timely fashion.

And the last time we presented it to the Independent Board, the Independent Board thought it was attractive and thought we should go forward with it to the U.C.C. and other parties.

MR. MORRIS: Your Honor, I move to strike the last portion of the answer that purports to describe what the Independent Board thought.

THE COURT: Well, --

MR. MORRIS: No foundation. Hearsay.

THE COURT: What is your response to the hearsay objection, Mr. Bonds?

MR. BONDS: Your Honor, I don't have one.

THE COURT: Okay. I sustain.

BY MR. BONDS:

Q What exceptions did you believe there were for communications with employees?

A Okay. Thank you. Yeah. Like I said, I covered Scott Ellington and settlement counsel. I covered the pot plan.

Q Okay.

A My -- my view of the pot plan as -- my view of the pot plan was that it was very attractive, and I had received encouragement to go forward with it as something that should be workable. That's my testimony on that.

And then -- and we talk about negotiating shared services. So, there's shared services in terms of overlap in functionality, but there's also, in terms of negotiating the shared services agreement, which, as I said, was something that Ellington was put in charge of three or four days ago by Jim Seery to negotiate with us. And he reached out to me to negotiate it. And I think the Pachulski deadline on it was three days later. That whole process was something that I viewed as separate from the TRO, especially since it was initiated by Jim Seery, DSI, et cetera, and consistent with what Scott Ellington's role had been for the last six, nine months.

Q As to the Debtor's request that you vacate the office space, did you comply with this request?

A Yes.

Q What did you think that vacating meant?

A I moved out all my -- my personal items to a new office at NexBank.

Q (faintly) And, in fact, did you work on the last day over to 3:00 a.m.?

A Yes. 4:00.

THE COURT: Mr. Bonds, I didn't hear your question. I didn't hear your question.

MR. BONDS: Okay. I'm sorry.

BY MR. BONDS:

Q Did -- isn't it true that you worked through the night, to 3:00 or 4:00 a.m., to vacate the premises?

A Yes. Until 4:00 a.m. on the last day, to organize and pack up all my stuff, yes.

Q Did you think your presence in the office, with no other employees there, violated the spirit of the TRO?

A No. I thought it was over the top and meant to tweak me, but, yeah, there's no -- there's not Debtor employees coming in since COVID.

Q (faintly) Okay. And you thought you could talk to Mr. Ellington and -- as settlement counsel; is that correct?

MR. MORRIS: I'm having trouble hearing it, Your Honor.

THE WITNESS: Yes.

THE COURT: Yeah. We're -- Mr. Bonds, please make sure you speak into the device.

MR. BONDS: I'm sorry. I'll try to get closer. Okay. I asked the Debtor -- or I, excuse me, I asked Mr. Dondero if he thought he could talk to Ellington as a go-between or settlement counsel. And I asked him if that was correct.

THE WITNESS: Yes. For settlement, shared services, the pot plan. Nothing that interrupts or affects the Debtor, but for those purposes, as has consistently occurred for the last six months.

BY MR. BONDS:

Q Okay. And you saw the texts and emails presented by the Debtor between you and Mr. Leventon; is that correct?

A The one regarding Multi-Strat?

Q Yes.

A Yes.

Q In your understanding, did you believe those communications were allowed under the TRO?

A Well, yes. And, again, to clarify my -- my contrasting testimony, I would never typically have gone to them for that kind of information, but to be compliant with the TRO, for Multi-Strat information, which I needed in order to put together the pot plan that the Independent Board audienced on December 18, I needed the information on Multi-Strat, and I requested it as appropriate through settlement counsel Ellington. And I think Ellington requested it from Isaac, who requested it from David Klos.

The whole purpose, I believe -- my belief is the whole purpose of this TRO is to make it impossible for us to get information to come up with alternatives other than a -- the plan proposed by Jim Seery. It's our -- if -- if -- without

Ellington in the go-between, which he's now no longer an employee, I assume the only way we get any information, balance sheet or anything from Highland Capital, is with a subpoena.

And as much as I've tried to engage or make an attractive pot plan for everybody, each one of them has been a complete shot in the dark, without even knowing the assets and liabilities of Highland, but just estimating where they were or were likely to be.

Q Do you believe your text message with Leventon caused any harm to the Debtor's business?

A No. It potentially fostered a pot plan, because, you have to know, the pot plan needed -- one of the aspects of the pot plan was the --

Q Do you still want to advocate for your pot plan?

A I think that's eventually where we ultimately end up. Or -- or should end up. Otherwise, I fear it's going to be an extended, drawn-out process.

Q And how much did you initially propose to pay creditors in this case?

A The most recent -- the most recent pot plan?

Q No. The -- initially.

A The initial pot plan, I believe, was $160 million.

Q And what about the notes?

A There was $90 [million] of cash and I believe $70

[million] of notes.
Q And what is Multi-Strat?
A Multi-Strat is a fund that's managed by Highland. They used to have $40 or $50 million in value. It used to contain a lot of life settlement policies. And I believe now has $5 or $6 million of value, after assets have been sold.
Q Do you recall the email Debtor's counsel presented regarding the balance sheet today?
A The balance sheet of Multi-Strat?
Q Correct.
A Yes.
Q Do you believe you were entitled to see that document?
A Yes. It's just -- again, for the pot plan, I needed it. But also I'm an investor in that fund and I'm entitled to it. It's -- there was nothing in there that was improper or untoward or in any way damaged the Debtor.
Q And you recall the request for documents sent by the Debtor; is that correct?
A On my -- my personal estate plan?
Q No, on Multi-Strat.
A The Debtor's request on -- I'm sorry. What was that?
Q The Debtor sent you a request for Multi-Strat. For Duga -- I'm sorry.
A For Dugaboy? Okay.
Q Dugaboy.

A Yeah. There's -- there's personal estate planning trusts. Some are active. Some are inactive. Some have been around for 15 years. But they're -- they're not assets or anything that's related to the estate. And that was -- that was my text to Melissa that said, you know, Not without a subpoena.

Q Mr. Dondero, if you remember back on Exhibit K, there was some request that you terminate your offices at the Crescent, and I think you were given seven days' notice to do that. Do you know if Christmas occurred during that time?

A I believe it did.

Q So, if Christmas and Christmas Eve are both holidays, how many days, business days, did they give you to terminate or to get out of the space?

A There would have been three business days. It was Monday through Wednesday that I moved out.

MR. BONDS: Your Honor, I'll pass the witness.

THE COURT: All right. Mr. Morris?

THE WITNESS: Take a break. I hope.

MR. BONDS: Your Honor, I'm sorry, can I take a ten-minute break? I think that I'm going to be through, but I don't know.

THE COURT: All right. I'll give you a ten-minute break.

MR. BONDS: All right. Thank you, Your Honor.

THE COURT: We're coming back at 2:15.

THE CLERK: All rise.

(A recess ensued from 2:06 p.m. until 2:16 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're back on the record in Highland versus Dondero. Mr. Bonds, do you have more examination?

MR. BONDS: Your Honor, I have one question.

THE COURT: Okay.

MR. BONDS: And that's --

MR. LYNN: And one more witness.

MR. BONDS: And one more witness.

CROSS-EXAMINATION, RESUMED

BY MR. BONDS:

Q Do you think that Scott Ellington and Isaac Leventon were treated appropriately by the Debtor?

A No, I do not. I don't think they've been treated fairly, nor do I think other senior employees have been treated fairly. I've never seen a bankruptcy like this where, during complex unwinding of 20 years of various different entities and structures, relying on the staff, working them hard, working overtime, a lot of investment professionals like lawyers and DSI just putting their name on the work of stuff that was done by internal employees, getting to the end of the year, trying to pay people zero bonuses and retract prior years' bonuses, and try and come up with legal charges against

those people is unusual to this case and my experience, in the bankruptcies we've been involved in, where typically management teams get paid multiples of current salary to stay on and be the experts.

I also think they were put in difficult spots from the very beginning. It was Jim Seery that made Scott Ellington the settlement counsel six, seven months ago. It was a broadly-defined role that was never retracted, never adjusted, never modified, yet somehow he and Isaac violated it. I don't know. I haven't spoken to them since they've been terminated. They aren't allowed to speak to me, from what I hear. But I wish them luck in their claims.

THE COURT: Okay. You pass the witness?

MR. BONDS: Yes, Your Honor.

THE COURT: All right. Mr. Morris, do you have further examination?

MR. MORRIS: Just a few questions.

REDIRECT EXAMINATION

BY MR. BONDS:

Q Mr. Dondero, you knew about this hearing for some time, right?

A No.

Q When did you first learn this hearing was going to take place?

A Two days ago.

Q Two days ago?
A When was the depo, three days ago? Whatever.
Q And you didn't know prior to the deposition that we would be having a hearing today on the Debtor's motion for a preliminary injunction?
A No. I thought it was going to be postponed or canceled. I was waiting for the text last night.
Q You had an opportunity to call any witness in the world you wanted to today, right?
A I guess.
Q You could have called -- you could have called the chief compliance officer at the Advisors if you thought the Court should hear from him as to the compliance issues that you've testified to, right?
A I think their letters stand on their own.
Q Okay. So you didn't think that it was important for the Court to hear from Mr. Sowin directly, correct?
A Sowin is a trader.
Q I'm sorry. Who's the chief compliance officer of the Advisors?
A Jason Post, as far as NexPoint is concerned. He's the one that would have been behind the K&L -- K&L letters.
Q And he is not here today to testify, right?
A I think his letters stand on their own and I think everybody should read them, make sure they read them.

Q Okay. But Mr. Post is not here to answer any questions; is that right?
A I don't know if there are any questions beyond what's obviously stated in the letters. You should read the letters carefully. They're -- they're -- they talk about clear violations.
MR. MORRIS: Your Honor, I move to strike. It's a very simple question.
THE COURT: Sustained. That was another yes or no answer, Mr. Dondero. Go ahead.
THE WITNESS: I'm sorry.
BY MR. MORRIS:
Q Mr. Dondero, Mr. Post is not here to testify in order to explain to the Court what he thinks the regulatory issues are, correct?
A He's not here today.
Q And you could have called him as a witness, correct?
A Yes.
Q And you thought Mr. Ellington and Mr. Leventon were treated unfairly, right?
A Yes.
Q And there's no reason why they couldn't have come today to testify, correct?
A I guess they could have.
Q And there's no reason why anybody on behalf of the K&L

Gates clients couldn't have been here to testify, correct?
A I didn't deem it necessary, I guess.
Q Okay. You could have offered into evidence, at least offered into evidence, any document you wanted, right?
A Yes.
Q And you could have offered the judge, for example, the shared services agreement, the shared services agreements for which you gave the Court your understanding, right?
A Which shared services, the one that Seery gave Ellington three days ago or the original one from years ago?
Q Any of the ones -- any of the ones that you have referred to today. You could have given any of them to the judge, right?
A Correct.
Q And you didn't, right?
A I did not.
Q In fact, there's not a single piece of evidence in the record that corroborates anything you say; isn't that right?
A I -- I believe all those documents are in the record. They're just not in the record of this TRO. But they're all --
Q Oh.
A They're all in the record.
Q Do you remember that there was a hearing on December 16th? I think you -- you testified that you're fully aware of that

hearing that was brought by the K&L Gates Clients. Do you remember that?

A Yes.

Q Who testified at that hearing on behalf of the K&L Gates Clients? Dustin Norris?

A I believe -- I believe Dustin Norris testified.

Q Uh-huh. And what's Mr. Norris's role at the Advisors?

A He's one of the senior managers.

Q Is he a compliance officer?

A No.

Q Is he a trader?

A No. But he's one of the senior managers.

Q Okay. They could have called anybody they wanted, to the best of your understanding, right?

A I don't think they got a chance to. Wasn't it an abbreviated hearing?

Q They offered Mr. Norris as a witness. Do you understand that?

A I -- all I -- I wasn't there. I didn't attend virtually. I -- but I did know that Norris testified. But I don't know who else was called, wasn't called, was going to be called, was on the witness list. I have no awareness.

Q Okay. You were pretty critical of the trades that Mr. Seery wanted to make that you interfered to stop, right?

A I think he's subsequently done most of those trades.

Q And you called them preposterous because he wanted to do it around Thanksgiving or around Christmas, at least based on your testimony, correct?
A That's when it did occur.
Q And is it your testimony -- is it your testimony that every single person in the world who trades securities near a holiday is making a preposterous trade?
A I think it's amateur and not what an investment professional would do.
Q So you never trade on holidays; is that your testimony? You've never done it once in your life?
A Very rarely, unless there's another overriding reason. And there was no overriding reasons, period.
Q How would you know that when you didn't even ask Mr. Seery why he wanted to make the trades?
A I asked Joe Sowin, who asked Jim Seery. And Joe Sowin said that Jim Seery just said for risk reduction.
MR. MORRIS: I move to strike on the grounds that it's hearsay, Your Honor.
THE COURT: Sustained.
BY MR. MORRIS:
Q You never asked Mr. Seery why he wanted to make the trades, correct?
A I'm not allowed to talk to Mr. Seery.
Q You certainly were around Thanksgiving; isn't that right?

A I don't know.
Q There was no TRO in place at that time, correct?
A That's true.
Q You're pretty critical of Mr. Seery and his capabilities; is that right?
A He's a lawyer. He's not an investment professional.
Q Did you object to his appointment as the CEO of the Debtor?
A No.
Q Have you made any motion to the Court to have him removed as unqualified?
A Not yet.
Q Okay. But with all the knowledge of all the preposterous things that he's been doing for months now, you haven't done it, right?
A No.
Q When you -- when -- before you threw the phone in the garbage, did you back it up?
A No.
Q Did it occur to you that maybe you should save the data?
A No.
Q You said that the only way you think you might be able to get information going forward is through a subpoena. Do I have that right?
A I mean, that's how it seems. I mean, it seems at every

turn -- and now with Scott Ellington being gone and Isaac being gone -- I have no idea how the Debtor is ever going to defend against UBS.

THE COURT: I did not --

THE WITNESS: I have no idea how --

THE COURT: I didn't hear the answer after with Ellington and Leventon being gone. I didn't hear the rest of the answer. Could you repeat?

THE WITNESS: I said I have no idea how the Debtor is ever going to defend itself against UBS. But I also have no idea how we're ever going to get any information or ever push forward any kind of settlement without having any access to information or anybody to talk to.

BY MR. MORRIS:

Q Do you trust Judge Lynn?

(Echoing.)

A Yes.

Q Is he a good advocate?

A Yes. If anybody returns his phone calls.

Q Do you recall that on October 24th Judge Lynn specifically asked my law firm to provide information on your behalf in connection with the Debtor's financial information, their assets and their liabilities?

A Yes.

Q Do you recall that the Debtor simply asked that you

acknowledge in an email between and among counsel that you would abide by the confidentiality agreement that was entered by the Court?

A I wasn't involved in those details.

Q Didn't you send an email in which you agreed to receive the financial information subject to the protective order that this Court entered?

A I'm sure I would. I just don't remember.

Q That was a condition that the Debtors made. That doesn't refresh your recollection?

A I'm not denying it. I just don't remember, and --

Q Okay. And --

A (overspoken)

Q I'm sorry, I don't mean to cut you off. And in fact, on December 30th, the day you were supposed to vacate the office, the Debtor voluntarily provided to Judge Lynn all of the information that had been requested on your behalf without the need for a subpoena, right?

A Yeah. It took a week. It's 40,000 pages of mixed gobbledygook that we're -- we're going through. But it should provide enough information for us to negotiate a pot plan if anybody so chose.

Q So you didn't need to (echoing) the 40,000 pages of financial information from the Debtor; all you needed was an agreement that you would abide by the protective order.

Correct?
A I think that was the first thing that was ever produced on request that I can remember. But yes.
Q And it was just a week ago, right?
A Yes.
MR. MORRIS: I have no further questions, Your Honor.
THE COURT: All right. Mr. Bonds, do you have anything else?
MR. BONDS: I do not, Your Honor, as to this witness. I have one other witness.
THE COURT: All right.
MR. MORRIS: Your Honor, I don't know who they plan on calling, but he's not on the witness list.
THE COURT: All right. Well, --
MR. BONDS: Your Honor, this other witness --
THE COURT: Just a moment. This concludes, for the record, Mr. Dondero's testimony. But, obviously, stick around, because we're going to have a lot to talk about when this is finished as far as the evidence.
All right. Now, who are you wanting to call that you did not identify?
MR. BONDS: I'd like to call Mike Lynn for the purpose -- or, to -- as a rebuttal witness.
THE COURT: Lawyer as witness?
MR. MORRIS: Your Honor?

THE COURT: Well, you know, first off, rebuttal of what? Rebuttal --

MR. MORRIS: Exactly. He's going to rebut his own client, Your Honor? He's going to rebut his own client? There's only been one witness to testify here. He was on their exhibit list. How do they call a witness to rebut their own client?

THE COURT: Yes. What -- I don't --

MR. BONDS: Your Honor?

THE COURT: Go ahead.

MR. BONDS: Mr. Morris testified or attempted to testify that the pot plan didn't gain any traction. We will submit Mike Lynn on that issue.

THE COURT: No.

MR. MORRIS: Your Honor?

THE COURT: I'm not going to allow a lawyer to testify to rebut lawyer argument. That's very inappropriate, in my view. So, not going to happen.

MR. LYNN: (garbled)

MR. BONDS: Your Honor, he would be a fact witness to discussions with the other side.

MR. MORRIS: Your Honor, I strenuously object. They're -- he's only rebutting -- my questions are not evidence. The only evidence in the record is Mr. Dondero's testimony. Mr. Dondero is their client. Mr. Dondero was on

their witness list. They should not be permitted to call any witness, with all due respect to Mr. Lynn, to rebut their own witness.

THE COURT: All right.

MR. BONDS: Your Honor, we're not rebutting our witness. We are rebutting the testimony that Mr. Morris gave.

THE COURT: Mr. Morris is a lawyer. He makes argument. He asks questions. He was not a witness today. Okay?

So if you want to say whatever you want to say as lawyers in closing arguments, then obviously you can do that. But I'm not going to allow a lawyer to be a witness to rebut something another lawyer said in argument or in a question. I -- it's -- so, I disallow that.

Anything else, then?

MR. BONDS: No.

THE COURT: Okay. And while we're talking about procedure, actually, Mr. Morris, it's the Debtor's motion, and I'm not even sure that's all of your evidence. So, do you have any more evidence as Movant?

MR. MORRIS: No, Your Honor. The Plaintiff and the Debtor rest.

THE COURT: All right. So, at the risk of repeating, now that the Movant has rested, it would be Mr. Dondero's chance to put on supplemental evidence. But what I'm hearing

from Mr. Morris is there were no witnesses identified on your witness list?

MR. BONDS: Other than Mr. Dondero, Your Honor.

THE COURT: Okay. All right. Well, was there any stipulated documentary evidence that -- that you had --

MR. BONDS: No, Your Honor.

THE COURT: All right. Well, I guess we're done with evidence.

Mr. Morris, your closing argument?

MR. MORRIS: All right. Before I get to that, Your Honor, I just want to make a very brief statement. When the Debtor objected to Mr. Dondero's emergency motion for a protective order, the Debtor stated that it sought discovery from Mr. Dondero to determine whether Mr. Dondero may have violated the TRO by interfering and impeding the Debtor's business, including by potentially colluding with UBS. After that motion was decided, both Mr. Dondero and UBS produced documents to the Debtor.

Based on the review of that information, the Debtor found no evidence that Mr. Dondero and UBS colluded to purchase redeemed limited partnership interests of Multi-Strat, nor any inappropriate conduct by UBS or its counsel.

The Debtor appreciates the opportunity to clear that part of the record.

THE COURT: All right.

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

MR. MORRIS: Now, with respect to the motion at hand today, Your Honor, I want to take you back just about a month ago to December 10th, 2020. At that time, we had a hearing on the Debtor's motion for a TRO. The motion had been filed in advance. Mr. Dondero had filed an objection. He had concerns about the scope and the language of the terms of the proposed TRO.

And at that hearing, Your Honor, if you'll recall, you listened carefully to the arguments that were made on behalf of Mr. Dondero. You heard carefully -- you listened carefully to the proposed changes that he sought to make. And you went through that proposed TRO word by word, Paragraph 2 and 3, and you read them out loud, and you made decisions at that time as to whether the Court believed any portion of that was ambiguous or whether it was clear. You made determinations at that time whether or not the provisions were reasonable.

Mr. Dondero wasn't there. He didn't read the transcript. He has no idea what you said. But his lawyers were there, and they had an opportunity to object and they had an opportunity to make comments, and the order is what the order is. And for whatever reason, Mr. Dondero chose not to read it, or, frankly, even understand it, based on his testimony.

The fact is, Your Honor, the one thing that the evidence shows very clearly here is that Mr. Dondero thinks that he is

the judge. He believes that he is the decider. He believes that he decides what the TRO means, even though he never read it. He believes that he decides what exceptions exist in the TRO, even though he never read it.

He believes that he decides that it's okay to ditch the Debtor's cell phone without even seeking, let alone obtaining, the Debtor's consent. I guess he decides that he can ditch the phone and trash it without seeking to back it up or informing the Debtor.

Mr. Dondero believes that he gets to decide that it's okay to take a deposition from the Debtor's office, even when the Debtor specifically says you're evicted and you're not allowed to have access.

Mr. Dondero believes that he gets to decide that Mr. Seery has no justification for making trades, even though he couldn't take the time to pick up the phone or otherwise inquire as to why Mr. Seery wanted to do that.

Mr. Seery -- Mr. Dondero believes that he is the arbiter and the decision-maker and gets to decide to stop trades, notwithstanding the TRO, notwithstanding the CLO agreements that he is not a party to, that his entities are not a party to.

Mr. Dondero thinks that he gets to decide that the Debtor has breached the agreements with the CLOs. He gets to decide that the Debtor is in default under those agreements. He gets

to decide that it's perfectly fine for Ellington and Leventon to support his interests while they have obvious duties of loyalty to the Debtor.

It is not right, Your Honor. It is not right. I stood here, I sat here, about four hours ago, five hours ago, and told the Court what the evidence was going to show, and it showed every single thing that I expected it to show and everything I just described for the Court about Mr. Dondero's belief that he's the decider.

He's not the decider, Your Honor. You are. And you made a decision on June -- on December 10th that he ignored.

There is ample evidence in the record to support the imposition of a preliminary injunction. And Your Honor, I'm putting everybody on notice now that we're amending our complaint momentarily to add all of the post-petition parties, because this has to stop. The threats have to stop. The interference has to stop. Mr. Dondero can always make a proposal if he thinks that there's something that will capture the imagination and the approval -- more importantly, the approval -- of the Debtor's creditors. We have no interest in stopping him from doing that. He's got very able and honorable counsel, and he can go to them and through them any time he wants.

But the record is crystal clear here that, notwithstanding Your Honor's order, one entered after serious deliberation, is

of no meaning to him. And we'll be back at the Court's convenience on the Debtor's motion to hold him in contempt. It'll just be a repeat of what we've heard today, because, frankly, the evidence is exactly the same.

With that, Your Honor, unless you have any questions, the Debtor rests.

THE COURT: All right. I do not.

Mr. Bonds?

MR. BONDS: Your Honor, we would like to divide our time between Mike Lynn and myself. Is that a problem?

THE COURT: That's fine. Go ahead.

MR. LYNN: Are we on mute?

MR. BONDS: No.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. LYNN: Your Honor, I'm taking a leaf out of Mr. Phelan's book. I happened to read the confirmation hearing in the *Acis* case regarding what was referred to as Clients A, B, and C. And Mr. Phelan, who testified, really gave an oral argument to the Court which was very persuasive and very thorough. So I'm going to sort of do the reverse, because I hope that the Court would find useful some information regarding the pot plan about which you've heard many words spoken but very little to do with what that plan was or how it came about.

The pot plan was proposed by Mr. Dondero for the first

time in September of 2020, shortly after the conclusion of the first round of mediations. Though there had been versions of it before, and lesser versions, the pot plan was finally in the form that would more or less survive it in September. Under the pot plan, Mr. Dondero proposed to come up with $90 million of cash and $70 million in promissory notes, and that was to form a pot which creditors would share in.

The proposal was provided to the Debtor and then shared with the Committee. Mr. Seery responded with a degree, a degree only, of enthusiasm to the pot plan, and indeed provided a counter-term sheet to the pot plan. He also, so he said, and I believe him, approached the Committee and said this is a proposal to be taken seriously.

He proposed some improvements in his view to the pot plan. No response was received from the Creditors' Committee at that time.

After going back and forth with the Debtor -- and Mr. Seery, not unreasonably, was unwilling to propose the pot plan without some support on the Creditors' Committee -- I contacted Matt Clemente. We had a nice conversation. And at that time, Mr. Clemente raised two particular concerns. The $160 million, which creditors did not think was enough, was not enough, in part, because that included no consideration for the acquisition of promissory notes executed some by Mr. Dondero and some by entities controlled by Mr. Dondero, which

notes total approximately $90 million.

The second concern was that Mr. Dondero would get a release under the plan. During that call, I said the issue of the notes is subject to negotiation and might well result in a transfer of those notes, possibly with some amendments, to the pot, and that Mr. Dondero was prepared, in all likelihood, to forego a release.

Mr. Clemente agreed to get back to me. He did. And he said to me, I have talked to the Committee about this and they would like you to go to or they want you to go first to Mr. Seery, work off of his revised timesheet -- or term sheet, sorry -- and after you have reached an agreement with him, come to us, come to the Committee, and we'll negotiate with you.

Now, I might have agreed that that was a reasonable approach if there were a possibility that Mr. Seery would propose a plan without the agreement of creditors. But the way I took it was that the Committee was saying go make a deal with Seery and then we'll start negotiating, and we know, correctly, that Mr. Seery will not propose a plan that does not have our support.

So, effectively, we get to go through two rounds of negotiations, even though effectively everything that is in the estate, everything -- causes of action against Mr. Dondero, promissory notes from Mr. Dondero -- everything that

they would get under a plan or under a liquidation, they would get under the pot plan.

Now, I wanted you to know that, Your Honor, not because I'm now trying to get you or anyone else to sell the pot plan. But I think it's important that Your Honor know that Mr. Dondero's approach in this case has not been a hostile approach.

I know the Court had what it found to be an unsatisfactory experience with Mr. Dondero in the *Acis* case. But from the time I became involved in this case and Mr. Bonds became involved, we have been quiet, we have said nothing, and we've done virtually nothing in the case, up until the time after the mediation, when negotiations regarding a pot plan broke down.

Since that time, regrettably, there has been a good deal of hostility, and it's spreading. I would like to see it stop spreading. I will do what I can to make it stop spreading. But I need others to help me on that. And it's my hope that I can count on the Pachulski law firm, the Sidley law firm, and the firms representing the major creditors to help make that happen.

I do not think, and I would submit that it is not to the benefit of the estate, it is not to the likely workout of this case, that it would be best served by entering a preliminary injunction, which it appears to me prevents Mr. Dondero from

saying good morning to one of the employees of the Debtor that he knows.

It seems to me, Your Honor, that the injunction, by its terms, as Mr. Morris would have it, is an injunction that would prevent Mr. Dondero from discussing politics with Mr. Ellington. And it seems to me that an injunction that broad, that extensive, and one which lasts, as far as I can tell, until infinity, that such an injunction is not the right thing to do, given, if nothing else, the First Amendment to the United States Constitution.

That will conclude my presentation, and I will turn it over to the wiser and better-spoken colleague, John Bonds. Thank you, Your Honor.

THE COURT: Thank you. Mr. Bonds, what else do you have to say?

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. BONDS: Your Honor, has the Debtor met the requirements for the issuance of a preliminary injunction? We submit that they have not. And the Fifth Circuit's rules are fairly clear as to the awarding of a preliminary injunction.

First, let's look at the type of preliminary injunction that the Debtor would like you to enter today. It provides that Mr. Dondero cannot talk to any employee, regardless of what is being communicated. Mr. Dondero can pass an employee on the street, but he can't acknowledge the employee, with

whom he may have worked for years. Nor can he talk to his personal assistants, again, which he has worked with for years. Does that violate the First Amendment of the Constitution?

What about the shared services agreement? What about the pot plan which he is advocating as a means of reorganizing the Debtor? Not the liquidation proposed by the Debtor. Can Mr. Dondero communicate with creditors about the pot plan and the other proposals without violating the TRO or the preliminary injunction which deals with interfering with the Debtor's business?

Your Honor, I think it's important to note that a preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the Plaintiff is entitled to such relief. Plaintiffs are entitled to a preliminary injunction if they show, one, a substantial likelihood that they will prevail on the merits of their claims; two, a substantial threat that they will suffer an irreparable injury if the injunction is not granted; three, their threatened injury outweighs the harm to the estate or the other party; and four, the public interest will not be disserved, misserved, if the preliminary injunction is granted.

The party seeking the preliminary injunction bears the burden of persuasion on all four requirements. We believe

that the Debtor today has failed to carry its burden of persuasion of proof with regard to the second element, which I'm going to refer to as the irreparable injury requirement. In order to show irreparable harm to the Court, the Plaintiff must prove that if the District Court denied the grant of a preliminary injunction, irreparable harm would be the result. Injuries are irreparable only when they cannot be undone through monetary remedies. There is no evidence before the Court today that Mr. Dondero cannot respond to any judgment that is rendered against him by this Court.

Your Honor, this preliminary injunction does not involve real property. Unlike the *Saldana* case, this request for the issuance of a preliminary injunction involves personal property only. The request that Mr. Dondero cease and desist all contact with employees is just wrong and may violate the First Amendment of the Constitution, as I previously stated.

We have other concerns regarding the issuance of a preliminary injunction. We feel that the preliminary injunction is too broad. It lacks a beginning and an end. When does the preliminary injunction terminate? What about the former employees? Once they are terminated, can Mr. Dondero speak to them? What about the pot plan? Is it gone forever? Can Mr. Dondero talk with the mediators about the pot plan? Can Mr. Dondero speak with the members of the U.C.C.?

It is easy to criticize Mr. Dondero. Did he violate the TRO? We submit that he didn't and the Debtor says that he did. What matters going forward is the lack of evidence of irreparable harm.

Mr. Seery sure wants to keep Mr. Dondero from talking to anyone in this case. Why is that? Does Mr. Seery believe that the only way to get his liquidation plan confirmed is to keep Mr. Dondero from talking to anyone? How will the preliminary injunction help the Debtor's creditors? Does keeping Mr. Dondero from talking with anyone mean that there will be a greater return to the creditor body? Does precluding Mr. Dondero from talking about his pot plan mean that the creditors will take home more money on their claims, or does it eliminate the possibility that they may take home more money on their claims?

Your Honor, what we are seeing here today is an attempt by a group to destroy what Mr. Dondero has built over the last few years. That isn't the way Chapter 11 should work.

Just one last thing to keep in mind, Your Honor. Mr. Seery's plan is a liquidation of the Debtor. Mr. Dondero's pot plan is a reorganization of the Debtor.

Thank you, Your Honor.

THE COURT: All right. Mr. Morris, you get the last word. Anything in rebuttal?

MR. MORRIS: I would just point out, Your Honor, that

nobody here has objected to the Debtor's motion for the entry of a preliminary injunction except Mr. Dondero. While I appreciate that this is an adversary proceeding, anybody who felt strongly about the matter certainly could have moved to intervene. The Creditors' Committee could have moved to intervene. Mr. Clemente could have stood at the podium and begged Your Honor not to impose the injunction because he thought it was in the best interest of creditors to allow Mr. Dondero to interfere with the Debtor's business and to speak with their employees. Nobody has done that, Your Honor. Nobody's here speaking on behalf of Mr. Dondero. Nobody's here to testify on his behalf. Nobody's -- there's no evidence in the record that supports or corroborates anything that he said at all, Your Honor.

Unless Your Honor has any specific questions, the Debtor is prepared to rest.

THE COURT: All right. I do not have any follow-up questions.

All right. I have a lot to say. I'm sorry, I apologize in advance, but I've got a heck of a lot to say right now. I'm going to give you a ruling on the motion before me, but I've got a lot to add onto that, so I hope all the key parties in interest are listening carefully. Mr. Bonds, in the video, I can only see you. I hope Mr. Dondero is just right there out of the video camera view. Okay, there you are. I wanted

to make sure you didn't wander off to take a bathroom break or anything. So, again, I have a whole lot to say here today.

First, I'm going to rule on the motion. The Court does find there is sufficient compelling evidence to grant a preliminary injunction that is completely consistent with the prior TRO. Okay? So, specifically, the Court today is going to continue to prevent Mr. Dondero from (a) communicating in any way, directly or indirectly, with any of the Debtor's board members -- I think that's really Strand board members -- unless Mr. Dondero's counsel and counsel for the Debtor are included. Okay. I'm saying those words slowly and carefully. There is no bar on Mr. Dondero talking to the board about a pot plan or anything else in the universe Mr. Dondero wants to talk to them about. There's just a preclusion from him doing it without his counsel and the Debtor's counsel present. Okay?

I did that before and I'm doing it now because I've seen concerning evidence that some communications to Mr. Seery and others had an intimidating tone, a threatening tone one or two times, an interfering tone. So, guess what, we're just going to have lawyers involved if any more conversations happen. Okay.

So (b) the preliminary injunction, just as the TRO did, is going to prevent Mr. Dondero from making any threats of any nature against the Debtor or any of its directors, officers,

employees, professionals, or agents. Okay. It's almost embarrassing having to say that or order that with regard to such an accomplished and sophisticated person, but, you know, I saw the evidence. I've got to do what I've got to do. You know, words in a text like, Don't do it, this is your last warning, and some of the other things, that has a threatening tone, so I'm going to order this.

Third, the preliminary injunction will prevent Mr. Dondero from communicating with any of the Debtor's employees except as it specifically relates to shared services provided to affiliates owned or controlled by Mr. Dondero.

Now, I'm going to elaborate in a couple of ways here. I think in closing argument there was a suggestion that he can't even talk to his friend, Mr. Ellington, about anything. Well, I heard today that Mr. Ellington and Mr. Leventon are no longer employees of the Debtor, so actually that's not an issue. But while this is very restrictive, while this prevents Mr. Dondero from engaging in small talk with Debtor employees about the weather or the football game or whatever, it's regrettable, but I feel like I'm forced to order this now, because, again, the communications that were put in the record. Okay? We just can't take any chances, as far as I'm concerned, with regard to there being potential interference with the Debtor's operations that might be harmful or contrary to creditors' interests.

Fourth, the preliminary injunction, just like the TRO, will prevent Mr. Dondero from interfering with or otherwise impeding the Debtor's business, including but not limited to the Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned or controlled by the Debtor, and pursuit of any plan or alternative to the plan.

Now, I understand the argument that this is pretty broad and might be, I don't know, subject to some disputes regarding was it interference, did it impede the Debtor's business or not? You know what, if you follow the other prongs of the preliminary injunction, that you don't talk to the board without your counsel, Mr. Dondero, and the Debtor's counsel, and you don't talk to Debtor's employees except with regard to matters pertaining to the shared services agreement, and, bottom line, if you just run everything by your attorneys, you'll be okay. We won't have this ambiguous, vague, problematic territory.

Fifth, I will go ahead and, for good measure, belts and suspenders, whatever you want to call it, prevent Mr. Dondero from otherwise violating Section 362(a) of the Bankruptcy Code.

Now, I read the response filed at 9:30 last night by Mr. Dondero's counsel. It's a good response. It makes legal arguments about that being, you know, it just being too vague.

Well, to the contrary, it just restates what's already in the Bankruptcy Code, right? Persons are prohibited from violating Section 362(a) of the Bankruptcy Code. If anything, it's the sky is blue, right, just stating what is true. But I understand Debtor wanting some clarity in an order, because we want you to take this seriously, Mr. Dondero, and not just do something and then say, well, you didn't know what was in the Code. You know, you need to consult with your lawyer. That's going to be in there.

Bottom line, I want that language in there because, Mr. Dondero, I want you to see an order that this Court expects you to comply with the Bankruptcy Code. And again, if you don't understand, if you're unsure whether you can take action *x* or *y*, consult with your very capable lawyers.

I note that if you listened carefully to these words, there was nothing in here that stopped Mr. Dondero from talking to the Creditors' Committee about a pot plan. Nothing in this injunction, nothing in the previous TRO, ever prohibited that.

Last, with regard to the ruling -- and again, I've got a lot more to say when I'm done -- I am going to further enjoin Mr. Dondero from what we said in the TRO: causing, encouraging, or conspiring with any entity controlled by him and/or any person or entity acting on his behalf from directly or indirectly engaging in any of the aforementioned items.

This is not an injunction as to nonparties to the adversary proceeding. It is an injunction as to Mr. Dondero from doing the various enjoined acts that I previously listed under the guise of another entity or a person that he controls.

Again, if you're dealing with and through your attorneys, Mr. Dondero, I don't think this will be hard to maneuver.

I guess I'm actually not through with my ruling yet. I do want to add that the Court rules that the injunction shall last through the time of confirmation of a plan in this case unless otherwise ordered by this Court.

And as to the legal standards, I want to be clear for the record that the Court believes this injunction is necessary to avoid immediate and irreparable harm to the Debtor's estate and to its reorganization prospects. I believe that there's a strong likelihood the Debtor will succeed in a trial on the merits of this adversary proceeding. I believe the public interest strongly favors this injunction. And I believe the balance of harms weighs in favor of the Debtor on all of these various issues.

Again, I want to reiterate, the intimidation and interference that came through in some of these email and text communications was concerning to the Court and is a motivation for this preliminary injunction.

Now, I'm going to add on a couple of things today. The first thing I'm going to add on -- and I want this, Mr.

Morris, in the order you submit. You didn't ask me for this, but I'm going to do it. I'm going to order you, Mr. Dondero, to attend all future hearings in this bankruptcy case unless and until this Court orders otherwise. And I'm doing this -- it's not really that unusual a thing for me to do. I sometimes order this in cases when I'm concerned about, you know, is the businessperson paying attention to what's going on in the case and is he engaged, is he invested, is he available when we need him?

In this case in particular, the evidence was that you didn't read the TRO. You were not aware of its basic terms and you didn't read it. Okay? So that was what sent me over the edge as far as requiring this new element that you're going to attend every hearing. Obviously, we're doing video court, so that's not that much of a burden or imposition. You can pretty much be anywhere in the world and patch in by video, since we're in the pandemic and not doing live court. But I think it's necessary so I know you hear what I rule and what goes on in this case.

I will tell you that I was having a real hard time during your testimony deciding if I believe you didn't read the TRO or know about the different things that were prohibited. You know, I was thinking maybe you're not being candid to help yourself in a future contempt hearing, or actually maybe you're being a hundred percent honest and candid but you're

kind of hiding behind your lawyers so that you can argue the old plausible deniability when it suits you.

But no more. No more. I'm not going to risk this situation again of you not knowing what's in an order that affects you. So you must be in court by video until I order otherwise.

Second, and I regret having to do this, but I want it explicit in the preliminary injunction that Mr. Dondero shall not enter Highland Capital Management's offices, regardless of whether there are subleases or agreements of Highland affiliates or Dondero-controlled entities to occupy the office, unless Mr. Dondero has explicit written permission that comes from Highland's bankruptcy counsel to Dondero's bankruptcy counsel. Okay? If he does, it will be regarded as trespassing.

And, I don't know, are there security guards on the premises? I mean, gosh, I hate to be getting into this minutia, but -- well, I just want it explicit in the order that Mr. Dondero, I'm sorry, but you can't go to these offices without written permission. And again, that can only be given from Debtor's counsel to Mr. Dondero's counsel. Okay? So it's going to be trespassing. You know, someone can call the Dallas Police Department and have you escorted out. Again, I hate having to do that. It's just, it's embarrassing for me. I think it's embarrassing for everyone. But I'm backed up in

that corner.

Next, I am going to ask that it be clear that Mr. Dondero can deal with the Unsecured Creditors' Committee and its professionals with regard to talking about a pot plan.

And next, I'm going to add -- and I think, Mr. Morris, you requested this at some point today in oral argument -- Mr. Ellington and Mr. Leventon shall not share any confidential information that they received as general counsel, assistant general counsel for the Debtor, without Debtor's counsel's explicit written permission. Okay? So we've got that in writing.

And, you know, that's a little awkward because they're not here, they weren't parties to the injunction, but they were Debtor employees until recently. If they want to risk violating that and come back to the Court and argue about whether they got notice and whatnot of that, they can argue that, but I want it in the order regardless.

So that is the ruling. And now I want to kind of talk about a few other things. And before we're done here, Mr. Morris, I'll ask do you have questions, does Mr. Bonds have questions, does anyone have questions about the ruling. But I want to talk about a couple of things. And again, I hope that I'm coming through loud and clear, Mr. Bonds, in your office for Mr. Dondero to hear this. It's really, really important that he heard what I'm about to say. I'm going to say some

kind of unpleasant things and then I'm going to say some hopeful things, okay?

Mr. Dondero? Okay. Mr. Dondero, I'm going to -- Mr. Morris, you've got your hands on your head. Did I miss something?

MR. MORRIS: No. I was just surprised to see Mr. Dondero on his phone. I apologize, Your Honor.

THE COURT: Oh, my goodness. Were you on your phone, Mr. Dondero?

MR. DONDERO: No, I was not.

THE COURT: Okay. I want you to listen to this really closely, and then I promise I'm going to have something hopeful to say after this very unpleasant stuff. You know, I keep a whiteboard up at my bench. I don't know if you can read it. But sometimes I hear something in a hearing and I think, okay, this is one of my major takeaways from what I heard today. And I've got two, I've got two big takeaways here. Number one on my whiteboard is Dondero's spoliated evidence. Game-changer for all future litigation. Okay.

MR. DONDERO: I'm sorry. I didn't hear that. I didn't hear that. Could you repeat that, please?

THE COURT: Mr. Dondero, spoliated evidence, game-changer in future litigation.

Okay. Let me tell you, the throwing away of the phone, that was the worst thing I heard all day. That was far and

away the worst thing I heard all today. I don't know what I'm going to hear down the road to fix this, but if it's really gone, let me tell you how bad this is. We have all sorts of Federal Rules of Civil Procedure that talk about this being a bad thing, but I wrote an opinion a couple years ago dealing with spoliation of electronic evidence, and I think it might be helpful for everyone to read. It was called *In re Correra*, C-O-R-R-E-R-A. I have no idea what the cite on it is. But in this case, *Correra*, we had a debtor who had a laptop, and he gave the laptop to his personal assistant, who took it away to another state. And at some point during the case, parties discovered, oh, there's a laptop that may have a treasure trove of information. Who knows? Maybe it does; maybe it doesn't. But there's a laptop that we just now learned about that the personal assistant has.

And so I issued an order that she turn it over, and there were subpoenas and depositions, blah, blah, blah. Long story short, the evidence ended up being that she deleted everything on the laptop, and then -- this would almost be funny if it wasn't so serious -- she downloaded thousands of pictures of cats onto the laptop. I kid you not, cats. Meow, meow, cats. And she downloaded a hundred-something full-length movies. And we had two days of forensic experts come in and take the witness stand and tell me about how, okay, this is like an amateurish -- you've talked about amateur hour today -- this

is kind of an amateurish way of deleting data, right. You first delete all the files on the laptop and then you cover over all the space to make sure the information is not retrievable. You know, this genius ended up retrieving some of the information.

But the long story short is I sanctioned the debtor and his assistant jointly and severally. You'll have to go back and look at the opinion. I'm pretty sure it was over a million dollars. And I can't remember if that was attorneys' fee-shifting only, or monetary, like penalty on top of the attorneys' fees-shifting. I just can't remember. But maybe poor Tara needs to be advised of that opinion, too. I mean, --

But the other reason I put game-changer in future litigation is, in my *Correra* case, it wasn't just the monetary million-dollar sanction or whatever it was; it was a game-changer in future litigation because the adverse party to the debtor ended up arguing -- and it was the state of New Mexico, by the way -- they ended up saying, in all future litigation, we want you -- some adversaries, we want you to make an adverse inference. In other words, for all of these elements that we're trying to prove in our fraudulent transfer litigation and whatever else was going on, we want you to make an adverse inference that there would have been evidence there on that laptop that would have supported some of our causes of

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

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

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

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

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

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

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

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

Is Mr. -- I can't see Mr. Dondero. I want to make sure he's not on the phone. Okay. Okay. Thank you.

So where was I going to head next? I guess I want to say a couple of things now that I would describe as a little bit more hopeful, and that is pertaining to this whole pot plan thing.

You know, I tend to think, without knowing what's being said outside the courtroom, that a pot plan would be the best of all worlds, okay, because the plan that we have set for confirmation next week, I understand we have a lot of objections, and if I approve it, if I confirm the plan, we're going to have a lot of appeals and motions for stay pending appeal, and no matter how that turns out, we're going to have a lot of litigation. Okay? You know, we're going to have adversaries. And we have a not-very-workable situation here where we have these Dondero-controlled affiliates questioning Mr. Seery's every move.

I would love to have a pot plan that would involve, Mr. Dondero, you getting to keep your baby, okay? I acknowledge, everyone here acknowledges, you are the founder of this company. This is your baby. You created a multi-billion-dollar empire, okay? I would be shocked if you didn't want to keep your baby. Okay? If there was a reasonable pot plan, I would love it.

But I'm telling you, the numbers I heard didn't impress me

a heck of a lot. I'm not an economic stakeholder. It's not my claim that would be getting paid. But I can see where these Creditor Committee members, they're not going to think $160 million -- $90 million in cash, $70 million in notes, or vive-versa -- is nearly enough. Okay?

So I am going -- what just happened? What just happened? I lost Mr. Dondero. Okay. This is getting kind of humorous, almost.

Okay. I am going to order that between now and the end of the day Tuesday there be good-faith, and I'll say face-to-face -- Zoom, WebEx, whatever -- negotiations between Mr. Dondero and his counsel and at least the Committee and its professionals regarding this pot plan.

Now, the train is leaving the station next Wednesday, okay? If we don't have Creditors' Committee and Debtor and Dondero rushing in here saying, Please continue the confirmation hearing next Wednesday, if we don't have like unanimous sentiment to do that, you know, this is a 15-month-old case, I'm going to go forward with the plan that's on file.

And it's been a long, expensive case. I had great mediators try to give it their best shot to get a grand compromise. I just, I'm not going to drag this out unless you all tell me Wednesday morning, We want you to continue this a week or two.

And let me tell you -- this may be the stars lining up, or it may not be -- I was supposed to have a seven-day trial starting the week after next, and then I was supposed to have a four- or five-day day trial starting immediately after that. And all of those lawyers came in and asked for a continuance because of COVID. They wanted a face-to-face trial, and so I've put them off until April.

So if you wanted to postpone the confirmation hearing to the following week or even the following week, I have the gift of time to give you. But I'm not going to do it lightly. I'm, again, I'm just going to order face-to-face meetings. And I said Dondero and his counsel and the Committee and its professionals. You know, if -- I'm not slighting the Debtor here or Mr. Seery, but I'm kind of taking a cue from what Mr. Morris, I think I heard you say, that at this point it's the Committee, it's the Committee's money, and I think that's the starting place. And if they want to join the Debtor in at the beginning or midway through, you know, wonderful, but I think it needs --

MR. POMERANTZ: Your Honor, this is Jeff -- this is Jeff Pomerantz. I hate to interrupt, and I never do that to a judge, but I did have something to say in my comments about a continuance that we've talked about with the Committee and some other developments in the case.

THE COURT: Oh.

MR. POMERANTZ: I'm happy to wait. But it has -- it has nothing to do with the comments you said, although, as I think you've heard from me before, the Debtor has been a supporter, a supporter of a pot plan. Mr. Seery has done a tremendous amount of work working with Mr. Dondero, working with Mr. Lynn, to try to make that happen. And if the Committee is willing to engage in a pot plan, we would definitely support that. Because we do agree with Your Honor that, absent a pot plan, we are looking at a lot of litigation.

Some of the issues you're going to have to deal with at the confirmation hearing if we do not have a peace-in-the-valley settlement is exculpations, releases, moratoriums on litigation, extensions of your January 9th order --

THE COURT: Uh-huh.

MR. POMERANTZ: -- with respect to pursuing certain people.

So, we get it, and we've gotten it from the beginning. And Mr. Seery, sometimes even at a fault, has been singlehandedly focused on trying to get that done. It's just unfortunate where we are here.

But having said that, I wanted to first apprise the Court of a recent major development in the case. I'm pleased to report that the Debtor and UBS have reached a settlement in principle which will resolve all of UBS's claims against the

estate, all of UBS's claims against Multi-Strat. The parties are working on documentation. The settlement is subject to internal approvals from UBS, but we've been led to believe those approvals will occur, and we would hope to file a Rule 9019 motion in the near future.

I'm sure Your Honor is quite pleased to hear that. The UBS matters have taken a substantial amount of time. And with the settlement of UBS's claims, the only material unresolved claim, unrelated to Mr. Dondero or the employees, are Mr. Daugherty. And Mr. Seery will continue to work with Mr. Daugherty to try to settle that.

THE COURT: Okay.

MR. POMERANTZ: With respect to the scheduling, with respect to the scheduling, Your Honor, there are three significant matters on for hearing on the 13th. The first is the Debtor's motion to approve a settlement with HarbourVest, which Mr. Dondero is contesting. Depositions are being conducted on Monday, and we anticipate an evidentiary hearing in connection therewith.

The Debtors, as Mr. Morris indicated earlier on in the hearing, have also filed a complaint and a motion for a temporary restraining order against certain of the Advisors and Funds owned and controlled by Mr. Dondero which relate to the CLO management agreements for which Your Honor has heard a lot of testimony today. We also expect that TRO to be

contested and for the Court to have an evidentiary hearing.

And as Your Honor mentioned, the confirmation of the plan was scheduled for Wednesday, and there were 15 objections. I would point out, Your Honor, all but four of which were Mr. Dondero, his related entities that he owns or controls, and employees or former employees.

The Court previously gave us time on the 13th and the 14th, I think anticipating that we would have a lot and it may be necessary to go into two days. However, Your Honor, those two days are not going to be enough to deal with all the issues that we have before Your Honor.

So what we suggest, and we've spoken to the Committee and the Committee is supportive, that we continue confirmation to a day around January 27th. This will enable the Debtor to not only -- and the Committee -- not only to take Your Honor up on what you'd like to see accomplished in the next few days. I'm sure the Debtor is supportive and will be supportive, and we hope the Committee will engage in good-faith negotiations, and if there's a way to do a pot plan, we are all for it. It'll give time for that to happen.

But at the same time, and I think what you'll hear from Mr. Clemente, that we're willing to give a continuance, we all know that if there is not a settlement to be had, if there is not a pot plan to be had, this case has to confirm, it has to exit bankruptcy, and at least from the Debtor's perspective, a

lot of protections will have to be in place that basically this has not just been a pit stop in Bankruptcy Court and we return to the litigation ways that Highland is involved in.

So, Your Honor, we believe that the two evidentiary hearings on for next week probably will fill up both days. We would suggest that the first day be the complaint and the TRO against the Advisors and the Funds for the 13th, and the 14th be the HarbourVest.

We also recognized as we were preparing for today, Your Honor, looking ahead, that we thought it was not fair for us, although we know Your Honor works tirelessly and as hard as anyone on this hearing and that Your Honor would be prepared for confirmation and would be prepared for each of those trials, given the gravity of these issues, the extensive pleadings, pleadings that you would get in confirmation on Monday from the Debtor, that it made sense to continue the hearing.

So, again, fully supportive of Your Honor's mandate to try to see if we could work things out, fully supportive of a continuance until the 27th, if that date works for Your Honor, but we believe we do need to go ahead with the two matters that are on for calendar next week.

MR. RUKAVINA: Your Honor, this is Davor Rukavina. May I be heard briefly?

THE COURT: Oh my goodness. Who do you represent,

Mr. Rukavina?

MR. RUKAVINA: And I apologize -- Your Honor, I am the new counsel who will be representing the Funds and Advisors. I will probably be taking the laboring oar at confirmation.

I apologize I'm not wearing a suit and tie. I did not anticipate speaking right now.

I support -- to the extent that that's an oral motion for continuance by Mr. Pomerantz, I certainly support that. I would suggest that the Court give us an understanding of that today, because we do have depositions and discovery lined up which we can then push if the hearing on confirmation is pushed to the 27th. And we have no problem going forward on the other matters on the 13th.

So, I am co-counsel to K&L Gates, Your Honor, so whoever the K&L Clients are, they're now my clients as well. I just wanted to be heard briefly that we support the recommendation by Mr. Pomerantz and just urge that the Court give us finality on that issue today so that we're not burning the midnight oil, many sets of lawyers preparing for confirmation on the 13th.

Thank you for hearing me, Your Honor.

THE COURT: All right. So, just to be clear, the proposal is that we go forward next Wednesday on the newest request for a TRO with regard to -- is -- the CLO Funds and

the Advisors. I'm forgetting the exact names. And then that would take likely the whole day, but whether it does or does not, we would roll over to Wednesday of next week -- that'd be the 14th -- to do the HarbourVest. It's a compromise motion, right? Is there anything else?

MR. POMERANTZ: No, correct, it's the compromise motion, Your Honor. There are two pending objections on this and discovery scheduled for Monday.

THE COURT: All right. Well, as far as --

MR. CLEMENTE: Your Honor?

THE COURT: Yes, who is that?

MR. CLEMENTE: Oh, Your Honor, it's Matt Clemente at Sidley on behalf of the Committee. I'm here, and I thought maybe I'd offer just a couple of comments at this point, but I'm happy to hold them.

THE COURT: Well, --

MS. SMITH: And Your Honor, this is Frances Smith. I would also like to be heard before you wrap up.

THE COURT: Okay. Well, I guess generally I want to know, does anyone have any objection -- I can't imagine they would -- but any objection to pushing confirmation out to around the 27th? I'm going to say that because I have an issue middle of the day the 28th. If we do it the 27th, I could only go a day and a half, okay? I have to go out of town the evening of the 28th, and I would be out the 29th as

well. That's Thursday and Friday. So we'll talk about that. But anyone, Mr. Clemente or anyone else, want to say anything about continuing the confirmation?

MR. CLEMENTE: Your Honor, it's Matt Clemente at Sidley. No, Your Honor, we're supportive of that schedule.

And Your Honor, just briefly, I heard my name discussed quite a bit at this hearing as well as the Committee. I'm not going to get into it unless Your Honor would like me to, but let me be very clear: The committee has taken very seriously the pot plan proposals that Mr. Dondero has presented, and there's much more to the discussion other than what Mr. Lynn suggested in his remarks.

So I'm not going to get into all that unless Your Honor thinks it's necessary. I think it's of no moment here. But I did want Your Honor to know that we have carefully considered the pot plan proposals and have communicated a variety of issues about that to Mr. Lynn and will continue to take the direction of Your Honor and engage on a pot plan, Your Honor. But I did not want there to be any suggestion that we did not take it seriously and that there was much, much more consideration and discussion about it than what was suggested.

THE COURT: Uh-huh.

MR. CLEMENTE: Thank you, Your Honor.

THE COURT: All right.

MS. SMITH: Your Honor, this is Frances Smith.

THE COURT: Who do you represent, Ms. Smith?

MS. SMITH: Your Honor, we were recently retained by the four senior employees: Tom Surgent, Frank Waterhouse, Scott Ellington, Isaac Leventon, along with Baker & McKenzie, and I believe we have the Baker & McKenzie lawyers Deb Dandeneau and Michelle Hartmann on the line.

Your Honor, we have listened to the whole hearing. And I was not going to make an appearance. I was following your instructions and listening carefully. But Your Honor, I -- first of all, we hate to be before you for the first time in a discovery dispute. We did file a very limited objection to the plan because of the disparate treatment of our clients, which we are not arguing today, of course. We received -- it is our usual practice, Your Honor -- you've known me for a long time -- to cooperate on having witnesses appear. We got -- we were notified very late Tuesday that the Debtor's counsel would like two of our clients to appear. We made what we thought was a reasonable request for a copy of the transcript from the deposition. We were invited to the deposition and then told we could not attend, or our clients could not attend. When we offered to make it lawyers-only, they said no. So we did not produce our clients without a subpoena.

Our clients have not been evading service. As far as we know, they were each attempted service one time, late

Wednesday, when they were -- around dinnertime. Mr. Leventon was home all day today. Didn't go any -- or yesterday. Didn't go anywhere. Was not served. Wasn't served this morning. The same, as far as we know, with Mr. Ellenton.

Your Honor, on the order that you just entered, I am a little unclear of where your findings of fact stopped. First of all, I do not think that you can enjoin Mr. Ellenton and Mr. Leventon. They are not parties to the adversary proceeding.

You know, we did some very quick research. There's a Seventh Circuit case, a district court may not enjoin nonparties who are not either acting in concert with an enjoined party nor in the capacity of agents, employees, officers of the enjoined party. Mr. Ellington and Mr. Leventon are not agents, employees, officers of Mr. Dondero. So I think that, Your Honor, you cannot make that ruling.

Of course, you can rule that Mr. Dondero cannot talk to Mr. Leventon and Mr. Ellington. That might be a way to fix that one part. But as nonparties, I don't believe that you can enjoin them.

Also, Your Honor, there was just no evidence against them to support that. Out of more than two dozen exhibits, there was one mention of Mr. Leventon, where all he did was give Mr. Dondero Matt Clemente's phone number. And you yourself ruled, Your Honor, that Mr. Dondero could speak with the Committee,

so that wouldn't even have been a violation of your orders. There's three related to Mr. Ellington, but no evidence of confidential information.

And, Your Honor, I'm very concerned about the comments that you made about Mr. Ellington and perjury. I just want to make sure that it's clear on the record that those were not findings of fact. That did not -- there was no evidence about that today. And I understand Your Honor's frustration. I was -- but I just want to be very clear on the record that those were not findings of fact that you were making during that part of your comments. I was a little unclear about where the ruling exactly stopped when you said you wanted to add onto the order and then you were going to make a few more comments.

So that's all I have, Your Honor.

THE COURT: Okay.

MS. SMITH: Thank you for listening and --

THE COURT: Thank you. Fair comments, one and all. I'm first going to tweak. I was concerned. You heard me express concern about, you know, Ellington and Leventon aren't parties to this adversary. Not here. So here's -- Mr. Morris, I assume you're the scrivener. Let's change what I said earlier and have the injunction read that Mr. Dondero shall not request that Mr. Ellington or Mr. Leventon share any confidential information they received as general counsel or assistant general counsel for the Debtor without Debtor's

counsel's explicit written permission, nor accept any confidential information that the two of them may have received as general counsel or assistant general counsel for the Debtor. Okay? So the injunction is --

MR. MORRIS: Your Honor, if I may, --

THE COURT: Who?

MR. MORRIS: Your Honor, if I may, that is not sufficient for us, because that means that they can actually share it with him as long as he doesn't request it. I'm a little surprised --

THE COURT: No. You didn't hear the accept -- the last part.

MR. MORRIS: Okay.

THE COURT: I added on at the end, nor shall Mr. Dondero accept any confidential information. They -- he shall not request that they share it, nor shall he accept it. Okay? I --

MR. MORRIS: So, but that -- my concern is that that makes Mr. Dondero the arbiter of what's confidential and what's privileged. And I think that's improper. I think it's really reasonable, and I'm surprised -- you know, we're all advocates here, so I take no issue with counsel, but the order was going to be pretty simple: Don't disclose privileged or confidential information. If they don't like that, that's fine. Just bar Mr. Dondero from speaking to either one of

them, period, full stop. Because we should not be in a position where he doesn't request it but somehow they send it to him. It is confidential.

I mean, who's deciding what's confidential here? Mr. Ellington? Mr. Leventon? Mr. Dondero? Just stop their communication. Mr. Dondero is subject to the Court's order. He's the one who's subject to this motion. Bar him from speaking to either one of them. It's a very -- very simple solution.

MR. BONDS: Your Honor, I agree that it's a simple solution. It's, I mean, not correct to assume that Mr. Dondero is in any way going to breach his obligations to the Court or to Mr. Ellington and Mr. Leventon. I don't see where -- what we're talking about.

MS. SMITH: Also, Your Honor, I have to object to him disparaging my clients that way. There's been no evidence that they improperly shared any information. They are licensed lawyers and they know the Rules of Professional -- they know the rules of professionalism, so --

THE COURT: Okay. I, you know, I didn't make a finding earlier when I held out my two giant takeaways, to get to your later question, no findings. But I really hope you share with them everything I said, the concerns I expressed. Maybe get the transcript.

MS. SMITH: Absolutely, Your Honor.

THE COURT: Because I have huge concerns about conflicts of interest here. Okay? Huge, huge concerns. I had them back when we had the discovery fight, Committee wanting documents, and, you know, and I still have them. You know, did Ellington know about the TRO?

MS. SMITH: Understood, Your Honor.

THE COURT: Okay. So let me backtrack. We already had a TRO that prevented Mr. Dondero from talking to any employees of the Debtor unless it was about shared services agreement.

So, Mr. Bonds, I'm going to flip it back to you on this one. Why shouldn't I at this point just say, okay, guess what, no talking to Mr. Leventon or Ellington for the time being? Why --

MR. BONDS: First of all, --

MS. SMITH: Your Honor, that's acceptable to us.

THE COURT: Okay. What's wrong with that, Mr. Bonds?

MR. BONDS: Your Honor, we don't believe that Mr. Dondero has violated the TRO.

And secondly and more importantly, we don't believe that there's any way that you can enter an order that singles out two former employees. I mean, that's bizarre.

THE COURT: If I'm concerned that it's thwarting the reorganization efforts and there are conflicts of interest here, why can't I?

You know, this is -- I hate to say it, but I feel like I've been in the role of a divorce judge today. We have very much a corporate divorce that has been in the works, unless we get this pot plan on track, okay, and I'm a judge having to enter interim orders keeping one spouse away from the other, keeping one spouse out of the house, keeping one spouse away from the kids. It's not pleasant at all. But I don't -- the more I think about it, the more I have authority to do it just to protect, to protect the nest egg here.

MS. SMITH: Your Honor, we are perfectly fine with you enjoining Mr. Dondero from speaking to our clients, and we will convey that to our clients.

THE COURT: Okay. Mr. Bonds, I can't hear you.

MR. BONDS: I'm sorry, Your Honor. What evidence is there of irreparable harm as to Mr. Dondero talking with either Mr. Leventon or Mr. Ellington?

THE COURT: Okay. Do I need to parse through the communications I saw? Do I need to parse-

MR. BONDS: Yeah, I think so. I mean, I don't understand.

THE COURT: Okay. I never authorized Mr. Ellington to be the settlement lawyer or whatever, okay? I never would have, okay? And maybe Mr. Seery, you know, said something to -- early on in the case to make him think he had that authority, but no, we're done. Okay? And I feel like it's

causing more harm than good right now. Okay?

I don't know who instructed all of these Dondero-controlled entities to hire lawyers. I don't know if Ellington and Leventon have been giving instructions to these entities. But we've got conflicts everywhere now. Okay? We've got -- and by the way, I'm just going to list them now. We have, of course, Bonds Ellis representing Dondero. We have Doug Draper, Heller Draper, now representing these trusts, Get Good Trust, Dugaboy Investment Trust. We have K&L Gates and now Munsch Hardt also representing the Advisors, NexPoint and the various CLO or other Funds. We have CLO Holdco represented by Kane Russell Coleman Logan. We have NexPoint Real Estate represented by Wick Phillips. Who have I left -- and, of course, the employees, Baker & McKenzie and Ms. Smith. We have Spencer Fane in there for other current or former employees. We have Loewinsohn Flegle in there for certain former or current employees.

I mean, the proliferation of lawyers. And again, I don't know if Mr. Ellington and Mr. Leventon have had a role in hiring counsel, wearing their hat for these other entities or not. Can anyone tell me? Maybe I'm worried about something I shouldn't be worried about.

MR. DONDERO: You're worried about something you shouldn't worry about, Your Honor.

THE COURT: Okay. So Ellington --

MR. MORRIS: Your Honor, I would just point to the evidence that's in the record, Your Honor. You have Mr. Dondero asking Mr. Ellington to show leadership in coordinating all of the lawyers you just mentioned. It's in the record.

THE COURT: Yes. I'm just going to, until otherwise ordered, no conversations between Dondero and Ellington and Leventon, and that's just going to be my ruling until further order. That's what I feel best about.

Now, let me ask you, knowing that I could only give you a half a day on the 28th of January, if we start the confirmation hearing on whatever the plan looks like on January 27th, I mean, do people want to go with that, --

MR. POMERANTZ: Your --

THE COURT: -- even knowing we might not finish that day, or no?

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz. Maybe if we could start on the 26th, have the 26th, 27th, and then maybe half of the 28th. I would think two and a half days should be enough, notwithstanding the volume of objections, because I think you'll find that, while there may be some evidence, I think the majority of the objections are really legal in nature.

THE COURT: All right. Traci, are you out there in video-land?

THE CLERK: Yes, I'm here.

THE COURT: Okay. Have I overcommitted the 26th? If we start the 26th at 9:30 in the morning, can we do that? Or --

MR. BONDS: Your Honor?

THE CLERK: That'd be fine.

THE COURT: Okay.

THE CLERK: Just remember that you have an appointment at lunchtime that day at noon on the 26th.

THE COURT: Okay. I --

THE CLERK: You don't have any court hearings.

THE COURT: Okay.

MR. BONDS: Your Honor, I'm sorry.

THE COURT: Go ahead.

MR. BONDS: Your Honor, I'm sorry. This is John Bonds. I have a hearing on the 26th that I can't miss.

THE COURT: Well, can someone else --

MR. POMERANTZ: Your Honor, we would request, right, that Mr. Lynn lead the confirmation hearing. There's a lot of lawyers. If we try to look at everyone's calendar, we're never going to be able --

THE COURT: Yes.

MR. POMERANTZ: -- to get something that's good for everyone.

THE COURT: Okay. Yes. Well, Mr. Lynn or Mr. Assink

can handle it, Mr. Bonds.

So we're going to start the 26th at 9:30. We'll go all day, except I have something at lunchtime, apparently. And then we'll go all day on the 27th, and then I can give you half a day on the 28th.

So you'll upload immediately a notice to that effect, Mr. Pomerantz.

MR. POMERANTZ: Yes, we would.

Your Honor, in terms of our documents in support of confirmation, we want to make it convenient with the Court. We know your Court would at least need one business day, so we would prefer to file, say, by 2:00 Central on the 24th, on a Sunday. Everyone will have it, and have one business day. I mean, the old order only had one business day in advance as well. So that's what we would propose for our confirmation documents to be filed.

MR. RUKAVINA: Your Honor, this is Davor Rukavina. An important issue here is how the creditors have voted, and I have no idea how they have voted. The voting deadline has expired. So I have no problem with what Mr. Pomerantz suggests, but I do think that the Debtor should file its tabulation of votes sooner rather than later so we all know one of the central elements for the hearing that we'll have.

THE COURT: Okay.

MR. POMERANTZ: That's fair, Your Honor. We're

prepared to file the summary of voting and tabulation by the 15th of January.

THE COURT: Okay. Very good.

So, backing up, Mr. Pomerantz, you asked that I approve you filing any plan modifications by noon on Sunday, the 24th? Is that what you said?

MR. POMERANTZ: Yeah. So, there's a couple of things. There's our confirmation brief.

THE COURT: Uh-huh.

MR. POMERANTZ: There is our -- any evidence we would submit, although I suspect we are likely to provide live testimony, as opposed to a declaration. There was our summary of ballots, which we will now do on the 15th. And to the extent we have any modifications, we would provide them on Sunday by 12:00 noon Central time as well. Yes.

THE COURT: All right.

MR. RUKAVINA: Well, Your Honor, this is Davor Rukavina. Does that mean the witness and exhibit lists also will not be due until Sunday at noon? Because I would request that we have the normal period of time to exchange exhibits and witnesses.

MR. BONDS: Your Honor, I think that the normal time period is also important in this case.

THE COURT: Okay. I'm going to --

MR. POMERANTZ: Your Honor, we could -- if everyone

agrees on witness lists, we could do those by 5:00 p.m. Central on the 22nd.

THE COURT: Okay. Let's do that. Okay.

MR. POMERANTZ: But that -- but that needs to be for everybody.

THE COURT: Oh, it will be for everyone.

MR. RUKAVINA: Your Honor, no problem.

THE COURT: Okay. Let's --

MR. POMERANTZ: 5:00 p.m. Central Standard Time.

THE COURT: No more discussions. That'll be the ruling, okay? Everything is going to be due by 5:00 p.m. Central time on Friday, the 22nd. All right.

MR. POMERANTZ: Your Honor, is that our brief as well, or --

THE COURT: Yes.

MR. POMERANTZ: -- was that just the witness list?

THE COURT: Everything. Brief, witness list, and --

MR. POMERANTZ: Okay.

THE COURT: -- plan mods.

Let me look through my notes and see if there's anything else I want to say. You know, let me do some quick math here. I know there was one other thing I wanted to say that involves math. Okay. I think my math is right here. Okay. You know, I mentioned the proliferation of lawyers. And let me just say this. We had -- we've had about 90 people on the -- showing

up on the video screen today -- 89, 90, 91, 92. A few, a little over 90. Okay? So let's say 90. It's been up to 95 earlier. But let's pretend that 60 of those are lawyers billing by the hour. That's very conservative. Probably many more than 60. And let's assume conservatively that the average billing rate is $700 an hour. That's probably very low, right? We probably don't have many baby lawyers on the phone. So that's a very low average. So, 60 lawyers times $700 an hour, $42,000 an hour this hearing has cost. And then we've been going over seven hours. So let's say seven, conservatively, times $42,000. This hearing has cost $294,000 today. A preliminary injunction hearing. I mean, no one thinks that's chump change. I don't know, maybe some people do. This just seems like a ridiculous way to spend resources. No offense to all the wonderful lawyers, but this is just -- it's crazy-town, right? It is crazy-town. So I implore you, okay, how about I use that word, I implore you to have these good-faith discussions on a pot plan.

Please, Mr. Dondero, I mean, don't waste people's time. $160 million, I know that's not going to cut it. Okay? So it's going to have to be more meaningful. I just know that in my gut.

But having said that, I mean, I honestly mean I think a pot plan -- I think you getting your baby back is the best thing for everyone. Okay? I think it's the best thing for

everyone. So I want you all to --

MR. DONDERO: Judge, I -- Judge, I just need to interject for a second, because no one follows the big picture. We filed for bankruptcy with $450 million of assets. $360 million of third-party net assets, $90 million of affiliated notes. The third-party assets are down to $130 million and falling fast.

MR. POMERANTZ: Your Honor, I hate to interrupt Mr. Dondero, but that is not the purpose of this hearing.

THE COURT: Well, --

MR. POMERANTZ: Mr. Dondero's statement of the assets and value is just not something that the Debtors would agree and support. I'm sure it's not something the creditors -- I think we understand what Your Honor is saying. I think the Committee understands. And Your Honor knows that the Debtor and the Committee are close to the asset values. And Mr. Dondero should be making his argument to the Debtor and the Committee, not Your Honor, in this open forum.

THE COURT: Okay.

MR. POMERANTZ: It's just not appropriate.

THE COURT: And I understand where you're both coming from. And he's saying that because I made the comment I made about $160 million not being enough.

I've seen the evidence. I've heard the evidence at prior hearings, Mr. Dondero. We've had a lot of hearings. And I

remember writing that down. Wow, why did that happen? Seeing the dissipation of value. I couldn't remember the exact numbers, but I thought it was like $500 million something and then $300 million or whatever. And I remember Multi-Strat, that being sold, and blah, blah, blah, blah.

But having said that, there are a lot of causes of action that have been hinted at by the Creditors' Committee and others. So, causes of action is one of the things they are looking at when they start thinking about what's appropriate value.

So I just, I get where everyone is coming from. I get where everyone is coming from. But, again, let's take one more stab at this, please. Okay?

MR. POMERANTZ: Yeah. And Your Honor, my last comment. We're commercial people. The creditors are commercial people. I think we've done a tremendous job in being able to resolve most every one of the significant claims. I think the Court should trust the process. Mr. Dondero should trust the process.

And again, if there's a commercial deal to be worked out, I don't think there's anyone more than of course the Debtor and the people on the Committee, who have been litigating in many cases with Mr. Dondero and Highland for ten years, I don't think it's anyone's desire. So if there's a reasonable, rational proposal that the creditors can get behind and want

to engage, then there'll be a discussion. If they don't believe it's a reasonable, rational proposal, they won't.

THE COURT: Yes. All right. Well, I do feel very good about what I've heard about the UBS issues being worked out. I mean, we have come a long way in 15 months, even though it's frustrating to me and others. But, again, I know you all are going to do what you need to do. And I'll look for the form of order. I'm going to see you all, Mr. Dondero, including you, next Wednesday. And if there's nothing else, we stand adjourned.

MS. SMITH: Your Honor, I'd like to review the form of order as it regards my clients before it's submitted.

THE COURT: Okay.

MS. SMITH: If I could have a courtesy copy, please.

THE COURT: Yes. Well, yes. I'm not going to require 90 lawyers to get the order, but I will ask Mr. Pomerantz, Mr. Morris, make sure Ms. Smith gets it and obviously Mr. Dondero's counsel gets it. And I probably won't get it until Monday, it sounds like, but --

MR. POMERANTZ: That's likely.

THE COURT: But I'll be on the lookout for it. Okay. Thank you. We stand adjourned.

MS. SMITH: Thank you, Your Honor.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

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 Date
Certified Electronic Court Transcriber

INDEX

EXHIBIT 9

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

	)	**Case No. 19-34054-sgj-11**
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	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.

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THE COURT: Please be seated.

(Beeping.)

THE COURT: Someone needs to turn off their whatever. All right. Good morning. This is Judge Jernigan, and we have scheduled today a bench ruling regarding the Debtor's plan that we had a confirmation trial on last week. This is Highland Capital Management, LP, Case No. 19-34054.

Let me first make sure we've got Debtor's counsel on the line. Do we have --

MR. POMERANTZ: Yes.

THE COURT: -- Mr. Pomerantz?

MR. POMERANTZ: Yes, Your Honor. Good morning, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones; on behalf of the Debtor.

THE COURT: Okay. Good morning. Do we have the Creditors' Committee on the phone?

MR. CLEMENTE: Good morning, Your Honor. Matthew Clemente of Sidley Austin on behalf of the Creditors' Committee.

THE COURT: Good morning. All right. We had various Objectors. Do we have Mr. Dondero's counsel on the phone?

MR. LYNN: Yes, Your Honor. Michael Lynn, together with John Bonds and Bryan Assink, for Jim Dondero.

THE COURT: Good morning. For the Trusts, the

Dugaboy and Get Good Trusts, do we have Mr. Draper?

MR. DRAPER: Yes. Douglas Draper is on the line, Your Honor.

THE COURT: Good morning. Now, for what I'll call the Funds and Advisor Objectors, do we have Mr. Rukavina and your crew on the line?

MR. RUKAVINA: Davor Rukavina. And Lee Hogewood is also on the line.

THE COURT: All right. Good morning to you. All right. And we had objections pending from the U.S. Trustee as well. Do we have the U.S. Trustee on the line?

(No response.)

THE COURT: All right. If you're appearing, you're on mute. We're not hearing you.

All right. Well, we have lots of other folks. I don't mean to be neglectful of them, but we're going to get on with the ruling this morning. This is going to take a while. This is a complex matter, so it should take a while.

All right. Before the Court, of course, for consideration is the Debtor's Fifth Amended Plan, first filed on November 24, 2020, as later modified on or around January 22, 2021, with more amendments filed on or around February 1, 2021. The Court will hereinafter refer to this as the "Plan."

The parties refer to the Plan as a monetization plan because it involves the gradual wind-down of the Debtor's

assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds for a while, under strict governance and monitoring, and a Claimants Trust will receive the proceeds of that process, with the creditors receiving an interest in that trust. There is also anticipated to be Litigation Sub-Trust established for the purpose of pursuing certain avoidance or other causes of action for the benefit of creditors.

The recovery for general unsecured creditors is estimated now at 71 percent.

The Plan was accepted by 99.8 percent of the dollar amount of voting creditors in Class 8, the general unsecured class, but as to numerosity, a majority of the class of general unsecured creditors did not vote in favor of the plan. Specifically, 27 claimants voted no and 17 claimants voted yes. All but one of the rejecting ballots were cast by employees who, according to the Debtor, are unlikely to have allowed claims because they are asserted for bonuses or other compensation that will not become due.

Meanwhile, in a convenience class, Class 7, of general unsecured claims under one million dollars, one hundred percent of the 16 claimants who chose to vote in that class chose to accept the Plan.

Because of the rejecting votes in Class 8, and because of certain objections to the Plan, the Court heard two full days

of evidence, considering testimony from five witnesses and thousands of pages of documentary evidence, in considering whether to confirm the Plan pursuant to Sections 1129(a) and (b) of the Bankruptcy Code.

The Court finds and concludes that the Plan meets all of the relevant requirements of Sections 1123, 1124, and 1129 of the Code, and other applicable provisions of the Bankruptcy Code, but is issuing this detailed ruling to address certain pending objections to the Plan, including but not limited to objections regarding certain Exculpations, Releases, Plan Injunctions, and Gatekeeping Provisions of the Plan.

The Court reserves the right to amend or supplement this oral ruling in more detailed findings of fact, conclusions of law, and an Order.

First, by way of introduction, this case is not your garden-variety Chapter 11 case. Highland Capital Management, LP is a multibillion dollar global investment advisor, registered with the SEC pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mr. Okada resigned from his role with Highland prior to the bankruptcy case being filed. Mr. Dondero was in control of the Debtor as of the day it filed bankruptcy, but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Official Unsecured Creditors' Committee, which will be described later.

Although Mr. Dondero remained on as an unpaid employee and portfolio manager with the Debtor after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and essentially control numerous nondebtor companies in the Highland complex of companies.

The Debtor is headquartered in Dallas, Texas. As of the October 2019 petition date, the Debtor employed approximately 76 employees.

Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including CLOs and other investments. Some of these assets are managed pursuant to shared services agreements with a variety of affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the Byzantine complex of companies under the Highland umbrella.

None of these affiliates of Highland filed for Chapter 11 protection. Most, but not all, of these entities are not subsidiaries, direct or indirect, of Highland. And certain parties in the case preferred not to use the term "affiliates" when referring to them. Thus, the Court will frequently refer loosely to the so-called, in air quotes, "Highland complex of companies" when referring to the Highland enterprise. That's a term many of the lawyers in the case use.

Many of the companies are offshore entities, organized in

such faraway jurisdictions as the Cayman Islands and Guernsey.

The Debtor is privately owned 99.5 percent by an entity called Hunter Mountain Investment Trust; 0.1866 percent by the Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; 0.0627 percent by Mark Okada, personally and through family trusts; and 0.25 percent by Strand Advisors, Inc., the general partner.

The Debtor's primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates.

For additional liquidity, the Debtor, prior to the petition date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at nondebtor subsidiaries and distribute those proceeds to the Debtor in the ordinary course of business.

The Debtor's current CEO, James Seery, credibly testified that the Debtor was "run at a deficient for a long time and then would sell assets or defer employee compensation to cover its deficits." This Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses that Highland was constantly incurring due to its culture of litigation, as further addressed hereafter.

Highland and this case are not garden-variety for so many

reasons. One is the creditor constituency. Highland did not file bankruptcy because of some of the typical reasons a large company files Chapter 11. For example, it did not have a large asset-based secured lender with whom it was in default. It only had relatively insignificant secured indebtedness owing to Jefferies, with whom it had a brokerage account, and one other entity called Frontier State Bank.

Highland did not have problems with trade vendors or landlords. It did not suffer any type of catastrophic business calamity. In fact, it filed Chapter 11 six months before the COVID-19 pandemic was declared. The Debtor filed Chapter 11 due to a myriad of massive unrelated business litigation claims that it was facing, many of which had finally become liquidated or were about to become liquidated after a decade or more of contentious litigation in multiple fora all over the world.

The Unsecured Creditors' Committee in this case has referred to the Debtor under its former chief executive, Mr. Dondero, as a serial litigator. This Court agrees with that description. By way of example, the members of the Creditors' Committee and their history of litigation with the Debtor and others in the Highland complex are as follows:

First, the Redeemer Committee of the Highland Crusader Fund, which I'll call the Redeemer Committee. This Creditors' Committee member obtained an arbitration award against the

Debtor of more than $190 million, inclusive of interest, approximately five months before the petition date from a panel of the American Arbitration Association. It was on the verge of having that award confirmed by the Delaware Chancery Court immediately prior to the petition date, after years of disputes that started in late 2008 and included legal proceedings in Bermuda. This creditor's claim was settled during the bankruptcy case in the amount of approximately $137.7 million. The Court is omitting various details and aspects of that settlement.

The second Creditors' Committee member, Acis Capital Management, LP, which was formerly in the Highland complex of companies but was not affiliated with Highland as of the petition date. This UCC member and its now-owner, Josh Terry, were involved in litigation with Highland dating back to 2016. Acis was forced into an involuntary bankruptcy in the Bankruptcy Court for the Northern District of Texas, Dallas Division, by Josh Terry, who was a former Highland portfolio manager, in 2018 after Josh Terry obtained an approximately $8 million arbitration award and judgment against Acis that was issued by a state court in Dallas County, Texas. Josh Terry was ultimately awarded the equity ownership of Acis by the Dallas Bankruptcy Court in the Acis bankruptcy case.

Acis subsequently asserted a multimillion dollar claim against Highland in the Dallas Bankruptcy Court for Highland's

alleged denuding of Acis in fraud of its creditors, primarily Josh Terry.

The litigation involving Acis and Mr. Terry dates back to mid-2016, and has continued on, with numerous appeals of bankruptcy court orders, including one appeal still pending at the United States Court of Appeals for the Fifth Circuit.

There was also litigation involving Josh Terry and Acis in the Royal Court of the Island of Guernsey and in a court in New York.

The Acis claim was settled during this bankruptcy case in court-ordered mediation for approximately $23 million. Other aspects and details of this settlement are being omitted.

Now, the third Creditors' Committee member, UBS Securities. It's a creditor who filed a proof of claim in the amount of $1,039,000,000 in the Highland case. Yes, over one billion dollars. The UBS claim was based on the amount of a judgment that UBS received from a New York state court in 2020 after a multi-week bench trial which had occurred many months earlier on a breach of contract claim against other entities in the Highland complex. UBS alleged that the Debtor should be liable for the judgment. The UBS litigation related to activities that occurred in 2008. The litigation involving UBS and Highland and its affiliates was pending for more than a decade, there having been numerous interlocutory appeals during its history.

The Debtor and UBS recently announced a settlement of the UBS claim, which came a few months after court-ordered mediation. The settlement is in the amount of $50 million as a general unsecured claim, $25 million as a subordinated claim, and $18 million of cash coming from a nondebtor entity in the Highland complex known as Multistrat. Other aspects of this settlement are being omitted.

The fourth and last Creditors' Committee member is Meta-e Discovery. It is a vendor who happened to supply litigation and discovery-related services to the Debtor over the years. It had unpaid invoices on the petition date of more than $779,000.

It is fair to say that the members of the Creditors' Committee in this case all have wills of steel. They fought hard before and during the bankruptcy case. The members of the Creditors' Committee are highly sophisticated and have had highly sophisticated professionals representing them. They have represented their constituency in this case as fiduciaries extremely well.

In addition to these Creditors Committee members, who were all embroiled in years of litigation with Highland and its affiliates in various ways, the Debtor has been in litigation with Patrick Daugherty, a former limited partner and employee of Highland, for many years in both Delaware and Texas state courts. Patrick Daugherty filed a proof of claim for "at

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

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

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

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

Yet another reason this is not your garden-variety Chapter

11 case is its postpetition corporate governance structure. Highland filed bankruptcy October 16, 2019. Contentiousness with the Creditors' Committee began immediately, with first the Committee's request for a change of venue from Delaware to Dallas, and then a desire by the Committee and the U.S. Trustee for a Chapter 11 or 7 trustee to be appointed due to concerns over and distrust of Mr. Dondero and his numerous conflicts of interest and alleged mismanagement or worse.

After many weeks of the threat of a trustee lingering, the Debtor and the Creditors' Committee negotiated and the Court approved a corporate governance settlement on January 9, 2020 that resulted in Mr. Dondero no longer being an officer or director of the Debtor or of its general partner, Strand.

As part of the court-approved settlement, three eminently-qualified Independent Directors were chosen by the Creditors' Committee and engaged to lead Highland through its Chapter 11 case. They were James Seery, John Dubel, and Retired Bankruptcy Judge Russell Nelms. They were technically the Independent Directors of Strand, the general partner of the Debtor. Mr. Dondero had previously been the sole director of Strand, and thus the sole person in ultimate control of the Debtor.

The three independent board members' resumes are in evidence. James Seery eventually was named CEO of the Debtor. Suffice it to say that this changed the entire trajectory of

the case. This saved the Debtor from a trustee. The Court trusted the new directors. The Creditors' Committee trusted them. They were the right solution at the right time.

Because of the unique character of the Debtor's business, the Court believed this solution was far better than a conventional Chapter 7 or 11 trustee. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large, complex businesses and serving on their boards of directors in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries.

By way of comparison, in the Chapter 11 case of Acis, the former affiliate of Highland that this Court presided over two or three years ago, which company was much smaller in size and scope than Highland, managing only five or six CLOs, a Chapter 11 trustee was elected by the creditors that was not on the normal rotation panel for trustees in this district, but rather was a nationally-known bankruptcy attorney with more than 45 years of large Chapter 11 case experience. This Chapter 11 trustee performed valiantly, but was sued by entities in the Highland complex shortly after he was appointed, which this Court had to address. The Acis trustee

could not get Highland and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of a plan over Highland and its affiliates' objections in his fourth attempted plan, which confirmation then was promptly appealed by Highland and its affiliates.

Suffice it to say it was not easy to get such highly-qualified persons to serve as independent board members and CEO of this Debtor. They were stepping into a morass of problems. Naturally, they were worried about getting sued, no matter how defensible their efforts might be, given the litigation culture that enveloped Highland historically. It seemed as though everything always ended in litigation at Highland.

The Court heard credible testimony that none of them would have taken on the role of Independent Director without a good D&O insurance policy protecting them, without indemnification from Strand, guaranteed by the Debtor; without exculpation for mere negligence claims; and without a gatekeeper provision, such that the Independent Directors could not be sued without the bankruptcy court, as a gatekeeper, giving a potential plaintiff permission to sue.

With regard to the gatekeeper provision, this was precisely analogous to what bankruptcy trustees have pursuant to the so-called "Barton Doctrine," which was first articulated in an old U.S. Supreme Court case.

The Bankruptcy Court approved all of these protections in a January 9, 2020 order. No one appealed that order. And Mr. Dondero signed the settlement agreement that was approved by that order.

An interesting fact about the D&O policy came out in credible testimony at the confirmation hearing. Mr. Dubel and an insurance broker from Aon, named Marc Tauber, both credibly testified that the gatekeeper provision was needed because of the so-called, and I quote, "Dondero Exclusion" in the insurance marketplace.

Specifically, the D&O insurers in the marketplace did not want to cover litigation claims that might be brought against the Independent Directors by Mr. Dondero because the marketplace of D&O insurers are aware of Mr. Dondero's litigiousness. The insurers would not have issued a D&O policy to the Independent Directors without either the gatekeeping provision or a "Dondero Exclusion" being in the policy.

Thus, the gatekeeper provision was part of the January 9, 2020 settlement. There was a sound business justification for it. It was reasonable and necessary. It was consistent with the Barton Doctrine in an extremely analogous situation -- *i.e.*, the independent board members were analogous to a three-headed trustee in this case, if you will. Mr. Dondero signed off on it. And, again, no one ever appealed the order

approving it.

The Court finds that, like the Creditors' Committee, the independent board members here have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and with good faith. As noted previously, they changed the entire trajectory of this case.

Still another reason why this was not your garden-variety case was the mediation effort. In summer of 2020, roughly nine months into the Chapter 11 case, this Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Court selected co-mediators, since this seemed like such a Herculean task, especially during COVID-19, where people could not all be in the same room. Those co-mediators were Retired Bankruptcy Judge Allan Gropper from the Southern District of New York, who had a distinguished career presiding over complex Chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner in a preeminent law firm working on complex Chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas.

As noted earlier, the Acis claim was settled during the mediation, which seemed nothing short of a miracle to this Court, and the UBS claim was settled many months later, and this Court believes the groundwork for that ultimate

settlement was laid, or at least helped, through the mediation. And as earlier noted, other enormous claims have been settled during this case, including that of the Redeemer Committee, who, again, had asserted approximately or close to a $200 million claim; HarbourVest, who asserted a $300 million claim; and Patrick Daugherty, who asserted close to a $40 million claim.

This Court cannot stress strongly enough that the resolution of these enormous claims and the acceptance of all of these creditors of the Plan that is now before the Court seems nothing short of a miracle. It was more than a year in the making.

Finally, a word about the current remaining Objectors to the Plan before the Court. Once again, the Court will use the phrase "not garden-variety." Originally, there were over one dozen objections filed to this Plan. The Debtor has made various amendments or modifications to the Plan to address some of these objections. The Court finds that none of these modifications require further solicitation, pursuant to Sections 1125, 1126, 1127 of the Code, or Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditor or interest holder who has not accepted in writing the modifications.

Among other things, there were changes to the projections

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

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

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

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

they have, and the Court believes that they have.

Now, to be specific about the remoteness of the objectors' interests, the Court will address them each separately. First, Mr. Dondero has a pending objection. Mr. Dondero's only economic interest with regard to the Debtor at this point is an unliquidated indemnification claim. And based on everything this Court has heard, his indemnification claim will be highly questionable at this juncture.

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

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

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

The witness who testified on these Objectors' behalves 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.

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

To be clear, 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.

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

time that this all came to light and the Court began setting hearings on the alleged interference, Mr. Dondero's company phone supplied to him by Highland, which he had been asked to turn in, mysteriously went missing. The Court merely mentions this in this context as one of many reasons that the Court has to question the good faith of Mr. Dondero and his affiliated objectors.

The only other pending objection besides these objections of the Dondero and Dondero-controlled entities is an objection of the United States Trustee pertaining to the release, exculpation, and injunction provisions in the Plan.

In juxtaposition to these pending objections, the Court notes that the Debtor has resolved earlier-filed objections to the Plan filed by the IRS, Patrick Daugherty, CLO Holdco, Ltd., numerous local taxing authorities, and certain current and former senior-level employees of the Debtor.

With that rather detailed factual background addressed, because certainly context matters here, the Court now addresses what it considers the only serious objections raised in connection with confirmation. Specifically, the Plan contain certain releases, exculpation, plan injunctions, and a gatekeeper provision which are obviously not fully consensual, since there are objections. Certainly, these provisions are mostly consensual when you consider that parties with hundreds of millions of dollars' worth of legitimate claims have not

objected to them.

First, a word about plan releases generally, since the Objectors at times seem to gloss over, in this Court's view, relevant distinctions, and seem to refer to the plan releases in this Plan and the exculpations and the plan injunctions all as impermissible third-party releases, when, in fact, they are not, *per se*.

It has, without a doubt, become quite commonplace in complex Chapter 11 bankruptcy cases to have three categories of releases in plans. These three types are as follows.

First, Debtor Releases. A debtor release involves a release by the debtor and its bankruptcy estate of claims against nondebtor third-parties. For example, a release may be granted in favor of creditors, directors, officers, employees, professionals who participated in the bankruptcy process. This is the least-controversial type of release because the debtor is extinguishing its own claims, which are property of the estate, that a debtor has authority to utilize or not, pursuant to Sections 541 and 363 of the Bankruptcy Code.

Authority for a debtor release pursuant to a plan arises out of Section 1123(b)(3)(A), which indicates that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."

In this context, it would appear that the only analysis

required is to determine whether the release or settlement of the claim is an exercise of reasonable business judgment on that part of the debtor, is it fair and equitable, is it in the best interest of the estate, given all the relevant facts and circumstances? Also relevant is whether there's consideration given of some sort by the releasees.

Now, the second type of very commonplace Chapter 11 plan release is an exculpation. Chapter 11 plans also very often have these exculpation provisions, and they're something much narrower in scope and time than a full-fledged release. An exculpation provision is more like a shield for a certain subset of key actors in the case for their acts during and in connection with the case, which acts may have been merely negligent.

Specifically, a plan may absolve certain actors -- usually estate fiduciaries -- such as an Official Unsecured Creditors' Committee and its members, Committee professionals, sometimes Debtor professionals, senior management, officers and directors of the Debtor, from any liability for postpetition negligent conduct -- *i.e.*, conduct which occurred during the administration of the Chapter 11 case and in the negotiation, drafting, and implementation of a plan. An exculpation provision typically excludes gross negligence and willful misconduct. It is usually worded in a passive voice, so it may seem a little unclear as to whether it is actually a

release and by whom.

In any event, the rationale is that parties who actively participate in a court-approved process -- often, court-approved transactions by court order -- should receive protection for their work. Otherwise, who would want to work in such a messy, contentious situation, only to be sued for alleged negligence for less-than-perfect end results?

Chapter 11 end results are not always pretty. One could argue that these exculpation provisions, though, are much ado about nothing. Why? For one thing, again, the shield is only as to negligent conduct. There is no shield for other problematic conduct, such as gross negligence or willful misconduct.

Second, in many situations, any claims or causes of action that might arise will belong to the Debtor or its estate. Thus, they would already be released pursuant to a debtor release.

Additionally, there is case law stating that, where a claim is brought against an estate professional whose fees have already been approved in a final fee application, any claims are barred by *res judicata*. Thus, exculpated professionals would only have potential exposure for a very short window of time, until final fee applications.

Additionally, certain case law in Texas makes clear that an attorney generally does not owe any duties to persons other

than his own client.

All of this suggests that the shield of a typical exculpation provision may rarely become useful or needed.

Moving now to the third type of release, a true third-party release, Chapter 11 plans also sometimes contain third-party releases. A true third-party release involves the release of claims held by nondebtor third parties against other nondebtor third parties, and there is often no limitation on the scope and time of the claims released.

This is the most heavily scrutinized of the three types of plan releases. Much of the case authority focuses on whether a third-party release is consensual or not in analyzing their propriety and/or enforceability.

In Highland, there are no third-party releases. Rather, there are debtor releases and exculpations. There also happen to be plan injunctions and gatekeeper provisions that have been challenged. The Objectors argue that these provisions violate the Fifth Circuit's opinion in *Pacific Lumber* or are otherwise beyond the jurisdiction or authority of the bankruptcy court. These arguments are now addressed.

First, the debtor release is found at Article IX.D of the Plan. The language, in pertinent part, reads as follows. "On and after the effective date, each Released Party is deemed to be hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor

and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including but not limited to the Claimant Trust and the Litigation Sub-Trust, from any and all causes of action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort, or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right, whether individually or collectively, or on behalf of the holder of any claim against, or interest in, a debtor or other person."

There are certain exceptions discussed, and then Released Parties are defined at Definition 113 of the Plan collectively as: the Independent Directors; Strand, solely from the date of the appointment of the Independent Directors through the effective date; the CEO/CRO; the Committee, the members of the Committee, in their official capacities; the professionals retained by the Debtor and the Committee in the Chapter 11 case; and the employees. This is a defined term in the Plan Supplement and does not include certain employees.

To be clear, these are not third-party releases such as addressed in the *Pacific Lumber* case. These are the Debtor's and/or the bankruptcy estate's causes of action that are proposed to be released. Releases by a debtor are

discretionary and can be provided by a debtor to persons who have provided consideration to the debtor and the estate. Section 1123(b)(3)(A) of the Bankruptcy Code permits this.

The evidence here supported the notion that these releases are a *quid pro quo* for the Released Parties' significant contributions to a highly complex and contentious restructuring. The Debtor is releasing its own claims. Some of the Released Parties would have indemnification rights against the Debtor. And the Debtor's CEO, James Seery, credibly testified that he does not believe any claims exist as to the Released Parties. The Court approves the Debtor releases and overrules the objections to them.

Next, the exculpations appear at Article IX.C of the Plan and provide as follows: Subject in all respects to Article XII.D of the Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, remedy, loss, and liability for conduct occurring on or after the petition date in connection with or arising out of the filing and administration of the Chapter 11 case, the negotiation and pursuit of a disclosure statement, the Plan, or the solicitation of votes for or confirmation of the Plan, the funding or consummation of the Plan, or any related agreements, instruments, et cetera, et cetera, whether or not

such Plan distributions occur following the effective date, the implementation of the Plan, and any negotiation, transactions, and documentation in connection with the foregoing clauses, provided, however, the foregoing will not apply to any acts or omissions of any Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct; or Strand or any employee other than with respect to actions taken by such entities from the date of appointment of the Independent Directors through the effective date.

Exculpated Parties are later defined at Section -- or, earlier defined at Section 62 of the Plan, Definition No. 62 of the Plan, as later limited by the Debtor, as announced in the confirmation hearing. And so these are the Exculpated Parties: the Debtor and its successors and assigns; the employees, certain employees, as defined; Strand; the Independent Directors; the Committee, the members of the Committee, in their official capacities; the professionals retained by the Debtor and the Committee in the Chapter 11 case; the CEO and CRO; and the related persons as to each of these parties listed in Part (iv) through (viii) above; provided, for the avoidance of doubt, and it goes on to say Dondero, Mark Okada, and various others aren't Exculpated Parties.

Now, as earlier mentioned, the Objectors argue that *Pacific Lumber*, 584 F.3d 229, a Fifth Circuit case from 2009, categorically rejects the permissibility of nonconsensual exculpations as well as third-party releases in a Chapter 11 plan. So the Court is going to take a deep dive into that assertion.

In *Pacific Lumber*, the Fifth Circuit reviewed on appeal numerous challenges to a confirmed plan of affiliated debtors known as Palco and Scopac and four subsidiaries. The debtor Palco owned and operated the sawmill, a power plant, and even a town called Scotia, California. The debtor Scopac owned timberlands. A creditor, a secured creditor called Marathon had a claim against Palco's assets. Marathon estimated Palco's assets were worth $110 million. Its claim was $160 million. Meanwhile, other parties had large secured claims against the other debtor, Scopac.

The plan that the bankruptcy court confirmed, which was on appeal to the Fifth Circuit, was filed by both the secured creditor Marathon and a joint plan proponent called MRC. MRC was a competitor of the debtor Palco. The Marathon/MRC plan proposed to dissolve all the debtors, cancel intercompany debts, and create two new entities, Townco and Newco. Almost all of the debtor Palco's assets, including the town of Scotia, California, would be transferred to Townco. The timberlands and other assets, including the sawmill, would be

placed in Newco.

Marathon and MRC proposed to contribute $580 million to Newco to pay claims against Scopac. And Marathon would convert its secured claim against Palco's assets into equity, giving it full ownership of Townco, a 15 percent stake in Newco, and a new note for the sawmill's working capital. MRC would own the other 80 percent of Newco and would manage and run the company.

An indenture trustee for the secured indebtedness against Scopac -- which, by the way, had also been a plan proponent of a competing plan -- appealed the confirmation order, raising eight distinct issues on appeal. One of the eight issues pertained to what the Fifth Circuit referred to as a "nondebtor exculpation and release clause." This issue is discussed on the last two pages of a very lengthy opinion.

While the complained-of provision is not quoted verbatim in the *Pacific Lumber* opinion, it appears to have been a typical exculpation clause. Not a third-party release; a typical exculpation clause. The Fifth Circuit stated, "The plan releases MRC, Marathon, Newco, Townco, and the Unsecured Creditors' Committee, and their personnel, from liability, other than for willful and gross negligence related to proposing, implementing, and administering the plan" at Page 251.

The Fifth Circuit held that "the nondebtor releases must

be struck except with respect to the Creditors' Committee and its members."

Footnote 26 of the opinion also states that the appellants had "not briefed why Newco and Townco or their officers and directors should not be released," and so "we do not analyze their position." Rather, the Fifth Circuit merely analyzed why the exculpation provision was not permissible as to the two plan proponents, MRC and Marathon.

Thus, the Court views *Pacific Lumber* as being a holding that squarely addressed the propriety of two plan proponents, a secured lender and a third-party competitor purchaser of the Debtors, obtaining nonconsensual exculpation in the plan. However, its reasoning certainly cannot be ignored, strongly suggesting it would not be inclined to approve an exculpation for any party other than a Creditors' Committee or its members.

As far as the Fifth Circuit's reasoning, it relied on Bankruptcy Code Section 524(e) for striking down the exculpations, stating, "The law states, however, that discharge of a debt of the debtor does not affect the liability of any other entity on such debt." Page 251. The opinion suggests that MRC and Marathon may have tried to argue that 524(e) did not apply to their exculpations because MRC and Marathon were not liable as co-obligors in any way on any of the debtor's debt.

The Fifth Circuit seemed dismissive of this argument, stating as follows, "MRC/Marathon insist the release clause is part of their bargain because, without the clause, neither company would have been willing to provide the plan's financing. Nothing in the records suggests that MRC/Marathon, the Committee, or the Debtor's officers and directors were co-liable for the Debtor's prepetition debts. Instead, the bargain the proponents claim to have purchased is exculpation from any negligence that occurred during the course of the case. Any costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either of these parties or the consummated reorganization. We see little equitable about protecting the released nondebtors from negligence suits arising out of the reorganization."

The Court goes on to note that, in a variety of cases, that releases have been approved, but these cases "seem broadly to foreclose nonconsensual nondebtor releases and permanent injunctions."

The Court then adds at Footnote 27 that the Fifth Circuit in the past did not set aside challenged plan releases that were in final nonappealable orders and were the subject of collateral attack much later, citing its famous *Republic Supply v. Shoaf* case, where the Fifth Circuit ruled that *res judicata* barred a debtor from bringing a claim that was specifically and expressly released by a confirmed

reorganization plan because the debtor -- the objector failed to object to the release at confirmation.

The Fifth Circuit in *Pacific Lumber* also noted that the Bankruptcy Code permits bankruptcy courts to enjoin third-party asbestos claims under certain circumstances, 524(g), which the Court said suggests nondebtor releases are most appropriate as a method to channel mass tort claims towards a specific pool of assets, citing numerous cases, including *Johns-Manville*.

In reach its holding, the Fifth Circuit saw no reason to uphold exculpation to the plan proponents MRC and Marathon, seeming to find it inconsistent with 524(e) under the facts at bar, but the Court did uphold exculpation for the Creditors' Committee and its members, stating, "We agree, however, with courts that have held that 1103(c) under the Code, which lists the Creditors' Committee's powers, implies Committee members have qualified immunity for actions within the scope of their duties." Numerous cites. "The Creditors' Committee and its members are the only disinterested volunteers among the parties sought to be released here. The scope of protection, which does not insulate them from willful and gross negligence, is adequate."

Thus, the Court held that the exculpation provisions in *Pacific Lumber* must be struck except with regard to the Creditors' Committee and its members.

Now, after all of that, this Court believes the following can be gleaned from *Pacific Lumber*. First, the Fifth Circuit hinted that consensual exculpations and/or consensual nondebtor third-party releases are permissible. The Court was, of course, dealing with nonconsensual exculpations in *Pacific Lumber*. In this regard, I note Page 252, where the Court cited various prior Fifth Circuit authority and then stated, "These cases seem broadly to foreclose nonconsensual nondebtor releases and permanent injunctions."

The second thing that can be gleaned from *Pacific Lumber*: The Fifth Circuit hinted that nondebtor releases may be permissible in cases involving global settlements of mass claims against the debtors and co-liable parties. The Court, of course, referred to 524(g), but various other cases which approved nondebtor releases where mass claims were channeled to a specific pool of assets.

Third, the Fifth Circuit outright held that exculpations from negligence for a Creditors' Committee and its members are permissible because the concept is both consistent with 1103(c), "which implies Committee members have qualified immunity for actions within the scope of their duties," and a good policy result, since "if members of the Committee can be sued by persons unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee."

Fourth, the Fifth Circuit recognized in *Pacific Lumber* that *res judicata* may bar complaints regarding an impermissible plan release, citing to its earlier *Republic Supply v. Shoaf* opinion.

Now, being ever-mindful of the Fifth Circuit's words in *Pacific Lumber*, this Court cannot help but wonder about at least three things.

First, did the Fifth Circuit leave open the door that facts/equities might sometimes justify approval of an exculpation for a person other than a Creditors' Committee and its members? For example, the Fifth Circuit stated, in referring to the plan proponents Marathon and MRC, that "Any costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either of these parties or the consummated reorganization." Here, this Court can easily expect the proposed exculpated parties to incur costs that could swamp them and the reorganization based on the past litigious conduct of Mr. Dondero and his controlled entities. Do these words of the Fifth Circuit hint that equities/economics might sometimes justify an exculpation?

Second, did the Fifth Circuit's rationale for permitted exculpations to Creditors' Committee and their members, which was clearly policy-based, based on their implied qualified immunity flowing from their duties in Section 1103 and their disinterestedness, and the importance of their role in a

Chapter 11 case, did this rationale leave open the door to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides Creditors' Committees and their members? For example, in a situation such as the Highland case, in which Independent Directors, brought in to avoid a trustee, are more like a Creditors' Committee than an incumbent board of directors.

Third, the Fifth Circuit's sole statutory basis was Section 524(e). This Court would humbly submit that this is a statute dealing with prepetition liability in which some nondebtor is liable with the Debtor. Exculpation is a concept dealing with postpetition liability.

The Ninth Circuit recently, in a case called *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), approved the validity of an exculpation clause incorporated into a confirmed Chapter 11 plan that purported to absolve certain nondebtor parties that were "closely involved" in drafting the plan. They were the largest secured creditor, a purchaser, and an individual who was an indirect owner of certain of the debtor companies. The exculpation was from any negligence, liability, for "any act or omission in connection with, related to, or arising out of the Chapter 11 cases."

By the time the appeal was before the Ninth Circuit, the only issue was the propriety of the exculpation clause as to the large secured creditor, which was also a plan proponent,

since all the other exculpated parties had settled with the appellant.

The Court, in determining that the exculpation clause was permissible as to the secured lender, concluded that Section 524(e) "does not bar a narrow exculpation clause of the kind here at issue -- that is, one focused on actions of various participants in the plan approval process and relating only to that process," Page 1082. Why? Because "Section 524(e) establishes that discharge of a debt of the debtor does not affect the liability of any other entity on such debt." In other words, the discharge in no way affects the liability of any other entity for the discharged debt. By its terms, 524(e) prevents a bankruptcy court from extinguishing claims of creditors against nondebtors over the very discharged debt through the bankruptcy proceedings.

The Court went on to explicitly disagree with *Pacific Lumber* in its analysis of 524(e), reiterating that an exculpation clause covers only liabilities arising from the bankruptcy proceedings and not of any of the debtor's discharged debt. Footnote 7, Page 1085.

Ultimately, the Court held that under Section 105(a), which empowers a bankruptcy court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of Chapter 11 and Section 1123, which establishes the appropriate content of the bankruptcy plan, under these

sections, the bankruptcy court had authority to approve an exculpation clause intended to trim subsequent litigation over acts taken during the bankruptcy proceedings and so render the plan viable.

This Court concludes that, just as the Fifth Circuit left open the door for consensual exculpations and releases in *Pacific Lumber*, just as it left open the door for consensual exculpations and releases in *Pacific Lumber*, its dicta suggests that an exculpation might be permissible if there is a showing that "costs that the released parties might incur defending against suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization." Again, that was a quote from the Fifth Circuit.

If ever there were a risk of that happening in a Chapter 11 reorganization, it is this one. The Debtor's current CEO credibly testified that Mr. Dondero has said outside the courtroom that if Mr. Dondero's own pot plan does not get approved, that he will "burn the place down." Here, this Court can easily expect the proposed exculpated parties might expect to incur costs that could swamp them and the reorganization process based on the past litigious conduct of Mr. Dondero and his controlled entities.

Additionally, this Court concludes that the Fifth Circuit's rationale in *Pacific Lumber* for permitted exculpations to Creditors' Committees and their members, which

was clearly policy-based based on their implied qualified immunity flowing from Section 1103 and their importance in a Chapter 11 case, leaves the door open to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides a UCC and its members.

Again, if there was ever such a case, the Court believes it is this one, in which Independent Directors were brought in to avoid a trustee and are much more like a Creditors' Committee than an incumbent board of directors. While, admittedly, there are a few exculpated parties here proposed beyond the independent board, such as certain employees, it would appear that no one is invulnerable to a lawsuit here if past is prologue in this Highland saga.

The Creditors' Committee was initially not keen on exculpations for certain employees. However, Mr. Seery credibly testified that there was a contentious arm's-length negotiation over this and that he needs these employees to preserve value implementing the Plan. Mr. Dondero has shown no hesitancy to litigate with former employees in the past, to the *nth* degree, and there is every reason to believe he would again in the future, if able.

Finally, in this situation, in the case at bar, we would appear to have a *Shoaf* reason to approve the exculpations. The January 9, 2020 order of this Court, Docket Entry 339, which approved the independent board and an ongoing corporate

governance structure for this case, and which is incorporated into the Plan at Article IX.H, provided as follows: "No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent Director's advisors relating in any way to the Independent Director's role as an Independent Director of Strand without the Court (1) first determining, after notice, that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors; and (2) specifically authorizing such entity to bring such a claim. The Court will have sole jurisdiction to adjudicate any claim for which approval of the Court to commence or pursue has been granted."

This was both an exculpation from negligence as to the Independent Directors and their agents and advisors, as well as a gatekeeping provision. This Court believes that this provision basically approved an exculpation for the Independent Directors way back on January 9, 2020 for their postpetition conduct that might be negligent. And this is the law of the case and has *res judicata* preclusive effect now.

Thus, as to the three Independent Directors, as well as the other named parties in the January 9, 2020 order, their agents, their advisors, we have a situation that fits within

Republic Supply v. Shoaf, and we fit within the exception articulated in *Pacific Lumber*.

The Court reserves the right to supplement these findings and conclusions as to the exculpations, but based on the foregoing, they are approved and the objections are overruled.

Now, turning to the Plan objection, it appears at Article IX.F of the Plan and provides, in pertinent part, as follows: Upon entry of the confirmation order, all enjoined parties are and shall be permanently enjoined on and after the effective date from taking any action to interfere with the implementation or consummation of the Plan. Except as expressly provided in the Plan, the confirmation order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined on and after the effective date, with respect to any claims and interests, from directly or indirectly -- and then commencing, conducting, continuing any suit, action, proceeding of any kind, and numerous other acts of that vein.

The injunction set forth herein shall extend to and apply to any act of the type set forth in any of the causes above against any successors to the Debtor, including but not limited to the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust, and their respective property and interests in property.

Plan injunctions like this are commonplace and

appropriate. They are entirely consistent with and permissible under Bankruptcy Code Sections 1123(a)(5), 1123(a)(6), 1141(a) and (c), and 1142, as well as Bankruptcy Rule 3016(c), which articulates the form that a plan injunction must be set forth in a plan.

The Court finds the objections to the Plan Injunctions to be unfounded, and they are thus overruled without much discussion here.

Now, lastly, the Gatekeeper Provision. It appears at Paragraph 4 of Article IX.F of the Plan and provides, in pertinent part, "Subject in all respects to Article XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 case, the negotiation of the Plan, the administration of the Plan, or property to be distributed under the Plan, the wind-down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing, without the Bankruptcy Court (1) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including but not limited to negligence, bad faith, criminal misconduct and willful misconduct, fraud, or gross negligence against a Protected Party; and (2) specifically authorizing such

Enjoined Party to bring such claim or cause of action against such Protected Party, provided, however, that the foregoing will not apply to a claim or cause of action against Strand or against any employee other than with respect to actions taken, respectively, by Strand or any such employee from the date of appointment of the Independent Directors through the effective date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in Article XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action."

This gatekeeper provision appears necessary and reasonable in light of the litigiousness of Mr. Dondero and his controlled entities that has been described at length herein. Provisions similar to this have been approved in this district in the *Pilgrim's Pride* case and the *CHC Helicopter* case. The provision is within the spirit of the Supreme Court's Barton Doctrine. And it appears consistent with the notion of a pre-filing injunction to deter vexatious litigants that has been approved by the Fifth Circuit in such cases as *Baum v. Blue Moon Ventures*, 513 F.3d 181, and in the *In re Carroll* case, 850 F.3d 811, which arose out of a bankruptcy pre-filing injunction.

The Fifth Circuit, in fact, noted in the *Carroll* case that federal courts have authority to enjoin vexatious litigants

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

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

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

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

One of the Objectors' lawyers stated very eloquently in closing argument, in opposing the plan injunction and gatekeeping provisions, that "Even a serial killer has constitutional rights," suggesting that these provisions would deprive Mr. Dondero and his controlled entities of fundamental rights or due process somehow. But to paraphrase the district court in the *Carroll* case, no one, rich or poor, is entitled to abuse the judicial process. There exists no constitutional right of access to the courts to prosecute actions that are frivolous or malicious. The Plan injunction and gatekeeper provisions in Highland's plan simply set forth a way for this Court to use its tools, its inherent powers, to avoid abuse of the court system, protect the implementation of the Plan, and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.

Accordingly, the Objectors' objections to this provision are overruled.

As earlier stated, this Court reserves the right to alter or supplement this ruling in a written order. In this regard, the Court directs Debtor's counsel -- I hope you are still awake; it's been a long time -- the Court directs Debtor's counsel to submit a form of order. And specifically, I assume that you've already prepared or have been in the process of preparing a set of findings of fact, conclusions of law, and confirmation order that tracks the confirmation evidence and

recites conclusions of law that the Plan complies with all the various provisions of Section 1123, 1129, and other applicable Code provisions.

What I want you to do is take this bench ruling and add it to what you've prepared. And what I mean is, as you can tell, I've been reading: I will have my courtroom deputy email to you all a copy of what I just read. I'll have her obviously copy the Debtor's counsel, Creditors' Committee, Dondero and the other Objectors, copy them on this written document she's going to send out. And, again, I want you to kind of meld it into what you've already been preparing.

Obviously, I did not address in this oral ruling every provision of 1129(a) and (b). I did not address every 1123 objection. I did not even address every single objection of the Objectors. But, again, any objection I've not specifically addressed today is overruled.

The briefing, I should say, that the Debtor submitted, there was a Memorandum of Law in Support of Confirmation filed on January 22nd. There was also a reply brief, a hundred pages or so, separately filed, replying to all the objections. I don't disagree with anything that was in that. So, again, to the extent you want to send me conclusions of law that are along the lines of that briefing, I would consider that.

And so what I thought is you'll send me the melded document and I will edit it if I see fit. I recognize this

may take a few days, so I don't give you a strict timetable, just hopefully it won't take too many days.

All right. Is there anyone out there -- Mr. Pomerantz, you had to go to jury duty, except I can't believe --

MR. POMERANTZ: No, I --

THE COURT: I can't believe you were called, but are you there?

MR. POMERANTZ: Your Honor, I am here. I was luckily excused, because I probably wouldn't have made it.

Your Honor, one just comment I'd make. You referred to the January 9th order. You didn't refer to the CEO order, which is your order July 16th, which had the same gatekeeper provision. I assume that was the same analysis?

THE COURT: That was an oversight. Same analysis. And that's exactly why I said I reserve the right to supplement or amend, because I know there had to be places like that where I omitted to mention something important.

MR. POMERANTZ: But thank you, Your Honor, for your thoughtful ruling, and we will certainly incorporate your materials into the order that we're working on and get it to you when we can. But we appreciate it on behalf of the Debtor. We know this took a lot of time and a lot of effort. Hopefully, you got a chance to still watch the Super Bowl yesterday.

THE COURT: Well, when I saw that Tom Brady was going

to win, I turned it off.

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

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

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

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 10:35 a.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 **02/09/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

EXHIBIT 10

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

In Re:	)	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas July 8, 2020
Debtor.	)	1:30 p.m. Docket
	)	- MOTION TO EXTEND EXCLUSIVITY PERIOD (737)
	)	- MOTION TO EXTEND TIME TO REMOVE ACTIONS (747)

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

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

DALLAS, TEXAS - JULY 8, 2020 - 1:37 P.M.

THE COURT: All right. Hello. This is Judge Jernigan. Hopefully you can all hear me. We're ready to start the Highland hearings we have today, Case No. 19-34054. Let's start off by getting appearances from those lawyers who want to appear formally today. First, for the Debtor, do we have Mr. Pomerantz or a team from Pachulski Stang?

MR. POMERANTZ: Yes. Good morning, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones; counsel for the Debtors.

THE COURT: All right. Good afternoon. Anyone else for the Debtors that wants to appear?

MR. ANNABLE: Yes, Your Honor. Yes, Your Honor. Zachery Annable and Melissa Hayward, local counsel for the Debtors.

THE COURT: All right. Thank you. All right. For the Unsecured Creditors' Committee, I think I see Mr. Clemente there on the screen.

MR. CLEMENTE: Good afternoon, Your Honor. Matthew Clemente; Sidley Austin; on behalf of the Creditors' Committee.

THE COURT: All right. Very good. I know we have lots of other folks on the line. I'm not sure who else might want to formally appear. I'll check on some of the usuals. For Acis, do we have Ms. Patel or Ms. Chiarello?

MS. PATEL: Good afternoon, Your Honor. Rakhee Patel and Annmarie Chiarello of the Winstead firm on behalf of Acis Capital Management, LP. Also on the phone is Brian Shaw of the Rogge Dunn Group.

THE COURT: All right. Thank you. For the Redeemer Committee, do we have anyone appearing for them?

MS. MASCHERIN: Good morning, Your Honor.

MR. PLATT: Your Honor, --

MS. MASCHERIN: Go ahead, Mark.

MR. PLATT: Sorry. Mark Platt, Your Honor, on behalf of the Redeemer Committee of the Highland Crusader Fund. And, obviously, Ms. Mascherin is on the screen as well.

THE COURT: Okay.

MS. MASCHERIN: Good afternoon, Your Honor.

THE COURT: Good afternoon. Let's see.

MR. PLATT: And Mr. Hankin is on the phone as well, --

THE COURT: Okay.

MR. PLATT: -- Your Honor.

THE COURT: All right. Very good. All right. Any other -- UBS, by chance?

(No response.)

THE COURT: Okay. Anyone for the CLO Issuers?

(No response.)

THE COURT: All right. Anyone I missed? U.S.

Trustee, perhaps?

(No response.)

THE COURT: All right. Well, --

MR. LYNN: Your Honor, --

THE COURT: Okay.

MR. LYNN: -- good afternoon. Michael Lynn and John Bonds for Jim Dondero.

THE COURT: Oh, okay. Hello. How are you?

MR. LYNN: Well, thank you.

THE COURT: All right. Anyone else wishing to appear at this time?

(No response.)

THE COURT: All right. We have a couple of matters set on our calendar. A motion to extend the deadline for removal of actions, to which I saw no written responses, and then a third motion to extend exclusivity, and I saw a Committee response to that.

I don't have on my hard calendar anything about a status conference regarding mediation, but I found in our notes from our hearing, I believe it was the UBS hearing in middle of June, that I said, you know, we might want to talk about that if we don't hear some rosy news or some developing positive news today at the July 8th hearing. So we'll kind of put that on the back burner and see if there's a need to talk about that today.

All right. So, Mr. Pomerantz, are you going to start us off?

MR. POMERANTZ: Yes, Your Honor. And actually, I had some comments that sort of touched on a few of the issues you talked about and I think it's apropos to talk about it in the context of the motion to extend exclusivity, which I do note, Your Honor, is not objected to.

We had asked in the motion for a 30-day extension and an additional extension beyond that in increments of 30 days, up to a maximum of 90 days, with the Creditors' Committee's consent. We have read their response. We understand they are accepting a 30-day extension, but wanted to put the Debtor and I'm sure the Court on notice that, at the end of 30 days, they don't anticipate any further extensions, which I think, based upon the course of actions, will be just fine, because I think, as I will report to Your Honor, we expect to be able to file a plan by then.

But I thought I would take this time, Your Honor, and sort of (audio gap) little context, and that is the (inaudible) to give Your Honor just a brief update of the status of the case, the status on the filing of the Debtor's plan, and as Your Honor alluded to, the Debtor's thoughts regarding mediation, because we have spent a lot of time since Your Honor first raised the issue in the middle of June talking about it, and we think we have a structure that has significant support from

the main parties in this case.

So, as I mentioned, Your Honor, at the hearing on June 30th, after stabilizing operations, the Board began to focus on resolving the significant litigation claims that have been filed against the estate. And the first step in that process, Your Honor, is the Board wanted to commission an independent analysis of those claims, not burdened by what had come before it in connection with the analysis. So we spent a lot of time, our firm did, providing detailed analysis on the major claims against the estate, including the Acis claim, the UBS claim, and the Redeemer claim.

Then the pandemic hit, and a lot of the Board's attention was spent on dealing with the disruption to the Debtor's business that was caused by the pandemic. However, during the last couple of months, Your Honor, the Board has began to focus on engaging with UBS, Redeemer, and the Acis groups in order to assess the ability to be able to resolve the claims short of contested and time-consuming litigation. Because as I mentioned to Your Honor on several occasions, the Board intended, when it came in on January 9th, and I think has done a good job, is changing the culture that had existed before, the culture of litigation, to potentially a culture of settlement and mediation.

And in that regard, Your Honor, I'm pleased to report that the Debtor has reached an agreement in principle with the

Redeemer Committee regarding the allowance of the Redeemer Committee's claim. The agreement is subject to resolution of a few minor drafting issues, and the Debtor anticipates seeking Court approval of a settlement in the near future.

With respect to Acis, Acis's claims, two weeks ago the Independent Board made an offer to resolve the Acis claims. At this point, has not heard back. Hopes to hear back from Acis.

In the interim, the Debtor has also filed an objection to the Acis claim, which it would intend to prosecute if it cannot be resolved consensually, either before or in connection with the mediation process that I will lay out that we would propose to the Court in a few moments.

With respect to the UBS claim, Your Honor, the Board believes that the Court's ruling on UBS's relief from stay motion was a necessary first step before settlement discussions could get off the ground, and the hope is that the claim could be resolved through mediation, if not sooner, and the parties discussing potentially different counterproposals. None have been made yet, but it is the intention of the Board to engage with UBS.

With respect to the mediation process, Your Honor, the Board agrees with the comments that the Court made that mediation could be a very useful tool and a catalyst to a settlement. That would resolve the litigation that has

burdened this estate for many years.

Since the last hearing, Your Honor, I've had discussions with both Committee counsel, Mr. Clemente, and counsel for each of the Committee members regarding a mediation process that I think, subject to Your Honor's concurrence, has broad support among the major parties, just proving to Your Honor that the parties can come together and agree on something in this case.

There is consensus that the Court should order a mediation that would encompass essentially two general areas. First, the mediation would seek to resolve the claims of Acis and UBS, to the extent the parties cannot reach agreement on their own prior to the commencement of the mediation.

However, resolving claims against the estate is really only one part of the equation. A true global resolution would also (audio gap) the Debtor's estate may have against Jim Dondero and related entities, claims that I'm sure Your Honor recalls the Committee bargained for the ability to prosecute in connection with the global settlement approved by Your Honor in January.

I've spoken with Mr. Lynn, Mr. Dondero's counsel. I know he's participating in the hearing. And he has indicated that Mr. Dondero is willing to participate in a plan mediation process to see if a global resolution can be reached.

The Debtor and the Committee have also discussed the names

of potential mediators, and subject, of course, to Your Honor's approval, the Debtor and the Committee have reached out to Judge Jones' clerk for the Southern District of Texas and he has told us that he has the time and the willingness to mediate.

We also believe that, if available, since there is a lot in terms of mediation in this case, that it may be helpful to have two mediators. And if Judge Isgur -- we haven't reached out to him -- is also available, we believe that both of those judges possess the qualities that this case would need to resolve -- to give the best chance of resolving the claims and the plan process in an efficient and a timely manner.

We would contemplate that the parties would submit fees to the mediator by July 31st, and the mediation would occur sometime in the second half of August.

Notwithstanding the mediation process, however, Your Honor, the Debtor is moving forward towards expeditiously filing a plan, which will not need to wait for mediation to conclude. And in that regard, Your Honor, the Debtor and the Committee have worked cooperatively over the last several weeks to draft a plan that would allow the Debtor to emerge from Chapter 11 as quickly as possible -- you know, 120 days or so after it would be filed.

The Debtor and the Committee and its members recognize that the administrative fees attending to the continued

administration of this case in bankruptcy is material, and that one way to reduce them is to emerge from bankruptcy as quickly as possible.

To that end, Your Honor, the Debtor is optimistic that it will be able to file a plan by the end of the current exclusivity period, which, if Your Honor grants the pending motion, would be August 12th. And, at present, the plan contemplates the creation of an asset monetization vehicle that will seek to monetize the assets in an appropriate manner.

The Debtor believes that the current plan is confirmable, whether or not the Debtor is successful in resolving the large claims against the estate, either consensually or in mediation. Worst case, the claims litigation process can proceed post-confirmation.

At the same time, however, Your Honor, the Independent Board -- led by Mr. James Seery, who has testified before Your Honor and who has been appointed as the Debtor's chief executive officer, subject to Court approval, and that hearing is scheduled for July 14th -- has also had positive discussions with Jim Dondero regarding a plan structure that would not only allow for the prompt exit from Chapter 11 but could also inject some liquidity into the case that would allow actual distributions to be made to creditors much more expedited than perhaps waiting for the monetization of the

assets. And Mr. Seery continues to have those discussions with Mr. Dondero, and he and the Board are cautiously optimistic that they will bear fruit.

However, Your Honor, just to be clear, the Debtor intends to file a plan by the expiration of exclusivity whether or not Mr. Dondero is part of that plan, and his involvement will not distract the Debtor from emerging from Chapter 11 as quickly as possible.

So we feel we have presented some rosy news today in terms of resolution of some of the claims and a path forward, that we think this case is on a different trajectory than it was quite some time ago, and we look forward to continuing a dialogue with the parties before mediation and in mediation, if Your Honor orders it, and hopefully can have a quick and (inaudible) resolution of the case.

THE COURT: All right. I have a few questions, but I'll turn to other lawyers to see what they have to say, and their comments may answer some questions I have. Mr. Clemente, go ahead.

MR. CLEMENTE: Yes, Your Honor. Thank you. Matthew Clemente from Sidley on behalf of the Committee.

Mr. Pomerantz is correct with respect to exclusivity. As we laid out in our papers, the Committee has no objection to the additional 30 days of exclusivity through August 12th, and the Committee sees no reason why a plan cannot be filed within

that time frame.

As we laid out in our papers, we at this time don't see any reason for exclusivity to extend beyond August 12th. But I do think that is consistent with the relief that the Debtor is asking for.

To be sure, Your Honor, given the position of the Committee and its constituency, we do not see any plan here that gets done without our consent, frankly, and approval. And we've made that point consistently to the Debtor, and we continue to make that point. Filing a plan with which the Debtor knows this constituency does not agree, frankly, we think would be a waste of time and resources and will create needless litigation, to which Your Honor expressed a strong distaste for at the last hearing.

So, Your Honor, we will continue to work with the Debtor in moving forward with a plan, and we are hopeful that the Debtor will continue to understand the importance of working cooperatively with the Committee to propose a plan the Committee can support, as opposed to one it knows the Committee will take issue with.

So, with that, Your Honor, again, we don't have any issue or objection to the entry of the exclusivity order, but I did want to make Your Honor aware of the Committee's views.

Second, Your Honor, with respect to mediation, the Committee is supportive of the mediation proposal Mr.

Pomerantz laid out. Mr. Pomerantz touched on it, and the Committee has been consistently clear, however, that the mediation should not distract from the task of moving forward with a plan, a plan, as Mr. Pomerantz told you, will be designed to be confirmable even without claim resolution or Mr. Dondero's involvement.

The Committee believes that it is important that the claims be addressed first in the mediation, the claim resolution issues, as they believe that that is the appropriate sequencing. It can all happen as part of the same mediation, but the Committee feels very strongly that the claims should be addressed first in the context of that mediation.

And with respect to Mr. Dondero's involvement, the Committee is not opposed to having his involvement and the Committee will negotiate in good faith during the mediation and will be looking to the mediator to help determine the most effective way to involve Mr. Dondero in the process -- again, with the very strong view that the claims should be addressed first in the context of that mediation.

That is all I have, Your Honor, but I'm happy, obviously, to answer any questions you have.

THE COURT: Okay. Let's hear from anyone else. Any other lawyers want to weigh in?

MS. PATEL: Good afternoon, Your Honor. Rakhee Patel

on behalf of Acis. And I will endeavor to not tread the same ground that Mr. Pomerantz and Mr. Clemente have. But just to kind of -- probably more so for the benefit of others that are participating in the hearing, because I know Your Honor, you're familiar with our matter, I hit on the two pieces of litigation that I think, you know, bear discussing in the context of mediation. And by the way, just to be clear, I have -- I have no position different than Mr. Clemente with respect to exclusivity.

But as Your Honor is aware, there is a lawsuit involving Acis and Highland Capital Management. It's an adversary. It's been through various permutations, the first of which started roughly two years ago. I think we just passed the two-year anniversary of the first adversary that all ended up being consolidated down and added to over time. And immediately prior to Highland's bankruptcy, that adversary was effectively abated by virtue of the withdrawal of the reference motion that was filed and argued and the Court was writing what I understand to be a lengthy Report and Recommendation in connection with. And that was then ultimately stayed by Highland's bankruptcy case in October of 2019.

As Mr. Pomerantz indicated, Highland has now objected to Acis's proof of claim. That just came roughly about two weeks ago. And keeping in mind, Your Honor, that Acis's proof of

claim is its complaint in that adversary that I just referenced.

At present, Acis's response is due somewhere around July 23rd, I believe, and there is a hearing scheduled on that claim objection on August the 6th. So a hearing has been set imminently.

Mr. Pomerantz and Mr. Couch were very kind to put in a peremptory call immediately prior to the filing, and they advised that they were going to be filing that claim objection and that they were going to be setting it for hearing on August the 6th, and I advised them that I had planned on being on vacation that week, which is all a very long way of saying, Your Honor, I think we're going to have to, in light of mediation, work up an alternate schedule.

And I'm confident that we'll be able to reach that alternate schedule, but we'll be keeping the mediation and its scheduling and the parties with schedules in mind. Because it doesn't seem to make an awful lot of sense to me to be litigating the claim objection before we get to mediation.

On the -- on other fronts, and, again, you know, I know Your Honor presided over the Acis case, obviously, for the last two and half years, commencing with the involuntary bankruptcy that touched off that case. But on the -- on the related front, is, as I advised the Court at the status conference during the Acis status conference, there was a suit

that was filed by Acis against Mr. Dondero, certain of Highland Capital Management's employees, the former treasurer, Mr. Waterhouse, as well as CLO Holdco, Grant Scott, and certain of the Independent Directors of Highland CLO Funding.

And, you know, as Your Honor may recall, that suit was filed to get ahead of the 546 or -- and/or Section 108 time period cutoff. But that suit is now pending. In connection with that litigation, Your Honor, there has been -- there are a couple of answers that were filed and there's -- there have been a panoply of motions to dismiss filed as well on various grounds: Personal jurisdiction -- ranging from personal jurisdiction, subject matter jurisdiction, 12(b)(6) grounds. Kind of a smattering of a whole lot of things. And all of that bundles together, Your Honor, into a whole lot more litigation.

So, in thinking about that piece of litigation and its overall impact on where the parties are, I endeavored to reach out to all of the counsel, the various counsel for the constituent groups therein to talk about what we were going to do with that piece of litigation, certainly now that we are discussing mediation. And I've had various positive at least preliminary discussions with Mr. Bonds, counsel for Mr. Dondero, and then also Mr. Kane, who is counsel for CLO Holdco and Grant Scott, and they were generally receptive to the concept of an abatement, pending mediation, just, again, so we

can put a pin in the litigation, see where we can get to in the context of mediation, if some sort of resolution can be reached that advances the collective ball and hopefully helps to, if not resolve the litigation, perhaps reduce or certainly streamline it.

I've reached out to, by email, to counsel for certain of the other employees who are, at present, evaluating that -- the request for an agreed abatement, and I've also reached out via email and phone to counsel for the Independent -- the two Independent Directors for Highland CLO Funding. That's Mr. Maloney and Ms. Matsumora. And I've not heard from them as yet.

So, in connection with that, Your Honor, likely, at least as of right now, my thought is that we would basically be filing a motion tomorrow seeking to abate that piece of litigation in connection with the mediation that we're discussing today, and, of course, depending upon the outcome of today. And we may seek to expedite that motion to abate if the parties don't agree to extend at least present responsive deadlines, et cetera. Because, again, it doesn't seem to make an awful lot of sense to be continuing with litigation while everyone is trying to get into resolution mode.

So, Your Honor, as you know, Acis has tried to remain consistently in resolution mode, but we hear Your Honor loud and clear and we will endeavor and try and streamline and at

least give the best-faith effort at trying to get things resolved as expeditiously as possible as we can.

THE COURT: Well, if that is the case, why haven't -- why hasn't the Debtor heard back from you on the offer they made two weeks ago?

MS. PATEL: Your Honor, the offer was made after -- shortly after the claim objection was filed. The claim objection itself, Your Honor, is a two-page claim objection. And, frankly, if I turn my camera around, you'd see that I am surrounded by paper. We are analyzing the claim objection as filed.

Your Honor, in terms of talking about Acis's claim, Acis, as you know, has been -- has been attempting to discuss its claim, and even during Acis's bankruptcy case, we engaged in two different mediations to try and resolve the overarching -- a lot of the facts that -- and circumstances that underlie the complaint, and those were unsuccessful.

Shortly after the Board was appointed -- and by shortly, I mean I think the hearing was in the morning; we ended up -- I and Mr. Terry ended up having lunch with the Board and the Board's counsel to again being fostering a relationship and to begin discussing Acis's claim in earnest. And we had a lengthy meeting at my offices -- if my memory serves, it was in early February -- with Mr. Nelms and with Mr. Seery. And then, frankly, didn't hear a whole heck of a lot with respect

to our claim or any type of negotiation. So the first thing that we heard back with respect to it was just a couple of weeks ago, and Your Honor, we --

(Audio interruptions.)

THE COURT: Okay.

MS. PATEL: We will --

THE COURT: Someone needs to put their phone on mute. Okay. Thank you.

MS. PATEL: Thank you, Your Honor. We have endeavored -- we have rolled up our sleeves and we are analyzing the claim objection and trying to narrow the issues. And we will be providing a substantive response back to the Debtor as quickly as we can.

The settlement proposal, frankly, Your Honor, came in while Mr. Terry was on vacation, so we did have a little bit of time lapse on that.

THE COURT: Okay. Where are people going on vacation these days? I can't get anywhere.

MS. PATEL: Your --

THE COURT: I've had to cancel a couple of vacations. I don't know where people are going.

But okay. Well, I'm very disappointed, nevertheless, to hear that there's been zero response in two weeks.

Anyone else wish to make a comment before I get to some questions I have?

MR. LYNN: Your Honor, Michael Lynn for Jim Dondero. This is just a comment. The Acis v. Dondero, et al. suit parallels in many respects the objection to the claim filed by the Debtor with respect to the Acis claim. We would probably seek to join in the objection, if for no other reason than to preserve our ability to address factual issues that the two matters have in common, to ensure against a future preclusive effect.

THE COURT: Okay. Anyone else?

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz again. I have a couple of comments with respect to Ms. Patel's. Would you like me to address them now?

THE COURT: Go ahead. Uh-huh.

MR. POMERANTZ: Okay. Your Honor, I think it's helpful to the Court to understand sort of the big picture in terms of our discussions with Acis. Prior to making a settlement proposal, which, incidentally, occurred before the claim objection was filed, a week or so ago -- well, actually, a few week before that, we had offered to sit down and meet with Acis with respect to their claim.

The initial response we received back was that, unless the Guernsey lawsuit was dismissed, they were not interested in sitting down and meeting with us. We were disappointed in that because, as we have consistently maintained since the Board has taken over, the Board does not control that Guernsey

lawsuit. But in any event, that was what Acis's position was.

Subsequently, a few weeks after that, we were told that Acis would be willing to sit down and have a discussion with us about their claim, similar to the discussions we had with Redeemer and similar to the discussions we had with UBS.

To make that discussion most productive, two and a half days into that -- I certainly realize two and a half days is not a lot of time -- we provided Ms. Patel and Mr. Shaw with a draft of the objection, which was mostly identical to the one that got filed. There was a couple of minor changes. We then had a discussion with them. I'm not going to, of course, reveal the substance of the discussion, but the purpose was to go over our thoughts before it was filed. And we were told, as Ms. Patel said, that Mr. Terry was on vacation, and we didn't expect, after putting, as Ms. Patel said, a roughly 60-page objection, that they would be able to turn it around. Several days later, we called up Ms. Patel and Mr. Shaw, communicated orally a settlement proposal, told them that a settlement -- told them that an objection would be filed and offered to, at their convenience, to sit down and talk about the claims.

We are still hopeful, Your Honor, in light of Ms. Patel's comments that we will receive a response, that we will receive a response. And to the extent we can narrow the issues down and -- before mediation, I think those ought to be helpful.

We also spoke to Ms. Patel. She had indicated she had a vacation scheduled. At the time, I think we were starting to talk about mediation. And the Debtor has no intention of mediating while litigating. We don't believe that's an effective use of people's time. So while it is on for August 6th, to the extent Your Honor does order us to mediation and mediation occurs at the end of August, we would anticipate that the hearing on the claim objection would be set for some time in September. But we are encouraged.

We also, after the additional litigations were filed by Ms. Patel against Mr. Dondero and certain of the Debtor's employees, who are still current employees, we had suggested that it might make sense to have an abatement and a stay of those proceedings, given the interrelatedness of those proceedings and the matters in Acis's claim objection. They initially rejected that, but I'm very happy to hear that their view now is that it does make more sense to try to see if we can coalesce around a mediation process without satellite litigation occurring.

So we are -- we are, to the -- we're not a party to that litigation. We weren't asked. The first time we had been told that that litigation would be stayed was I heard it just a few minutes ago. But we are very much in support of that and hope that the parties can coalesce around a mediated resolution as opposed to a litigated resolution.

THE COURT: Okay. Remind me again the amount of Acis's proof of claim.

MR. POMERANTZ: I will let Ms. Patel answer that because it's a little unclear and there are some -- been disputes in terms of who said what about it. So I would ask Ms. Patel to remind the Court of what they're claiming.

MS. PATEL: Your Honor, on the face of our -- of the filed proof of claim, it states that the claim is in excess of $75 million.

THE COURT: Okay. All right. Anyone else wish to make a statement today?

(No response.)

THE COURT: All right. Well, as I said, I have a few questions, some I came in here with and some sort of popped up in my brain as I heard the presentations today.

Mr. Pomerantz, I mean, I feel in many ways I have sort of only a 30,000-foot level understanding of certain things going on outside of the courtroom. And here's what I mean by that. You made a comment that the Board, you know, had to deal with the destruction of the Debtor's business caused by the pandemic. I think those were your exact words. I would like to understand that better, because there was indeed a theme in your motion to extend exclusivity of, you know, one of the reasons we're not where we would like to be at this juncture is, among other things, you know, we had the pandemic hit.

I don't have a full appreciation of how that has slowed things down. I mean, I know there was one specific comment that Jefferies issued margin calls and so that caused liquidity issues. But other than that, I'm not -- I mean, yes, the capital markets fell off a cliff in March, but my impression, naïve as it may be, is that things have kind of bounced back after March. So, tell me how the pandemic has had an effect in trying to get to resolution of issues and a plan.

MR. POMERANTZ: Absolutely, Your Honor. So, as I think Your Honor knows in the calls, the Debtor's primary assets consist of two things. One, public stock that it trades through a proprietary account in its select account, and other stocks, public stocks, which, as Your Honor mentioned, the pandemic roiled the stock market, and for the period of time in March and early April, given the fact that the Debtor had margin accounts, a substantial amount of the time spent primarily by Mr. Seery, who effectively started becoming a CEO at that time -- we'll deal with his motion next week -- if it wasn't for his efforts, his expertise and acumen, the result could have been a lot worse.

So he's been spending a lot of time in dealing with Jefferies, because, as Your Honor is aware, with margin accounts, there is really limited protections that are available under the Bankruptcy Code, and the automatic stay

and other protections don't necessarily apply, and Jefferies could have turned around and sold all the stock. So the value that was preserved took a lot of time and effort. That was one area.

The second area, Your Honor, is the Debtor's assets also include interests in private equity investments. A lot of the Debtor's funds that it manages and which the Debtor has significant interest in have a variety of different companies. Each of those companies were dealing with the pandemic in their own different ways, whether it was addressing issues of applying for PPP loans, whether it was addressing employees, there's capital structure issues, each of them are potentially a Chapter 11 making all of their own.

So, again, the type of effort and time that it took -- again, principally, Mr. Seery, acting as CEO, but also, you know, the other Board members -- was a lot, to stabilize those investments and to make sure that they were not lost through actions by lenders or whatnot.

And the third aspect is the Debtor manages funds, still manages funds and actively manages funds. And managing funds that have principally financial-type assets in this environment has been extremely challenging.

As Your Honor accurately mentions, over the last couple months the stock market has come to a little more stability. Whether that will remain is anyone's guess. And during that

time, that's when a lot of the efforts that I've mentioned in terms of the claims work has been put back on. But there was a month or two period during the pandemic, the early stages, that really impacted the Debtor's ability, and it was all-hands-on-deck to address those issues.

At the same time, though, Your Honor, our firm was working on the extensive analysis that was required to, for example, address all the legal issues in connection with what I think I recall is a 34-count complaint by Acis; for our firm to get up to speed with respect to the UBS claim, which, as Your Honor heard a few weeks ago, spanned 11 years of litigation; and also to address the issues with Redeemer and be in a position that, as I mentioned before, we have reached a settlement.

So, there were a lot of things going on. We had hoped to be where we are now a couple of months ago. But I think the Board, under the strong leadership of the Board and the strong leadership of Mr. Seery, has effectively stabilized the operations, and we have now been able to, the last couple of months, really turn to how do we get out of this case, as evidenced by the comments I made with the substantial effort that's been made in the plan and the substantial progress I think has been made on putting the Board in a position to sit down and have meaningful discussions with creditors (inaudible).

THE COURT: Okay. I mean, again, I don't -- I don't

have a witness here, but, well, remind me, what do we have set July 14th?

MR. POMERANTZ: So, July 14th, Your Honor, we have two motions. One is a motion to appoint Jim Seery as the chief executive officer. Again, I will talk more about it in connection with that hearing. If Your Honor recalls, as part of the term sheet in January, there was a recognition by the Committee and by the Debtor that instilling the Board was obviously critical. It was critical to avoid this case going into a different direction. And I think there was a recognition that it would be important that somebody stepped up and become the CEO.

It was too early to tell whether that somebody would come from the Debtor's board, the newly-installed board, or someone else, but there was a contemplated process. And while the first couple of months of the case were spent, again, on stabilizing operations, I think starting in mid-March and as we went on it was pretty clear that, of the three people on the Board, while all of them are providing invaluable services in leading the Debtor to where it is now, Mr. Seery was stepping up primarily because of his significant operational background in connection with these types of assets. And he has essentially been working a couple hundred hours a month or thereabouts over the last few months doing the things I just alluded to, and the Debtor has determined to seek his

retention as a CEO. Has had discussion with the Committee on terms. They're not all finalized or resolved yet, but that hopefully will be uncontested by the 14th.

Mr. Seery will also undertake the role of chief restructuring officer, which, as Your Honor recalls, we already have Brad Sharp as -- from DSI as chief restructuring officer. They will essentially become financial advisor. DSI has provided a valuable role to the Board and to counsel in this case. But given that Mr. Seery will, if the Court approves the motion, become the CEO, it would make sense that he be the CRO as well, so it's a separate motion to essentially transmute the DSI representation from a CRO representation to a financial advisor representation. So the two matters are on, Your Honor, but I've --

THE COURT: Okay.

MR. POMERANTZ: -- given Your Honor a preview.

THE COURT: Well, I'd like to hear testimony from both of them on the 14th, Mr. Seery and Mr. Sharp.

Again, I -- I mean, ideally, we would have evidence at a hearing on a motion to extend exclusivity. And I understand you didn't have any objections, you worked out essentially an agreement with the Committee. So, I mean, I understand you didn't necessarily think that evidence would be needed.

But I, again, you know, my understanding is 30,000-foot level. I'm just trying to understand, you know, with three

wonderful independent board members and with a CRO and all these fantastic professionals, it just feels like we -- you know, multiple things could be going on at once, and I kind of feel like, you know, January 9th, six months ago, we had the independent board installed. We had the protocol order with the Committee worked out, you know, which we call it a settlement, but it was mostly a mechanism to allow the Committee to have oversight and monitoring. And it just feels like, January 9th, okay, then we were in a position to really start focusing on these big claims. We knew it was Acis and we knew it was UBS, even though the bar date hadn't hit. And it feels like to me we've -- I shouldn't say bought a lot of time, but a lot of time has gone by for not as many results as I would like.

Tell me why I'm being unfair. And, again, I go back to, okay, if it's the pandemic, help me to understand what it was about. You know, I kind of got scared by that phrase you used, destruction to the Debtor's business caused by the pandemic. I mean, I guess part of what I'm getting at here is, Has there been a massive loss of value by the Debtor caused by the pandemic, and that has been sort of a halting event to being able to talk about a plan?

MR. POMERANTZ: Well, Your Honor, I believe, and I actually went back to my notes, and I think I said disruption. I didn't say destruction.

THE COURT: Oh.

MR. POMERANTZ: And if Your Honor heard destruction, --

THE COURT: I heard destruction. Maybe I --

MR. POMERANTZ: -- or if I misspoke, I apologize. But there wasn't any implication of a destruction in the Debtor's business. Again, financial assets did take a hit. There were some concerns in how, you know, to monetize those assets, the stock assets, and working through the Jefferies issues as well as the private equity issues.

And look, Your Honor: When the Board took over on January 9th, I think they recognized soon after their appointment that there was a lot of stuff to do. There was -- it was a really steep learning curve. Highland, as people have described it in the hearings in this case, is an extremely complicated structure of companies.

So, yes, perhaps things could have moved a little quicker. Your Honor does recall the early stages of the case, we dealt with motions for the appointment of a trustee by the United States Trustee. There was other litigation over retention of professionals and others, which, you know, Your Honor has commented about in the past, and I think we're past that and beyond that. But there has been a lot of work.

And, again, on the claims work, the Board, to be independent, did not want to rely on the employees of the

Debtor in evaluating the various claims. So that took a lot of time and effort.

So, you know, look, I think you could look at it two ways. One way you could look at it, that it's been pending six months and we don't have a plan yet, we don't have the claims resolution. I would -- and I tend to be a glass-is-half-full type of person -- I think the message that we are hearing today is that the plan process is on track. We have resolved one of the three major litigation claims. We have coalesced around a mediation process that people can get behind and hopefully have concluded at the end of August. That the process is going to include not only the inbound claims against the company but potentially the claims by the company against some of the targets.

I think there is reason for optimism at this point in the case. And while, you know, I wish it was May and we were having this discussion, not July, I still think there has been a lot of groundwork that was prepared to get to the place we're here. And, you know, the Board is laser-focused on getting results, and getting results quick.

THE COURT: Okay. Let me follow on about the agreement in principle on the Redeemer claim. They had an arbitration award. So that doesn't sound like a major milestone to me, to be honest. Tell me why I'm wrong about that. They had an arbitration award.

MR. POMERANTZ: Sure. Your Honor, they do have an arbitration award, but there are several aspects of the arbitration award that needed negotiation and resolution. A significant part of the arbitration award was the Debtor's obligation to repurchase some Cornerstone shares that Redeemer had for a certain dollar amount. Well, obviously, the Debtor in bankruptcy doesn't have the ability to write a check to repurchase it.

There was issues on the Debtor's ability to ultimately recoup different fees that the arbitrator had determined had been taken inappropriately that had to be repaid, and to what extent the Debtor would be entitled to a credit.

So, by no means am I telling Your Honor that the Redeemer claims and issues were as difficult as the Acis and UBS claims and issues. But there were a variety of issues, there were a variety of matters that had to be discussed. You know, we worked cooperatively with Redeemer and with Jenner & Block. And we, again, have reached a resolution that is going to provide a face amount of a claim which is materially less than the claim that was on file.

But Your Honor, by no means am I trying to convince Your Honor that this was the same type of work that needed to go into -- resolve the others. But having said that, getting that claim resolved, which the Debtor believes is the largest legitimate claim against this estate, I think is an important

step forward that will lead towards hopefully the confirmation of a plan and hopefully spur on efforts from all the parties -- Acis, UBS, and the Debtor -- to try to make the same type of progress in their claims.

THE COURT: Okay. All right. My next question is, I mean, you've talked about -- I think it was the previous hearing I heard you say a term sheet had been provided to the Committee or going back and forth. I mean, help me to understand what you're envisioning the plan is going to look like in this case. I mean, I know there's a wide swing between UBS being owed a billion dollars and being owed nothing, and Acis being owed $70 million versus, you know, nothing or wherever you think the number should be, or the Debtor's board thinks the number should be. I know, you know, these are giant questions. But can you answer for me what you're envisioning?

I mean, again, one of the pleadings said, you know, the plan should provide for orderly monetization of assets, provide for a process for resolution of claims, and pursue causes of action. I mean, again, that's kind of 30,000-foot stuff. Tell me what you're envisioning.

MR. POMERANTZ: Sure. So, Your Honor, just to take a step back, we -- this case was filed not necessarily for the traditional reason that cases are filed. There weren't operational fixes that needed to be done at the business.

THE COURT: Right.

MR. POMERANTZ: There wasn't a capital structure that needed to be revised.

THE COURT: Right.

MR. POMERANTZ: Right? So, as everyone knows, the case was filed because the Redeemer Committee got its arbitration award, to prevent execution on that. Okay?

We also had a very complicated business. There are not many, I think, examples of asset managers around the country of the type of Highland Capital that actually go through a Chapter 11. And it caused a tremendous amount of upheaval, of issues. Your Honor, we've been dealing with the protocols on a daily basis with the Committee. Your Honor has seen some of that.

So while the hope was, from the beginning of the case, to end this case in a nice, tidy bow, get a resolution that would not only resolve everyone's claims but also try to resolve the claims that the estate had against third parties, as time was going by the parties realized that there was nothing more bankruptcy could provide this company. This company right now has litigation issues to deal with that can be resolved with the help of the Bankruptcy Court, as appropriate, in connection with the claims process. And the Board -- and the Committee, for that matter -- were looking at the substantial amount of fees that were being incurred by the Debtor professionals and the Committee professionals which were draining liquidity from the company and started to think, How can we

exit this case? Even if we can't get what has been referred to by people as a grand bargain, how can we exit this case quickly and efficiently?

So what really has to be done in terms of exiting the case? Coming up with a way to monetize the assets, a structure in which those assets can be monetized; not doing anything in the context of a plan process that would in any way interfere with the estate's obligations under the Advisers Act with the SEC or otherwise; and coming up with a governance structure of who's going to govern that.

So the plan that is currently contemplated -- and it's more than a term sheet, Your Honor. We have had numerous versions of the plan go back and forth. We are right now waiting. The pen is in the hand of the Committee. We think we are very close to having a form of a plan and a form of a disclosure statement that would essentially contemplate some type of trust vehicle that would monetize the assets. And the structure of how that trust would work, whether it's one trust, whether it's two, whether it's one trustee, whether it's two, how that trust would be governed, who would be on the governing board: Those are all issues that are currently being worked out.

At the same time, the company is doing a thorough analysis of every contract and every asset, to make sure that assignment provisions and contract provisions and regulatory

issues, that we don't somehow trip up in connection with the plan process.

So, essentially, at its core and at its minimum, it will be transferring the assets into a monetization vehicle, some type of trust vehicle, which, again, the corporate and regulatory lawyers are working with us, with the bankruptcy lawyers, to figure out the appropriate way, given the nature of the Debtor's business, having an oversight board that has, you know, creditor support. And if you ask Mr. Clemente, it'll be total creditor identification of the people, which we are in discussions of what the Board looks like after. And monetization over time, and a way to resolve the claims over time.

So that is essentially the concept. Again, to the extent we can resolve the claims soon, to the extent we can work on a negotiation with Mr. Dondero to bring in liquidity so that creditors will not have to wait for the monetization of the assets, which a lot of these assets are not assets that are easily monetizable and it will take some time. But it is -- the Debtor feels strongly and I think the Committee feels equally as strongly that emerging from Chapter 11 with some type of vehicle to monetize the assets, governance and control, and a way to resolve remaining claims, that is the minimum that can and should be accomplished and that the Debtor is committed to accomplishing in short order.

If something else comes out of it where we get more, again, where the claims are resolved or where we have a grand bargain with Mr. Dondero, that's something we're going to strive for. But at a minimum, it needs to be an asset monetization vehicle, governance, and a way to -- a structure to resolve claims.

THE COURT: Okay. Asset monetization vehicle. You know, subject to regulatory lawyers and corporate lawyers figuring out the exact mechanics, you're saying essentially put the business of Highland into a trust or trusts, and then, I guess, from cash flow of the business over time, the creditors would be paid? Or are you saying something more than that?

MR. POMERANTZ: Well, again, I think it's on an asset-by-asset basis. And, you know, Mr. Seery, you know, is -- has become very familiar with all the assets, now has a -- ideas in mind which he's shared with the Board on how to best monetize the assets. Some assets, there may be a quick sale. Some assets, it may be over time. So it's a combination.

This is not going to be a fire sale of the Debtor's assets. It's not in the best interest of the Debtor, we believe. It's not in the best interest of the creditors. We don't think anyone is in favor of that. It's dealing with each of the assets in an appropriate manner and figuring out how to monetize them, recognizing that given -- even though

the stock market has bounced back, the market for privately-owned businesses may not have bounced back as much.

So it's figuring out with the appropriate people, appropriate governance structure, how best to monetize those assets, recognizing that creditors want to be paid and they're -- they don't want to be in the business of long-term holds. So, the Debtor gets that. But it's really being a thoughtful approach on how to get the best value from those assets.

THE COURT: Okay. There's nothing, though, being discussed as far as a big chunk of cash distribution up front, unless Dondero comes up with it?

MR. POMERANTZ: Well, potentially. I mean, potentially, Mr. Dondero is a potential source of liquidity. There are some significant assets that may be able to be liquidated sooner rather than later. So it's something that's in discussion.

But the lion's share of the value for creditors is likely going to come over time, unless there is someone who, like Mr. Dondero, who is essentially willing to buy back the company. And that is something that's being explored.

So, look, we've had a lot of transparency with the Committee. We have weekly meetings, the Board and the Committee. We just started a few weeks ago. I think the professionals are working together. They understand what the assets are in the estate. So, to that end, I think we have

been working very cooperatively with our creditors over the last few months and we're just seeking to do it the best way.

So nothing I've said today, nothing, you know, should come as and will come as a surprise to the Committee, but we're working better, recognizing that ultimately the creditors want to be paid, and doing that in an appropriate manner and a thoughtful manner is what the Debtor is committed to do with its partner, the Committee, in this process.

THE COURT: Okay. Sort of jumping back, I forgot to ask earlier when we were talking about Acis: Has the Fifth Circuit rescheduled oral argument on the appeal of the Acis confirmation order and order for relief?

MR. POMERANTZ: I believe -- Your Honor, maybe Ms. Patel would know off the top of her head.

THE COURT: Ms. Patel?

MS. PATEL: Your Honor, it was -- it was briefly -- I -- and I say briefly, it was briefly we had -- we got a notice at some point, I believe in early June, that the Fifth Circuit had reset oral argument. And then approximately, I can't remember exactly, but it was like, I don't know, a week or maybe ten days later, we got a notice that it was cancelled again. We have not received notice that it is rescheduled, so it is still pending. But it has not been taken off oral -- it has not been taken off oral argument at some juncture.

THE COURT: Okay. Well, I acknowledge that that is a

pandemic disruption for sure. It would have been nice to have that resolved one way or another by now.

MS. PATEL: Agreed, Your Honor. We were trying to figure out, frankly, in the week to ten days that it took from the scheduling to how it was cancelled, exactly how our team was going to get down to New Orleans. And the -- I think the leading contender was to rent an RV and drive down so we could safely get there. So it certainly has been a casualty of the pandemic.

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.

MR. POMERANTZ: So, look, Your Honor, the first I

could say is that, to my knowledge, Highland Capital, the Debtor, has not obtained a PPP loan. I know there have been discussions with certain funds that basically have certain assets, private operating companies, about obtaining PPP loans. I don't have the specifics for Your Honor. I'm happy to provide that.

Of course, to the extent Mr. Dondero, on any of his affiliated funds that are under the control of the Debtor, I would have no way of answering that, but I'm happy to follow up with that with the Board and report back to Your Honor in whatever appropriate manner you felt to obtain that information.

THE COURT: Okay. Well, let's have a report on that on the 14th when we come in. You know, maybe Mr. Seery or Mr. Sharp or some other person. But you can probably imagine the different things going through my brain. You know, well, first, let's see if it was -- you know, I don't -- again, I'm not expecting it to be Highland Capital Management, LP. I would be beyond shocked if, you know, that somehow happened when they're in bankruptcy. And, you know, I think it would require a 364 motion, just like any other borrowing, although I know it's kind of a forgivable loan. Strange bird.

But then if it's some affiliate of Highland, I still feel like we need some transparency and disclosure on that. I mean, I -- and who were the human beings behind it. It just

raises a lot of questions in my brain. Anything else?

MR. POMERANTZ: Your Honor, would you mind saying what newspaper you found it in? Because not everything one reads in the newspaper is accurate, but we will definitely --

THE COURT: Oh, yeah. I know --

MR. POMERANTZ: -- follow up on it and --

THE COURT: Fake news really is a thing.

MR. POMERANTZ: I didn't say fake news.

THE COURT: Oh, I know, I know. It's not really a good term. But *Business Insider*? Is that reputable? Or no? I thought I saw it in one of the local papers, too. I mean, someone tell me if that's, --

MR. POMERANTZ: We -- we --

THE COURT: -- you know, something unreliable.

MR. POMERANTZ: We will investigate it, Your Honor. I don't know what confidentiality restrictions would be on whether if any of those entities -- but we will get the information. If there's any concern on confidentiality, perhaps we could have an *in-camera* on that. But before we get ahead of ourselves, let me broach the issue with the Board and Mr. Sharp and then be in a position to act and respond more intelligently.

THE COURT: Okay. My last topic is to come back to mediation. I was surprised that Judge Jones' or Judge Isgur's staff expressed that they had availability. They are the

busiest judges in the country right now. I'm wondering when were they contacted. Was it really recently, or a week or two ago? Because they've probably gotten ten new mega-cases in the past two weeks.

MR. POMERANTZ: So, Your Honor, the last -- the last two weeks, again, probably since June 15th, we had been discussing the structure of a mediation. We, the Debtor, proposed perhaps a combination of Judge Isgur and Jones. We initially had that conversation with Mr. Clemente, and then we socialized it with the rest of the Committee members. As of last Thursday, I believe it was, we had consensus that Judge Jones, and if available, also Judge Isgur, would make sense.

I sent an email to Judge Jones' clerk, indicating that we had a hearing today, that it would be helpful if we got a response, and this morning, two hours before the hearing, Judge Jones' clerk responded and told Mr. Clemente and I that he is available and ready and suggested that we have a conference with -- again, I'm not sure if it'll be him or his clerk, to talk about availability. Of course, we didn't want to go ahead and have that discussion until, you know, we got Your Honor's input on it.

THE COURT: Okay. I mean, a couple of things come to mind. One is I am just flabbergasted that they would have any availability. I know they're -- I'm aware of Judge Jones doing hearings on weekends.

But second, I'm also concerned what is their idea of availability. Because in order for a mediator to meaningfully help you on this, I mean, it's going to take not just hours but days of time, unless you want the mediator to just have a 30,000-foot view. And I mean, I just cannot imagine, --

MR. POMERANTZ: So, --

THE COURT: -- once again, that they would have days and days to come up to speed with, you know, 11 years of litigation or however long it was, not that long, with UBS, you know the years with Acis, you know, the various alleged claims and causes of action, and, you know, the Byzantine structure here. I mean, you know, not that they have to be, you know, as educated as a judge presiding over litigated matters, but I just cannot imagine they could meaningfully spend time on this.

So what are you all envisioning? Because I know what I'm envisioning, and maybe we're not seeing it the same way. I mean, what are you thinking? That you'll go in and spend a day with, you know, maybe just each of you doing a 25-page white paper, and you'll either settle it by the end of the day or not, or what?

MR. POMERANTZ: So, let me start by saying that when everyone raised the issue of Judge Jones and Isgur, everyone had the same potential concern that Your Honor has mentioned. You know, my firm and me personally, I'm involved in a couple

of cases before Judge Jones now, significant cases. So there was a concern.

I think people also generally thought that if they accepted and they knew what they were getting into, they would want to do a good job and they'd have the time.

We have not had the ability to have an extensive discussion. That discussion could either occur with Mr. Clemente and myself speaking to the clerk or the judge, or if Your Honor -- nothing stops Your Honor from picking up the phone, speaking to Judge Jones and asking him as well.

But I expect it to be a very intensive mediation process. I do understand that Judge Jones only does mediations in person, so this would require people getting to Houston, which, in my experience, while I have participated in mediations virtually on the phone, it's a lot more effective to be in person. We would anticipate detailed mediation briefs. We would envision each of the parties speaking to Judge Jones to give him their perspective. But it would be -- it would be a significant assignment.

Again, whether we would conclude at the end of August, I don't know, but I would contemplate a good two, three days of in-person mediation at the end of August, and then probably, if necessary, to set up for something else, which, again, there are several different things. And I mentioned in my opening remarks why I think people like Judge Jones -- and

this is also why we thought about Judge Isgur as well -- it's not often you have two mediators, but two mediators, especially judges who work together and who are pretty adept at mediation, I mean, you know, having a bankruptcy judge be a mediator is fine, but Judge Jones and Isgur, they have done a lot of that, and I understand have continued to do that, notwithstanding themselves getting busy.

So I can't answer Your Honor's question of whether they know what they are getting themselves into. I would hope that by, again, a combination, or Mr. Clemente and I speaking to them or Your Honor speaking to them, they would understand. And if they are willing to do it -- obviously, Highland is a high-profile case; I know judges, sitting judges, often like to help out their brethren who are sitting on the bench. So if they are ready and able to do it, we'd think we'll have lucked out, and we think they would be great to aid the process.

If for some reason they don't really appreciate or if Judge Jones doesn't appreciate what it is, then we can go back to square one, and, you know, I'm sure find other people as well. But we'd like to sort of give it a shot.

THE COURT: Okay.

MR. BJORK: Your Honor?

THE COURT: Yes?

MR. BJORK: May I be heard? This is Jeff Bjork with

Latham, hi, on behalf of UBS. I apologize. I just wanted to say that, from our perspective, we have concern, we raised this concern about Judge Jones or Isgur having the time to really evaluate the claims. I mean, as you noted, our claim is complex, to say the least. So is Acis's. There's a lot of history behind it.

And so while we appreciate the fact that there is a mediation process that will be moving forward, we have raised the prospect of having a separate mediator like Dan Weinstein or someone of that ilk to serve as a mediator with respect to our claim dispute, with the goal of trying to advance that in advance of August.

So we have put that out to the Debtors. We raised that today in advance of this hearing. We're happy to progress that discussion. But I wanted you to understand, from our perspective, we share your concern.

THE COURT: Okay. Anyone else?

MR. POMERANTZ: So, just on that, Your Honor, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- you know, we understood UBS's view. We believe each of the other Committee members and the Committee believe Judge Jones would be the appropriate person. And, again, I think we're all I think somewhat in the dark here, and I think the next step is to really find out the time that they have available to devote to it. And, again, if they

have the time to devote to it, I don't think Mr. Bjork could challenge that Judge Jones would be an excellent mediator and excellent to resolve a complicated issue like the UBS claim.

THE COURT: Uh-huh. But you all cannot go down to Houston live anytime in the near future. I don't know if you're reading. Houston is pretty much like New York was two months ago. It's -- well, the death rate is not as terrible because it's younger people getting it, but it's the hotspot for coronavirus right now. And --

MR. POMERANTZ: And we understand that, Your Honor.

THE COURT: Uh-huh.

MR. POMERANTZ: And, again, you know, we're sitting here on July 8th. A lot could change by August 25th. A lot couldn't change. I'm not, you know, I'm not sure there are other places in the country people like to travel to more. I mean, you know, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- there are several places that are hotspots. It may be challenging to do an in-person mediation. I know on the Debtor's side we are committed to make it happen. I might just ask Ms. Patel if she has the number of the RV company she was going to -- because maybe that's an appropriate way to get there.

THE COURT: All right. So, well, let's see. I was going to say you'd be quarantined 14 days after, but you're in

California, not New York. New York, you know, has quarantined --

MR. POMERANTZ: Yes.

THE COURT: -- people traveling from Texas. Well, and remind me: August 25th. That was just sort of an internal target date you all had created?

MR. POMERANTZ: Yeah. It was around, you know, again, the end of August, you know, that we'd, you know, do around that time.

THE COURT: Uh-huh. All right. You know, I'm -- I've been talking to lawyers in different cases, where the topic of mediation is being discussed, about more and more mediators, and this is private mediators, are becoming very adept with Zoom mediation. And what I thought was noteworthy -- I hadn't thought through this, you know. I thought, well, you can do mediation like this. You know, if you can do court by video, why can't you do mediation by video, what's the big deal? But there are private mediators who apparently have become every adept very fast at having these separate caucus rooms, okay? So when you have mediation involving, you know, 12 different constituencies, you know, the mediator will close out all the other conference rooms and go to these three people, and then close that out and go to these eight people in this other room. And it just really hadn't occurred to me that, oh, if you're not live and in person, how do you that,

you know, the going back and forth from room to room? And they've got some tricks worked out where some of them are doing that. And I just don't know that any sitting judges are going to have that all worked out.

I have a couple of names in mind. And I have not talked to either of these folks, but I had thought of these people. You know, they're going to cost you money. They're not going to be free mediators like Judge Jones and Judge Isgur. But two people. One, I had thought of retired Judge Jim Peck. I don't know if he has availability, or, you know, a conflict or anything like that, but he's someone I happened to have gone to baby judge school with back in 2006, and, you know, have somewhat of a friendship with him. And I thought of him because not only does he have a personality that I think might fit this situation, but, as you know if you ever had a case with him, I mean, he's just so very smart. You know, he dealt -- handled the *Lehman* case. You know, he's not going to be -- he'll be a very quick study, is what I'm thinking, as far as whatever factual background he would need to assemble to get up to speed.

And, again, I just worry -- and I'm going to get on the phone and talk to Judge Jones and Judge Isgur -- but I'm just really worried if they will devote the amount of time for this to have a meaningful shot at settling.

Another name I thought of is a lawyer in Houston who was

at Weil Gotshal many years, Sylvia Mayer. I don't know if any of you know her, but she pretty much does mediation and arbitration full-time now, and she is one of the people I am aware has mastered this Zoom separate conference rooms. So, once again, you know, a very quick study, I think, my impression from past dealings with her.

There may be many other names we could add to that list, but you might want to all kind of talk offline about those as well.

But here's what I want to do.

(Audio interruption.)

THE COURT: Was someone wanting to speak up?

Okay. I am going to think on this more between now and the 14th. And, again, I'm going to be reaching out to Isgur and Jones, and might reach out to Jim Peck and Sylvia Mayer as well, just to have a lot of options out there. And then we'll talk on the 14th about what my research has revealed in talking to these folks.

So, everyone, just let's continue to think on this mediation thing. But, again, I want this to be meaningful. I'm very worried that, you know, if all you get is one day, even a long day, with these folks, that it's just not at all realistic that there would be a chance at settling. So I've really got to think on this.

As far as the motions before the Court, I'm going to grant

the motion to extend exclusivity for 30 days. Okay? So, August 12th. And no potential add-ons for two 30-day additional extensions, which, you know, the mechanism, I think you were hoping not to have to come back to the Court, that if the Committee agreed, you know, you could just automatically get up to 90 days. I'm not quite clear. But the point is I'm just extending to August 12th, and for now that's all I'm going to do. Okay?

MR. POMERANTZ: Understood, Your Honor.

THE COURT: And we didn't talk about the other motion. That was sort of a no-brainer, I think, as far as everyone was probably concerned, the motion to extend the period to remove actions. The current deadline is July 14th. You're wanting to extend that out to January 14th, 2021, correct?

MR. POMERANTZ: Correct, Your Honor.

THE COURT: All right. Is there anyone who wanted to say anything about that one?

(No response.)

THE COURT: All right. So that -- I think there's good cause to grant that motion as well.

The only other thing --

MR. POMERANTZ: Your Honor, one --

THE COURT: Okay.

MR. POMERANTZ: One comment on what Your Honor said

about mediation. Again, I had a dialog with Albert, Judge Jones' clerk. We may want to get him on the phone, Mr. Clemente and I. Of course, we won't do it if Your Honor doesn't think it's helpful. But it might be helpful. And, again, I didn't know if that was going to be with Judge Jones or if it was going to be with just his clerk, to talk about days or whatnot.

But we'd be happy to get on the phone in order to give him the parties' perspective, which, look, we all agree this has to be a meaningful mediation. And perhaps hearing it also from us in terms of what we expect and what we contemplate and what we think the issues might be and whatnot could be helpful.

If Your Honor doesn't want us to do that, that's fine. But since I suspect his clerk will get back to me and say "Are you available?" to Mr. Clemente and I, I just didn't want to step on any toes and I wanted to check with Your Honor whether you want us to take that call or not.

THE COURT: Okay. I got a little confused. You're asking for a blessing to kind of continue the dialogue you've already started with their offices?

MR. POMERANTZ: Well, I'm just asking. Again, I don't want to be presumptuous.

THE COURT: Uh-huh.

MR. POMERANTZ: The fact that Your Honor is calling

Judge Jones is important. But I expect Judge Jones' clerk to get back to us and say, "Are you available to have a conversation?" And I just want to know what Your Honor's pleasure is in terms of whether we should have it or not. I think it might be helpful, but if Your Honor says, okay, you've brought it here, you want to take it over from here, I would obviously respect that. But just, just wanted to come out of this hearing clear on what your expectations are in terms of that communication.

THE COURT: Okay. I'll take it from here. And if they call back, just say, you know, I understand Judge Jernigan is going to be calling Judge Jones directly. And so -- but I'll get on the phone this afternoon, so hopefully there won't be any awkwardness on that.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: All right. Anything else?

The only other thing I was going to tie back to is I fully expect that there would be across-the-board agreement to abate the Acis newly-filed adversary, so I hope I would -- I don't even remember who all the defendants are, but please make that a priority, talking about that in the next few days, and report to me on that on the 14th. Okay? Ms. Patel?

MS. PATEL: From Acis's perspective, yes, Your Honor, will do. I'm on -- I'm all over it.

THE COURT: Okay. All right. Well, if there's

nothing else, we'll go ahead and adjourn for today. And I'll keep -- if there's anything worthwhile to report on the mediation front before we have our hearing on the 14th, I'll have my courtroom deputy reach out to all counsel by email and let you know. Okay? All right.

MR. POMERANTZ: Thank you very much, Your Honor.

MS. PATEL: Thank you, Your Honor.

THE COURT: Thank you. We stand adjourned.

THE CLERK: All rise.

(Proceedings concluded at 3:00 p.m.)

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CERTIFICATE

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

/s/ Kathy Rehling **07/09/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBIT 11

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	) Case No. 18-30264-SGJ-11
	) Case No. 18-30265-SGJ-11
	) (Jointly administered under
ACIS CAPITAL MANAGEMENT, L.P.	) Case No. 18-30264-SGJ-11)
and ACIS CAPITAL MANAGEMENT GP,	)
LLC,	) DEBTORS' MOTION to FILE
	) REDACTED QUARTERLY REPORTS
Debtors.	)
	) September 23, 2020
	) Dallas, Texas

Appearances via video and/or telephone:

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I N D E X

Wednesday, September 23, 2020 11:02 o'clock a.m.

P R O C E E D I N G S

THE COURT: Last on our 10:30 docket is an Acis Capital matter. It's a motion of Acis to file redacted quarterly operating reports. This is in Case Number 18-30264.

Ms. Chiarello, I see you there for the reorganized debtor, correct?

MS. CHIARELLO: Yes. Good morning, Your Honor. Annemarie Chiarello here on behalf of Acis Capital Management, L.P. and Acis Capital Management, GP, LLC, the reorganized debtors.

We also have with us on the phone and video, Joshua Terry. Mr. Terry is a principal of the reorganized debtors. And I believe Ms. Patel is also on the video.

THE COURT: All right. Thank you very much.

For the U.S. Trustee, I believe I see Ms. Lambert there. Correct?

MS. LAMBERT: Yes, Your Honor.

THE COURT: All right. Good morning to you.

Do we have —

MS. LAMBERT: Good morning.

THE COURT: — anyone else wishing to appear this morning on this matter?

(No audible response.)

THE COURT: All right. So we have, it looks like,

several people on the phone. They may just want to observe, but I always want to double check that someone may be on mute and think they're appearing but they're not.

So, Mike, can you — can you make sure everyone's off mute for a minute? Are you able to do that?

THE REPORTER: Yes, ma'am.

THE COURT: Okay. So everyone's off mute now. If you wish to appear and you haven't, go ahead.

MR. LYNN: Your Honor, are you able to hear me?

THE COURT: I can now.

MR. LYNN: I fear I can barely hear you. I'm going to dial in a second time and see if I get better reception.

THE COURT: All right. Well, that's Mr. Lynn for Mr. Dondero.

I can recognize your voice. So we heard you. And it sounds like you were going to try to change your device to get better audio.

All right. Anyone else wishing to appear?

All right. Well, Ms. Chiarello, are you making the argument this morning?

MS. CHIARELLO: Yes, Your Honor.

(Noise.)

MS. CHIARELLO: May I begin?

THE COURT: You may. And I just realized I left my exhibit notebook back in chambers.

So, May, can you go grab that?

Okay, the law clerk's going to grab that. Thank you.

OPENING STATEMENT ON BEHALF OF THE DEBTORS/MOVANTS

MS. CHIARELLO: Thank you, Your Honor.

Good morning again. Annemarie Chiarello here on behalf of Acis Capital Management, L.P. and Acis Capital Management, GP, the reorganized debtors. We're here on Acis' motion to file its quarterly operating report under redaction. That motion was filed at Docket Number 1161. The two objecting parties that we have today are the United States Trustee's Office and we believe Mr. Dondero filed a comment rather than formal objection.

And, before we get any further, this Court has heard days, weeks, months of testimony in this case. Undoubtedly you're aware that Mr. Dondero is not a creditor or an equity holder in the debtor, at least not the named equity holder, former or otherwise, in the debtor. So we'd just like to reserve our right to object to Mr. Dondero's standing to be heard today. I'm happy to go into that further. I thought it may make sense to present to you our opening argument and then address the standing as the last issue, but I'm happy to address it whichever way you'd like.

THE COURT: Let's defer that for now, so you may go ahead with your opening, your other issues.

MS. CHIARELLO: Your Honor, we're here on a 107(b)

motion, a motion to really file our quarterly operating reports with limited information available to — on the public docket. We don't believe there's any dispute as to the standard that's applicable. And the United States Trustee, who has filed a substantive objection, we agree on the standard. We don't believe Mr. Dondero disagrees with the applicability of the standard here, but again it's under 107, at the request of a party-in-interest the Bankruptcy Court shall protect information that is confidential or commercial information.

And, as a threshold matter, we're — we're sorry for wasting — or using the Court's time for this. I know Acis has taken up a lot of your time in the last few years. And we tried to reach a practical solution with respect to this issue. If Your Honor had looked through our exhibits or the docket, you will see that initially Highland Capital Management filed a lengthy objection to this — to this motion and ultimately they withdrew their objection after coming — after we worked on a stipulation that was agreeable to each party. It's in your exhibit notebook at Exhibit A. And I really think that's demonstrative of what we're trying to do here.

So as Your Honor is aware, Acis had limited creditors during its bankruptcy case and few remaining creditors that need to be paid through the plan of reorganization. There are really only four remaining creditors, three of which are disputed and subject to claim objection. Those are Hunton Andrews Kurth,

Stinson Leonard, Highland Capital Management, and then the remaining nonobjected-to creditor is Mr. Terry's claim. So today we have no creditors who are objecting to the relief that we're requesting, but I do think the presence of Mr. Dondero, whether or not this Court decides to grant him — or decides to hear him on his — on his comment, is really illustrative of our problem.

Mr. Dondero's objection highlights that noncreditors may misuse the information in Acis' quarterly operating reports. We know Mr. Dondero doesn't want this information in order to see if the plan is being complied with as an essential creditor or a party-in-interest. We don't know why Mr. Dondero is objecting, but we don't believe his actions are benevolent.

As a reminder, this case is postconfirmation and we only have four remaining creditors. And our motion does not request that the Court permit Acis to redact information on the QORs related to payments to creditors. We're asking the Court to permit Acis to redact information related to its business operation. We are concerned that Dondero-controlled entities are going to misuse this information.

We are concerned that the Donor Advised Fund; the Charitable DAF Devised Fund, L.P., which we've referred to as the DAF; and CLO HoldCo, again has been referred to as part of the DAF structure; and entities controlled by Grant Scott, Jim Dondero's college roommate, are going to use information in the

Acis unredacted QORs to sue parties related to the Acis CLOs, including U.S. Bank, Brigade, and Moody's. And this concern has come to fruition as multiple times in the last year U.S. Bank; Moody's; Acis Capital Management, L.P.; Brigade; and even Mr. Terry individually have been sued by the DAF, CLO HoldCo, or both.

We understand the United States Trustee's concern about setting precedent for sealing QORs, but we do think here the facts matter. And we'd like to highlight again that there are no objecting creditors. The creditors remaining are two law firms who are capable of filing objections; Highland Capital Management, who we have agreed to provide this information in a form that we believe protects the confidentiality of the information.

And, Your Honor, if you take a look at the stipulation, you will see that, generally speaking, we provide the — the — and that's at Exhibit A, we're providing that — the Acis QOR information to: The Highland Capital Board; and Pachulski, debtors' counsel for Highland Capital Management; and their restructuring advisor, Development Specialists, Inc., but we have prevented that information from living on the Highland Capital Management server because we have — as Your Honor is aware in this Highland Capital Management case there have been some issues about what lived on the Highland Capital Management server, who has access to it, and which of the Highland entities

gets to control that information. And ultimately we want to make sure that this information can't be misused by Mr. Dondero's entities.

Again we're not trying to limit this information from other courts or actual creditors. Our goal is to reduce frivolous and expensive litigation that is bad for the Acis CLOs and has aided Acis' ability to reorganize. We are not attempting to limit legitimate discovery in another court or we are not trying to limit the United States Trustee's access to this information. If you take a look at our proposed order, it provides that it should be given to the United States Trustee's Office.

And with that, Your Honor, unless you have any questions, I'd like to move to Mr. Dondero's standing or lack thereof.

THE COURT: All right. Go ahead.

MS. CHIARELLO: So as Your Honor's aware, under Section 1109(b), there is a very broad party-in-interest standard with respect to being heard in a bankruptcy matter. And there are — there are enumerated parties including creditors, obviously the United States Trustee under a different statute, the debtor, certain parties-in-interest. But Mr. Dondero is not a creditor and he is not an equity holder in the debtor, nor is he former equity in the debtor. At this point he is merely a litigation counterparty.

And if you take a look at our Exhibits C through V, those are the debtors' schedules and — schedules and claims registry which show that Mr. Dondero is not a creditor or — and is not looked at as an equity holder, and has not filed a proof of claim against the debtor.

Judge Bohm, faced with a similar situation in 2016, found that a litigation counterparty was not a party-in-interest has standing to be heard in a postconfirmation matter. So that case is *In re Odin Demolition* and it's at 544 B.R. 615. In that case Judge Bohm, was faced with a motion to reopen a bankruptcy case after litigation had been brought pursuant to a plan. The party that moved to reopen the bankruptcy case was actually the defendant in the matter, really seeking to make sure that they were to have an order clarifying whether certain claims and causes of action had been reserved properly under the plan. And in that case Judge Bohm denied the litigation counterparty's motion to reopen for, among other reasons, that they didn't have standing as a noncreditor to reopen the bankruptcy case and as a party — as an entity that was not a party-in-interest. And we believe that Mr. Dondero is in the same category.

At the very — at the very least, I think Mr. Dondero's arguments should be — should be faced with some suspicion. And we'd like to highlight that although it was quite some time ago, we don't see Mr. Dondero on the video or the phone, and we do have a standing order in this case with respect to presenting

argument. As you have — you at one point required under — under Order 36- — Docket Number 36 — 336, you required party representatives to be at every hearing if the parties were going to take a position.

So for all of those reasons we don't believe Mr. Dondero's comments should be heard. But to the extent that Your Honor does intend to indulge Judge Lynn and Mr. Dondero, we — we object and we dispute the contentions that Acis had or may misuse its role on the Highland Capital Management Committee to do anything nefarious. I don't think there — there's no evidence that that's occurred and it's, frankly, particularly in light of concurrent events, it's rather insulting to insinuate that there's been any — anything nefarious going on there.

THE COURT: All right. Thank you, Ms. Chiarello.

I'll hear next from the U.S. Trustee, Ms. Lambert.

OPENING STATEMENT ON BEHALF OF THE U.S. TRUSTEE

MS. LAMBERT: Judge Jernigan, —

THE COURT: Okay.

MS. LAMBERT: — as Acis has stated, the parties are in agreement about what the legal standards are and really about most of the facts, but not about what the legal conclusion here is or what the appropriate remedy is for the problem.

Acis contends that none of the creditors are here. First, the United States Trustee contends that this is a public document that the public is entitled to have access to; that

professors, government agencies, Congress use to evaluate whether plans are being complied with and whether the Bankruptcy Code is being performed successfully as applied.

Secondly, two of the creditors that are subject to objection are law firms, so they're in an awkward position to object to their former clients' position, number one. And, number two, because the information has been redacted, they don't really have the ability to assess what the information is or speak as to whether they need it. And in the context of objected-to proofs of claim, where the plan contemplates payment, they are entitled to know whether there is a reserve for them or not. This they cannot access and evaluate from the information that's been provided.

This information is typically disclosed in bankruptcy cases, in large forfeit cases; confidential information is often disclosed in individual cases. That information may lead to litigation. The parties to contracts are entitled to know whether their contracts are being complied with. Undoubtedly, the DAF litigation has been a series of annoying and costly — costly litigation events. We don't question that, but the proper remedy for that is to seek some relief in this Court by asking that the Court enforce the interpretation of its order and its prior interpretation of the DAF agreement — the DAF litigation issues and seek to have any complaint in another forum enjoined or require that the litigation be filed here in

the Acis bankruptcy case, not that the public be denied access to the information, because that does not comply with the standards that the Constitution requires for public access to the court as discussed in the *Nixon* case and as interpreted in the statutory context of 107 and 9018 and in the cases that discuss how those should be applied in a constitutional context such as a line — (brief garbled audio).

Alternatively, if the Court is inclined to do this, and this started as a motion to seal, which was withdrawn, and then Acis filed a motion to redact, and we hoped that the redactions would be more limited, but the redactions go to the substantive information in the case. You cannot evaluate compliance with the plan under the redactions that — that are set forth in the proposed orderly operating reports. You cannot tell from quarter to quarter where the money is or what's been paid or what has happened. And that's where we get to.

This is not information that can be tailored for this case. And, therefore, it's not really a redaction. It's really a motion to seal. The fact — the information that they provide is about the claims that have not been paid, but let's — that information is accessible otherwise in the bankruptcy reports, in the claims register, and in the objections to claims. The information that's not available to creditors and to the public is the information that's been redacted about the finances in the case.

So often fraudulent transfers, whether prepetition or postpetition, are disclosed in operating reports. The bankruptcy processes is not designed to cover up litigation issues. Here, the allegation is that the litigation issues are frivolous, and that may be true, but the remedy for that is different than sealing the quarterly operating reports.

And for these reasons we would ask that the motion be denied or, alternatively, if the Court is inclined to do this, that the Court define a period of time for unsealing the quarterly operating reports, because, as set forth in the case law and in the Federal Judicial Center Guide, generally, orders to seal should define a period for unsealing them; and — and also that the Court allow the United States Trustee to comply with its ethical and statutory obligations, in that the Court include the standard language that it would include in sealing orders for that purpose.

However, we still contend that the evidence will reflect that the sealing should not occur and that this is bad precedent for bankruptcy cases and especially large corporate cases. I'm available if the Court wants more. Thank you.

THE COURT: All right. Ms. Lambert, I'm going to ask you a follow-up question. You just said it would be bad precedent. Have you ever seen either redaction of or sealing of either monthly operating reports or quarterly operating reports in a Chapter 11? I've never, that I can remember, had anyone

ask me to do this, so I've never looked into it. Is this something that is occasionally happening and I'm just not experiencing it till now, or do you know?

MS. LAMBERT: No, Your Honor. In fact, Mr. Neary, when I discussed this motion with him, said that he had never seen this before either. We are aware of some circumstances where particular line items in quarterly operating reports have been redacted, but never something substantive or that caused an inability to access, to evaluate, or determine what had happened in accordance with the plan.

Similarly, the Court asked about monthly operating reports, no, we have not seen that before. As is pointed out in other pleadings that were filed, the SEC also requires disclosure of this type of information in large corporate cases.

I can, however, Your Honor, think of two Chapter 7 cases where large settlements were sealed and the final reports were sealed. Both of those resulted in discussions with the U.S. Trustee about this should not have occurred and we request that it not occur again. And there were provisions for unsealing them at a subsequent date. That is the only circumstance which I feel ethically I'm bound to disclose to the Court that I can think is analogous to this.

THE COURT: All right. Well, I ask and I'll just tell you all what's dancing in my head. I mean bankruptcy judges, we've been talking for a couple of decades now about, you know,

these motions to seal or motions to heavily redact. They seem to be coming with more and more frequency in the large Chapter 11 complex cases.

And, you know, I'm about to hear from Mr. Lynn, but in the Highland case of course I had a motion to seal the plan and disclosure statement because of pending mediation. And I approved that under the very unique situation that I thought it was, but I've never sealed a plan and disclosure statement before.

And, again, it's a subject that causes I think all of us bankruptcy judges angst because we do have this general notion, not just a notion, a statute, 107, that presumes everything is publicly available, again unless commercial information, scandalous, confidential. So there's kind of a perception that more and more and more people are wanting to avail themselves of 107 and say something's commercial, say something's sensitive, confidential. But, you know, sometimes it's very questionable.

All right. So with that, Mr. Lynn, are you there? Your client's standing has been challenged, first and foremost. Why don't you start there and then we'll see where we go from there.

MR. LYNN: Your Honor, can you hear me?

THE COURT: I can, yes.

OPENING STATEMENT ON BEHALF OF JAMES DONDERO

MR. LYNN: Okay, good. Well, I had hoped to break in earlier because I could have, I think, solved some of this problem. Let me begin by saying Mr. Dondero is the portfolio manager for certain funds that have an interest in CLOs that Acis manages. So indirectly he has an interest in there. However, he does not have a direct interest in this. And we filed the four comments rather than a response or an objection.

We agreed with the United States Trustee, although we do not agree with some of her comments regarding DAF litigation that occurred after the confirmation of the Acis plan, which we think is probably beyond the jurisdiction of the Bankruptcy Court.

We also don't agree with the rude characterizations of Mr. Dondero and the angelic characterizations of Mr. Terry that counsel for Acis mentioned. However, we don't have any particular interest in whether or not this motion is granted other than on a precedential level.

THE COURT: All right. Well, Ms. Chiarello, I'm going to ask you: Do you — do you intend to put on any evidence today? And you know you have a notebook full of exhibits, but is your client perhaps going to testify on this?

All right. We're — I guess you were muted. If you could unmute — go ahead.

MS. CHIARELLO: Oh, yeah. Yes, Your Honor, we intend. As a threshold matter, we would move to admit Exhibits A through

W, which are in your binder and with the caveat being I believe Ms. Lambert wanted to make clear that Exhibits C through K are not admitted for the truth of the matter asserted therein but merely to show that they have been sent and the contents. But obviously, particularly with respect to the DAF complaint, we obviously would contest the truthfulness of the matters asserted in those. And the same caveat for Exhibits Q through T. And, with that, we would move to admit Exhibits A through W.

THE COURT: All right. Are there any objections, Ms. Lambert? If you could unmute yourself.

MS. LAMBERT: The agreement is as stated by Ms. Chiarello so that the exhibits that she carved out are admitted for notice purposes but not for the truth of the matter asserted. That includes the proof of claim register. And the other items are admitted for all purposes.

THE COURT: All right. So to be clear for the record, I'm admitting A through W, but C through K and Q through T are being admitted for notice purposes only, not for the truth of the matter asserted.

(Debtors'/Movants' Exhibits A through W received in evidence, as noted above by the Court.)

THE COURT: Ms. Chiarello, could you tell me, do we — were these filed on the docket so I can cross-reference that or do I just have the hard copies?

MS. CHIARELLO: Your Honor, they are filed with the

docket. And I believe your hard copies, although it's hard to tell for the first few because there are things that were filed, the filings on filings, they should have the file mark copies as well on the top. So, for example, if you go to Exhibit T, it should have the 1180-21. So I believe then that these were all filed at Docket Number 1180.

THE COURT: Okay.

MS. CHIARELLO: So if it's 1180 —

THE COURT: All right, I gotcha.

MS. CHIARELLO: — 1180-1 through 26.

THE COURT: You know that I need to give the court reporter hard copies of all this, and the answer is no. These are all found at Docket Entry Number 1180 on the Acis docket.

All right, with that, —

MS. CHIARELLO: Yes, Your Honor.

THE COURT: — call your witness.

MS. CHIARELLO: Yes, Your Honor.

Your Honor, if it would — I believe Ms. Lambert has — doesn't have any objection to — or objection to the admissibility of our exhibits. If you would be amenable to it, we'd like to walk through some of what those exhibits are to limit the amount of testimony from Mr. Terry. But if you'd like to hear from Mr. Terry first, we can offer you that.

THE COURT: No, that's fine. You can walk through the exhibits first.

MS. CHIARELLO: Okay. Do you mind if I share my screen?

THE COURT: Go ahead.

MS. CHIARELLO: Okay. Can you see it?

THE COURT: Um-hum.

MS. CHIARELLO: Okay. So we've moved in as Exhibit A the stipulation between Acis and Highland Capital Management, refers us to the Acis QOR. As I mentioned earlier, you will see in paragraph 3 that the parties that have the — or who the information is being made available on a confidential basis are Pachulski Stang Ziehl and Jones; Mr. Seery; Mr. Nelms; Mr. Dubel; and Highland's bankruptcy advisor, Development Specialists, Inc.; Mr. Dondero; the Charitable Donor Advised Fund; and CLO HoldCo are parties that the Viewing Parties are prohibited from disclosing this information to.

Next, — next we'll move to Exhibit B, which is the Acis — and I'll put up in one moment — which is the proposed redacted exhibit — I'm sorry — redacted quarterly operating report with respect — showing the information that we are and are not redacting. So, again, this is postconfirmation, so these operating reports are somewhat limited. But we'd be redacting information related to Acis' cash receipts, but for cash disbursements, creditors can see the payments made under a plan. And — and then the remaining information would be redacted as it — again, this is the backup for, again, the cash

disbursement.

So I'm going to move through Exhibit C through E and G all at once. First, for purposes of today, I'll pull this up, but I know Your Honor has a — I'll pull up G, but you have all of them in front of you. So these are the DAF lawsuits that we have been discussing. There are a number of iterations of them, the most recent which is Exhibit G.

So you take a look at these and the plaintiffs are either CLO HoldCo or the Donor Charitable Advised Fund. It sounds from Judge Lynn's comments that Mr. Dondero may serve in some capacity with respect to these entities, but you — you have heard these mentioned as the DAF. They assert that they are interest — or they hold an interest in the Acis CLOs either directly or indirectly. And, generally speaking, this litigation alleges misconduct related to the Acis CLOs and misconduct related to the Acis bankruptcy case.

With respect to the mismanagement, it will sound familiar to Your Honor as it's quite similar to the mismanagement alleged by Highland Capital Management during Acis' bankruptcy case, an objection that this Court overruled when it confirmed Acis' plan of reorganization.

So the parties to these lawsuits, which admittedly have changed, this is probably the most fulsome one, include U.S. Bank; Moody's; Acis Capital Management, which is of course our debtor, our reorganized debtor; Brigade Capital Management,

L.P., which is the debtors' subadvisor; and Mr. Terry individually.

I think what's most notable — or maybe most interesting, maybe not most notable, just how — how interesting this litigation has become. So one of the causes of action that is present here is actually a defamation claim against Moody's. And the defamation claim is quite surprising, particularly in light of who is bringing this cause of action. So the Acis, the DAF, and CLO HoldCo, who allege that they are noteholders in the Acis CLOs, are actually suing Moody's for not downgrading their investment. So that's at page 26 of Exhibit G.

And, again, this is — this is more — I mean it's really just litigation for whatever value it is. At some point this litigation was dismissed. If you look at Exhibit H and F, those are dismissal orders. I will note they were dismissed without prejudice in February of 2020. However, the — if you take a look at Exhibit J, you will see — now I have to understand how to switch between these exhibits — so Exhibit J is actually dated April 20 — 21, and it's a letter from Mr. Hurst, counsel for the DAF entities, to U.S. Bank, basically raising the same concerns related to the mismanagement of the Acis CLOs. So this letter was sent after the litigation was dismissed, so I don't think we — we don't see the dismissal as anything other than a strategy, if you will.

Again we have another letter now on this Exhibit K,

which is a letter from Grant Scott on behalf of the Donor Advised Fund, L.P. So this is a letter from Mr. Scott to Seward and Kissel, who were counsel for U.S. Bank in this — actually in this bankruptcy case. I believe they're on the telephone.

And Mr. Scott is a patent lawyer. You can tell from his letterhead. And he is Mr. Dondero's college roommate. And he is, again, alleging these same sort of issues related to the Acis CLOs and Acis' performance. If you take a look at the third paragraph you can see his concerns. And — and all of these letters request an accounting from the Acis CLOs. We don't necessarily know why. We obviously have suspicions, but we think they're — they're asking for certain information.

And if you take a look at — this is — Exhibit L, you will see Mr. Kotwick's response to Mr. Scott with respect to the requested information. Effectively Mr. Kotwick responds that under the documents, the DAF and CLO HoldCo aren't entitled to this information. So we really see this as an end-run for Mr. Dondero and his entities to get information that they would not otherwise be entitled to under their documents. And, unfortunately, we believe that this is also bolstered by requests we have received previously from counsel to Highland Capital Management prior to the entry of the stipulation, and those are Exhibits I and M, again requesting really detailed financial information from Acis, which we believe is unrelated to plan performance. And we can talk about plan compliance in a

moment.

And, finally, Your Honor, I think it's worth noting that there are two transcripts at Exhibits N and O. Both are transcripts actually from the Highland Capital Management bankruptcy case. And Exhibit N is a transcript from the February hearing on the motion to employ Lynn Pinker — I'm sorry — Foley Lardner, and it was originally intended to be a hearing on a motion to employ Lynn Pinker Cox and Hurst. And so at page 59, Judge Nelms testifies that the Highland Capital Management Board was not aware of this DAF litigation. So we don't take a lot of comfort in knowing that the Board — it's not that the Board can control this litigation, at least that hasn't — and that's not what has been demonstrated. We hope — we hope that they can exert their influence here, but we don't know that that necessarily is within their purview.

And this is further illustrated by actually a comment from last week. Now I'm in Exhibit O. And so if you look at page 42, although I'm sure Your Honor remembers, we heard from counsel for Mr. — from Judge Lynn's firm, Mr. Assink makes statements on the record to this Court that Mr. Dondero was still working with entities that he controlled to file proofs of claim in the Highland bankruptcy case. And I know that definitely was surprising to us, but really illustrates the fact that Mr. Dondero is still around, still has the same intentions, and we don't believe that the letter-writing campaign or

litigation has stopped.

And, finally, Your Honor, we want to move to Exhibit W. This is something I'm not sure the Court is aware of. Sorry. This is the final judgment from the Guernsey Court with respect to Mr. Terry. If you recall, Your Honor, Mr. Terry was sued on the Island of Guernsey, effectively contemporaneous with Acis' first confirmation hearing. So Highland CLO Funding Limited, which we have called things like ALF, HCLO, CLOF, they sued Mr. Terry in Guernsey effectively for filing the Acis involuntary petition. And ultimately that case was dismissed, and I'm probably to butcher the Guernsey term, but it does seem for lack of jurisdiction.

And in connection with that case, the Guernsey Court found that testimony submitted by Mr. Sevilla, an Island — Exhibit W on page 8, so his information, particularly this confidential information was related to whether Mr. Terry's payment of his involuntary fees and expenses were — should be characterized as a bribe rather than an allowed administrative claim under the Bankruptcy Code, Mr. Sevilla's testimony was found to be inaccurate with respect to that and a number of other items with respect to jurisdiction over Mr. Terry, but I don't know that that's necessarily relevant.

So with that, Your Honor, unless you have any questions, we'd move — we'd call Mr. Terry to the stand.

THE COURT: Let me ask one question before we do that.

So what pending satellite litigation remains at this point? If the DAF lawsuits were dismissed, granted without prejudice, and this Guernsey lawsuit is now resolved, what — what is left of what I'll call the satellite litigation?

MS. CHIARELLO: Your Honor, Mr. — I believe there is still pending litigation in state court and actually Mr. Terry can answer that question better than I can. But with respect to litigation that is not in front of Your Honor, I believe that there remains — Acis has state court litigation, but between Acis, on one hand, and the Highland-related entity on the other, I believe there is something still pending in state court, but I think Mr. Terry should speak to that.

THE COURT: Okay. Because I'm understanding the heart of the argument here with your motion is that Dondero, Dondero-controlled entities have misused information in connection with lawsuits filed against —

MS. CHIARELLO: Um-hum.

THE COURT: — Mr. Terry and U.S. Bank, Brigade, Moody's, and so that's what I'm getting at: Are there pending lawsuits where that is still a concern?

MS. CHIARELLO: So I think that the answer to your question is the most recent DAF litigation has been dismissed. However, after that dismissal there have been letters —

THE COURT: Right.

MS. CHIARELLO: — from Mr. Scott asserting the same

causes of action. And we don't — we have no reason to believe that that is over. It just may not be occurring today. And we are concerned that providing this information emboldens that type of litigation.

THE COURT: Okay, got it.

All right. Well, Mr. Terry, I'll need to swear you in. So if you could make sure you allow your video to capture you. Do we have you, Mr. Terry? Let's make sure you're not on mute and your video is activated. I saw you earlier today.

MR. TERRY: Yes. Can you see me, Your Honor, and can you hear me?

THE COURT: I can now. Thank you.

JOSHUA TERRY, DEBTORS'/MOVANTS' WITNESS, SWORN/AFFIRMED

THE WITNESS: I do.

THE COURT: All right. Thank you.

Ms. Chiarello.

DIRECT EXAMINATION

BY MS. CHIARELLO:

Q. Good afternoon — I'm sorry. Good morning, Mr. Terry. We've got 13 minutes. I know you testified a number of times before the Court, but would you introduce yourself?

A. I'm the president of Acis Capital Management, L.P. and also the ultimate owner of Acis Capital Management, L.P.

Q. And, Mr. Terry, I believe you had a copy of the exhibits electronically available to you, but to the extent if possible

I'm going to put them in front of the screen that form the share screen. But as a threshold matter, I think it's probably important to address a few things that have been raised today.

So with respect to how the plan works, can you explain how — what's required under the plan with respect to a reserve creditor, unsecured creditors, or disputed claims, and explain if there is a balance or how much is in that reserve?

A. Yes. There is — under the plan, I believe, and I'm going off memory, but as I recall there is a requirement that the debtor or the reorganized debtor in this case keep an adequate reserve for potential future claims, and we have since we've emerged.

MS. CHIARELLO: And, Your Honor, there is a pending settlement with Highland Capital Management.

BY MS. CHIARELLO:

Q. So I think it's prudent to take that into account, so accounting for that Highland Capital Management claim, do you believe that there are sufficient reserves to pay the remaining unsecured creditors to the extent that they would be allowed pursuant to the plan?

A. Yes.

Q. Okay. And then you heard Judge Jernigan ask a question with respect to satellite litigation. Can you — can you speak to what remaining litigation there is between Acis, on one hand, or you, on one hand, and Highland, on the other, or Dondero-related

entities, on the other?

A. Yeah. As I understand it, in state court in the 162nd District there is still an open case between, on one hand, Highland Capital Management, L.P., which obviously this bankruptcy case stayed that party in that litigation, but James Dondero and Thomas Surgent as well, and then my wife and I as the plaintiffs. And this relates to the stolen retirement money as well as some related other claims that we had. That litigation, originally Highland had filed claims against me individually, which were already rejected by the arbitrators. They sued me again for the same thing.

In state court, we won a summary judgment hearing in March of 2019, which dismissed Highland's claims against me and left my wife and I as the plaintiffs regarding the retirement money. That case, we did settle that on October 2nd, 2019, which was a few weeks prior to trial. And so that settlement was between Highland, Dondero and Surgent, and then my wife and I, on the other hand. And so we had a rule and an agreement in place, which I think has been an exhibit in this Court before, but that case still remains open technically, I believe.

Then Acis, on the other hand, does have a state court action against former attorneys of Acis. And that one is in the 162nd district as well. And then there are the pending adversaries which are in this Court.

And I believe after the Guernsey judgment, I believe

that matter is closed pending a — there is still an assessment of cost or fees that can be awarded, given I was individually the prevailing party.

Q. Thank you, Mr. Terry. So I am going to pull up what is Exhibit B, which is a — it's been filed with the docket, but it is the — it's Acis' quarterly operating reports, which have been filed with appeal — I'm sorry — filed with redactions. Can you explain kind of the narrow redactions that we have and what we are — or what Acis is not intending to redact?

A. Correct. The — the items that we're not redacting are payments to creditors and essentially the U.S. Trustee fees on — on the QORs. The other information is redacted.

Q. And how many remaining creditors does Acis have?

A. In terms of allowed claims, it's just me individually. In terms of disputed claims, it's Lackey Hershman, which while I believe it's now called Stinson Leonard, and then Andrews Kurth, and then Highland are the three remaining disputed claims.

Q. And are any of them objecting today?

A. No, not to my knowledge.

Q. And with respect to the cash receipts and cash disbursements and the information that's being redacted here, can you explain why that information is confidential or commercial information?

A. So certain — as I believe former Judge Lynn mentioned, Mr. Dondero has access as portfolio manager to certain CLO indenture trustee reports of the Acis CLOs and is able to get information

from those that the average creditor would not get. And it's my belief that Mr. Dondero or Grant Scott or other Dondero-related individuals or entities, believe they can discern information between our QORs and this other information that they have that might help them perpetuate this litigation that seems to be their agenda, unfortunately; that, you know, we don't believe necessarily they can discern what they think they can discern, but unfortunately that hasn't stopped them in the past from mischaracterizing information, such as the Guernsey lawsuit. And, you know, we're concerned that, you know, this information will then allow them a basis to continue to file lawsuits to the detriment of our CLOs, to the detriment of the service providers to our CLOs, and to the detriment of our business and our reorganization.

Q. Thank you. So, Mr. Terry, can you explain to the Court who is the DAF or what we're referring to when we say the DAF?

A. Yeah. There's a series of entities that are generally referred to as the DAF. I think the two plaintiffs are the Charitable Donor Advised Fund, L.P., and then CLO HoldCo Limited, which as I understand it it's a subsidiary of the former entity. Grant Scott serves as director of both of those entities. Ultimately, these entities are owned by Highland Foundations, of which, as I understand, Mr. Dondero serves as president and Grant Scott serves as treasurer of the ultimate shareholders of these entities.

Q. And, Mr. Terry, who is Grant Scott?
A. Grant Scott is Mr. Dondero's college roommate. He's a patent attorney in North Carolina with an electrical engineering degree that focuses on semiconductor and microelectronic patents.
Q. Okay. So how has the DAF litigation and then the threatened continuation of the DAF litigation affected the Acis CLOs?
A. So in a number of ways, unfortunately. You know, I think the first — the first way is it really prevents resets or inhibits the ability to reset these CLOs, which we've tried to do since emerging. We've requested that of HCLOF. We were hopeful when this independent board was put in place that we would be able to work with them to get the CLOs reset finally. And, you know, coincidentally or not, about a week after the conversation started with the new independent board back in February was when the lawsuit was amended to add Acis, me individually, and Brigade up in New York. So unfortunately it's kept resets from happening.

I think additionally these — when everybody has to lawyer up, there's various indemnification provisions in place in these CLO documents. And it's expensive to the CLOs. It becomes an administrative expense essentially of the CLOs. And the definition of administrative expense allows, within the indenturers, allows for the U.S. Bank, as indenture trustee, their counsel is paid — U.S. Bank's expenses are paid first

before any other vendors are paid in the CLO.

So naturally when U.S. Bank is sued as indenture trustee, it leads to a big expense burden of the CLOs. And then when Acis, Brigade, myself, others are sued, it leads to indemnification issues of the CLOs, which ultimately are, you know, a burden on the CLO that we had hoped to try to minimize as much as we can. So those are the two main ways. It's the resets and the expenses.

Q. All right. So does the mere threat of litigation in — I think what I'd characterize as — a letter-writing campaign, does that — does that affect the Acis CLOs somewhat similarly to an actual filing of the complaint?

A. It does. It's similar in a way on the expenses, on the expense front. And it also will continue to be a cloud on a reset transaction.

Q. So what has been the effect of what I call the DAF litigation and the letter-writing campaign on Acis' reorganization?

A. Unfortunately, it — this litigation in general has been an impediment since we emerged. I mean just broadly speaking, the effective date was February 15th, 2019. There were affidavits submitted in Guernsey on the 15th and 18th from Mr. Sevilla; from Bill Scott, the former chairman of Highland CLO Funding; Heather Bestwick, the other director of Highland CLO Funding, submitting this Court's ruling to the Guernsey Court saying,

'This is an offense, we can't get a fair trial in the United States.'

The — after that we had a May 2019 hearing in Guernsey. These letters started, the demand letters started in August of 2019 to U.S. Bank, Moody's, and S&P. The lawsuit occurred in October of 2019 and then was amended in November and amended in January and amended in February. And then we had a letter in April and another letter in May of 2020. And so it's just been a constant — obviously it's a distraction, but when all the service providers to Acis CLOs — or not all, but a lot are being sued, it's a cloud over other third parties' willingness to want to engage with Acis on their business. And, unfortunately, it's understandable. So that — that's been an impediment.

And then there have also been concerns raised and due diligence meetings, and whatnot, that, well, what if you did a CLO, and Mr. Dondero did acquire — and the secondary market acquired a position in that CLO just to sue all the service providers to that CLO initially, even if he wasn't involved in the initial transaction, just because, you know, he seems to have it out for me, and so that's just unfortunately constantly this cloud over trying to go out and get new business. It's just this unending, you know, litigation against Acis.

Q. All right. So I think there was kind of — let me go back to my question. So effectively you — you fought and — and won the

Guernsey litigation; is that — is that a correct assessment?
A. Yes.
Q. And ultimately it was dismissed after — how long had it been pending when it was dismissed for lack of jurisdiction?
A. Two — two years since the date it was filed, roughly. Almost two years.
Q. So even if you succeed in this litigation that's there, this type of litigation, it injures Acis; is that correct?
A. Yes.
MS. LAMBERT: Objection, leading.
THE COURT: Sustained.
MS. LAMBERT: Yeah, and I — I ask that the answer be stricken.
THE COURT: It will be stricken.
MS. LAMBERT: I'm sorry. I had trouble unmuting.
THE COURT: All right. It is so ordered.
Continue.
BY MS. CHIARELLO:
Q. Mr. Terry, what are the effects of the litigation on Acis?
A. Well, I mean it's problematic. It continues to be a cloud. You know, as mentioned before, it continues to be a cloud over — over our business.
MS. CHIARELLO: Your Honor, I have nothing further. I prefer to redirect if there is a cross.
THE COURT: All right. Any cross, Ms. Lambert?

Ms. Lambert?

MS. LAMBERT: Yes. Yes, Your Honor, —

THE COURT: Go ahead.

MS. LAMBERT: — there is a cross.

CROSS-EXAMINATION

BY MS. LAMBERT:

Q. Mr. Dondero, you and I have met before —

THE COURT: You called him Mr. — you called him Mr. Dondero. That is —

MS. LAMBERT: Mr. — I have questions about Mr. Dondero.

BY MS. LAMBERT:

Q. Mr. Terry, you and I met before. And sometimes we've been aligned, the U.S. Trustee and your individual interest, and sometimes we've been opposed; is that right?

A. Yes, I believe so.

Q. First I want to ask you about the reserve amount. The reserve amount is redacted in the two quarterly operating reports that are in evidence, right?

A. Well, technically I don't think the reserve — a reserve amount is one of the items on the operating report. The reserve amount, so I don't know how to exactly answer that question.

Q. You didn't disclose the reserved amount today, did you?

You didn't —

A. That's — well, I don't know if that's correct either. If I

could, the outstanding claims, there's a Highland claim that might total eight million pending this settlement agreement that obviously has been reached. I think that's what they have alleged their prepetition gap period and admin claim to be in total. And then the other objected-to claims are about $400,000 in terms of Lackey Hershman/Stinson Leonard, whatever, I forget how that's styled, and then Hunton Andrews Kurth. And then — and then there's my claim as well. But the — which there is between 8- and 900,000 outstanding on that. So, in general, when I think of the reserved amount I think of those claims and how am I going to pay them over time with not just existing cashflow but future cashflow.

Q. You would agree with me that you have not disclosed today the amount that has been set aside from reserve, correct?

MS. CHIARELLO: Objection, asked and answered.

THE COURT: Overruled.

THE WITNESS: I don't think that is — I don't know how to answer your question because the reserved amount isn't an amount on the operating report, it's an amount that I need to reserve for both in cash and in future cashflow, as I understand it.

BY MS. LAMBERT:

Q. Your counsel asked you if there was a reserve. You have not provided the dollar amount of the reserve to the Court today, have you?

A. Well, the dollar amount of the reserve is all of these factors that we're talking about that can help take care of these claims that I just mentioned. So the dollar amount of the reserve would be $8 million plus $400,000 plus somewhere between 8- and $900,000 total, but then, for example, there's a Highland settlement that will take care of some of that, hopefully, there is cash onhand and then there's future cashflows that will take care of that amount that needs to be reserved for.

Q. You would agree with me that on today's date, Acis and the Stinson law firm do not currently agree on the amount owed to Stinson, right?

A. I believe that's correct.

Q. You would agree with me that on today's date Acis and Hunton, which you refer to as Andrews Kurth, do not agree on the amount owed to Hunton, right?

A. That's correct, I believe so.

Q. And if the reserve amount is redacted or the underlying information is not provided and the quart- — is redacted in the quarterly reports, they can't complain about whether there is a reserve or not, can they?

A. Respectfully, the question was based on a reserve amount that's in the QOR, and I don't think there is an item in the QOR that's a reserve amount.

Q. They can't evaluate the cashflow to determine whether they should ask for a reserve, can they?

A. I feel like there's two parts to that question. The reserve is inherent in the plan, that I have to keep a reserve, I believe. They can't — they could always ask for information.
Q. I'm going to shift from the reserve to Acis' compliance with the agreements. You would agree with me that in or out of bankruptcy Acis has to comply with its management contractual obligations, wouldn't you?
A. Generally, yes.
Q. And — and the parties to your contractual obligations are entitled to compliance, right?
MS. CHIARELLO: Objection, Your Honor. I think this is outside the scope of direct.
THE COURT: Well, she could always recall him, I guess, as her own witness, so I'm going to go ahead and allow it. So overruled.
THE WITNESS: I'm sorry. Can you repeat the question, Ms. Lambert?
BY MS. LAMBERT:
Q. Complying with your contractual obligations is something that the parties to the contracts are entitled to evaluate, correct?
A. I believe so.
MS. LAMBERT: I have no further questions.
THE COURT: All right. Any redirect, Ms. Chiarello?
MS. CHIARELLO: Just briefly.

REDIRECT EXAMINATION

BY MS. CHIARELLO:

Q. Mr. Terry, does the plan require — or did the plan have a bucket of money to pay unsecured creditors upon confirmation? Was there a set dollar amount of funds?

A. No. There — there wasn't a set dollar amount of funds just to pay unsecured creditors upon confirmation.

Q. So how does the plan contemplate paying unsecured creditors?

A. I think in part from cash that was available upon confirmation and then in part from ongoing business operations.

Q. So to the extent that there were not funds available on the date that Acis emerged, creditors would be paid from Acis' future cashflows; is that correct?

A. Yes.

Q. Okay. And have Hunton — Hunton Andrews Kurth asked you or requested any information from Acis regarding plan compliance?

A. No, not to my knowledge.

Q. Has Stinson Leonard requested any information from Acis related to plan compliance?

A. Not to my knowledge.

Q. Okay. And to the extent that that information was requested from Hunton or Stinson Leonard or, I guess, Mr. Terry as an individual, would you be amenable to providing that information to them under some — the same or similar terms that you have provided that information to Highland Capital Management?

A. Yes.

MS. CHIARELLO: I have no further questions, Your Honor.

THE COURT: Any recross, Ms. Lambert?

Okay, I think that was a no. Okay.

MS. LAMBERT: No, Your Honor.

THE COURT: I'm trying to figure out do I have a question for Mr. Terry or maybe it's a question for you, Ms. Chiarello. As I was trying to keep track of what litigation was pending versus what is not, there was a reference to adversary proceedings in the Bankruptcy Court. Since I haven't had those before me yet I have not studied them.

So could someone tell me — I mean I know about the biggie, if you will, the 34-count adversary proceeding involving Highland and Highland's claims in the alleged fraudulent transfers and whatnot, but are there others? If so, I haven't had reason to study those, so I'd like to know what those involve.

MS. CHIARELLO: Yes, Your Honor. There are a few other adversary proceedings that are pending in front of Your Honor. And you haven't — you're not familiar with them because they have largely been stayed or delayed given kind of the posture of the Highland Capital Management bankruptcy case. Those were filed on the eve of the 108 deadline, just to preserve causes of action. So the first of which is what we

have been referring to as the officer adversary. I don't have the case number in front of me, but I can get it for you. And that is asserting similar — a similar factual scenario that's at issue in the big Highland — or the big adversary case that Your Honor is familiar with, but the causes of action are against Acis' former officers and directors, so Mr. Dondero, Mr. Waterhouse, an individual — it's really individuals including some Highland Capital employees. We hope that that is in the midst of being resolved or — to some degree. And I think you — there hasn't been a 9019 filed by Highland Capital Management, so I'm — and I'm not sure where that stands, but I think some of that will be addressed or I'm hopeful some of it will be addressed, and when you are able to see that.

And then there is one other adversary pending related to a preference in a fraudulent-transfer claim against Mr. Stinik. Mr. Stinik was a Highland Capital — he had the Highland Capital Management email address but contends that he was a contractor for Acis. The basis of the lawsuit is effectively there is — there was no contract between Mr. Stinik and Acis. And it's a relatively small dollar fraudulent-transfer and preference action, I think it was about $380,000 total. I may be — that may be a little high. But, again, I think — I think that — it's not — it's not before Your Honor today and it's certainly — I believe we're working to move that trial — to a trial date out, but it's really in the discovery phase.

THE COURT: All right. Well, when you were describing the officer adversary proceeding against — or officer and director adversary proceeding against Dondero, Waterhouse, and some Highland employees, I was a little confused. Do you think that has been entirely settled or — because you mentioned the 9019 motion. I know that Acis and Highland have resolved your issues, but has this been resolved as well?

MS. CHIARELLO: Your Honor, if I may —

Ms. PATEL: Your Honor, —

THE COURT: Oh, Ms. — Ms. Patel is speaking up. She may be the point person on that.

MS. PATEL: Yes.

THE COURT: Go ahead.

MS. PATEL: Yes, Your Honor. If I — if I can chime in. With respect to the settlement. The settlement involves certain of the defendants in the Dondero, et al. adversary, so the nonHighland adversary, but not all of them. There are certain employees who are contemplated to be included as a part of the resolution. Now there are still developments that could happen and that will become a little bit more clear I think when the 9019 is filed. It's anticipated that that 9019 — at least everyone's targeting that to be filed, frankly, today. That might get pushed out. And, just as a full disclosure, it might get pushed out a couple of days, but the parties are working hard to get that 9019 on file. But — so it's a little bit of a

hybrid answer as to what's going to happen with respect to it, but the resolution does not contemplate a full global resolution of the Dondero, et al. lawsuit, it's just a few — a few of the defendants, namely, certain Highland employees.

THE COURT: Okay. Thank you.

All right. Well, that — that's really all I had as far as follow-up questions.

So thank you, Mr. Terry, we appreciate your testimony today.

(Witness excused.)

THE COURT: Is there anything else, Ms. Chiarello?

MS. CHIARELLO: Just by briefly, Your Honor.

I think it's important to highlight that we are here truthfully near — past confirmation, and there is no absolute right for creditors —

MS. LAMBERT: Your Honor, I'm trying to determine have we closed the evidence, so we're submitting closing arguments?

THE COURT: Well, I'm trying to determine that as well.

Ms. Chiarello, are you having — are you going to have any more evidence?

MS. CHIARELLO: No, Your Honor. We rest on the evidence submitted.

THE COURT: Okay. So I need to ask Ms. Lambert: Do you have evidence at this time?

MS. LAMBERT: The U.S. Trustee's evidence has been admitted in the redacted quarterly reports that were admitted in the case in chief of Acis. The U.S. Trustee has no additional evidence. Thank you.

THE COURT: All right. Thank you.

All right, Ms. Chiarello, you may resume.

CLOSING ARGUMENT ON BEHALF OF THE DEBTORS/MOVANTS

MS. CHIARELLO: I apologize, Your Honor. Again Annemarie Chiarello on behalf of Acis, L.P.

I think it's important to note here that we are post confirmation. We are really almost nearly two years post confirmation. And in a situation where a case has been closed pursuant to a final decree, creditors would not have access to this issue — this information. This is not an absolute right of creditor to get this information. Even though that is — that is the case, Acis is absolutely amenable to providing this information to creditors.

Our concern is really having it available to litigation counterparties and parties who not only previously sued Acis but have — who have threatened to sue Acis, Brigade, U.S. Bank, and even Moody's, the rating agency. We believe we have met our burden with respect to 107(b). And given that we have demonstrated that the information is confidential, under 107(b) the Court does not have discretion to permit this information to be publicized on the docket.

Like I have said, we have been amenable to Ms. Lambert in providing this information to her in whichever — including whatever revision she would like in the order with respect to her and the United States Trustee having access to this information, our concern is really related to litigation counterparties. And I know that this is very unorthodox and it's not typical for operating reports to be redacted, however this is a very highly specific factual scenario that we don't expect to be the case in other — in other bankruptcies. Typically bankruptcies doesn't result in this type of satellite litigation, and we're well aware of that. And we hope that we're moving forward, where that isn't going to continue to be the case. But given what's already occurred to — for Acis and even though — even though Acis has the ability to defeat some of these frivolous claims or suits filed in Guernsey, this doesn't — we don't want to embolden litigation counterparties with information that they should be able — if they think they're entitled to, they can get a legitimate discovery.

So with that, Your Honor, we ask the Court to grant our motion for redact — to redact Acis' quarterly operating reports in a manner consistent with what you have seen of Exhibit B.

THE COURT: All right. Thank you.

Ms. Lambert, closing argument.

CLOSING ARGUMENT ON BEHALF OF THE U.S. TRUSTEE

MS. LAMBERT: Yes, Your Honor.

On balance, the Court has two components here. One component is the public's access to information, information that is used to evaluate compliance with the Code and the rules and the plan. And both the creditors and the public are entitled to that information.

On this side, the debtor, Acis, or the postconfirmation debtor contends that Stinson and Hunton should not knock at their door and ask for information if they need it. Over here we have the component of the contention that the litigation against the debtor or the postconfirmation debtor regarding compliance with the management agreement, compliance with its fiduciary duties and similar, and the side effects for Moody's and for — for other entities is a reason to protect information that normally would be public in the bankruptcy case.

The people over here should not have to knock on the door because there is an issue about compliance. Compliance is a requirement of the Bankruptcy Code and rules. And I know that the Court and I have experienced cases both personally and in observe where unfortunately people have gotten involved in ongoing years of litigation.

Historically, Mr. Terry and Mr. Dondero and their related entities had a business marriage. Historically, that business marriage has come to an end, but they still have a

child together, which is Acis. And the reporting about that child and the financial information about that child does not change the obligation to comply with the legal requirements and to comply with the contractual requirements. If there is litigation that is being filed, it is frivolous. Federal rules and the common law provide remedies for that, including remedies that are sufficient to compensate for that.

In addition, even with the third-party litigation, to the extent that it impacts the ability of Acis to do new contracts, there are also mitigation remedies for that. It's unfortunate, but that is the factual situation that we have. That factual situation is nonsufficient to limit the information that is normally publicly required in this context. Alternatively, the United States Trustee requests that the motion be denied in its entirety or, alternatively, that it be tailored in accordance with the prayer and the U.S. Trustee's objection.

THE RULING OF THE COURT

THE COURT: All right. Thank you.

Well, we're going — we're going to stop it right here. I think that Mr. Dondero technically did not have standing here today, that I think — I think Mr. Lynn weighed in and explained, you know, that he felt compelled to weigh in on a potentially precedential matter and so he's weighed in, and so we're going to cut it off there.

I have found this to be a somewhat tough call, tough decision here today because, on the one hand, it sort of feels like in this context, at this very late juncture of Acis' Chapter 11, there's sort of a no-harm/no-foul situation. We are not only well past, more than a year and a half past confirmation and the effective date, but we only have a couple of creditors left at this point other than Highland and — who gets the information pursuant to an agreement, or at least its professionals and independent board members do and Mr. Terry himself. So it sort of feels a little bit like, eh, if I would grant this motion, there are really likely only a couple of parties-in-interest who are impacted, and they have gotten notice, they haven't weighed in. That is Hunton Andrews Kurth and Stinson. But 107 governs this motion. And, as has been noted, it talks in terms of everything being public record and open to examination to the public without any charge. And the Court can deviate from this public access only on motion of a party to protect a trade secret, or confidential research, development, or commercial information, or to protect a person with respect to scandalous or a defamatory matter contained in a paper filed. So that's the governing statute.

So looking at the evidence today, would these quarterly operating reports and the numbers they reflect for receipts and disbursements and whatnot, is this in the nature of any of those elements of 107(b), I don't think it is. The only

thing that it might be is commercial information, but I really don't think there's been a showing that it is of the nature that 107(b) is intended to address.

Now don't get me wrong, I am very troubled by some of what I've heard today. I doubt Mr. Dondero is listening in personally, but I'm going to say, and maybe it will get back to him, maybe it won't, but that I'm very troubled by hearing that Dondero-controlled entities, and I believe the DAF, based on what I've heard in the past, is Dondero controlled, I'm very troubled that Dondero-controlled entities are suing Acis and parties that have dealt with Acis, U.S. Bank, Brigade, and the Moody's one is really mind-boggling, but I'm very troubled that this could be hampering Acis' ability to do a reset and it's driving up expenses.

And if these lawsuits were brought before me through a removal or any other mechanism, you know, first, I would have to look at subject matter jurisdiction of the Bankruptcy Court. Yes, we're way past the effective date of Acis' plan, but the Fifth Circuit case authority provides that if there is a dispute postconfirmation that bears on the interpretation, implementation, or execution of a confirmed plan, then the Bankruptcy Court has subject matter jurisdiction in that context. And it sure sounds like, hearing Mr. Terry's version of things today, which sounded very credible, that this is potentially impinging on the reorganization and plan of Acis.

So it's very troubling to me that — well, I've said it before in Highland hearings, that these battles just continue on, but if it's impairing with a plan I confirmed, it's impairing a plan I confirmed, it's impairing the ability to perform under that plan, then that is a problem for the plaintiffs.

Now I've heard there is no pending litigation in that regard, but I'm troubled by the April 2020 letter I saw that is essentially a suggestion we may start this up again, the litigation that we dismissed. 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. I haven't seen it, but, come on.

So, bottom line, I don't find the 107 standard here is met today, so I am denying entirely the motion. I haven't been convinced that this is commercial information that 107(b) justifies redacting or sealing. But, again, I am most troubled by what I've heard today.

I have found Mr. Terry to be a very credible witness today on these points. He's testified in this Court many times and I continue to find him a very credible witness.

And so to the extent Mr. Dondero is listening or gets

a transcript, I hope it's loud and clear to him that to the extent you are engaging in efforts surreptitious or overt to derail Acis in its reorganization, there is going to be a price to pay for that. So I hope that message gets to him.

Very troubled, very troubled by what I've heard today.

All right. Well, I think that concludes our business here today. Is there anything else anyone wants to raise?

MS. LAMBERT: Judge Jernigan, Ms. Lambert for the U.S. Trustee. Would you like me to prepare an order just as for the reasons stated?

THE COURT: I would like you to do that. Thank you very much. All right.

MS. LAMBERT: And I think I will order the — I think I will order the transcript and have it sent to Mr. Lynn.

THE COURT: All right. Thank you.

(The hearing was adjourned at 5:21 o'clock p.m.)

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State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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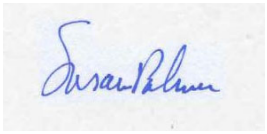

Susan Palmer
Palmer Reporting Services

Dated September 26, 2020

EXHIBIT 12

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

In Re:	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas June 30, 2020 9:30 a.m. Docket
Debtor.	MOTION FOR REMITTANCE OF FUNDS HELD IN REGISTRY OF COURT FILED BY CLO HOLDCO, LTD. (590)

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

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DALLAS, TEXAS - JUNE 30, 2020 - 9:37 A.M.

THE CLERK: All rise.

THE COURT: Good morning. Please be seated. This is Judge Jernigan, and I am ready to start our Highland setting. Let me start by getting appearances. I see Mr. Kane there on the video for our Movant this morning on for CLO Holdco. Is that correct?

MR. KANE: Yes, Your Honor. Thank you.

THE COURT: Good morning. All right. Who do we have for the Debtor? Do we have Mr. Pomerantz or others from the Pachulski firm?

MR. POMERANTZ: Yes. Good morning, Your Honor. It's Jeff Pomerantz and John Morris, and also on the phone is Greg Demo, on behalf of the Debtors.

THE COURT: Okay. Thank you.

MR. MORRIS: Good morning, Your Honor.

THE COURT: Good morning to all of you. All right. What about for the Unsecured Creditors' Committee? Do we have Mr. Clemente or Ms. Reid or others?

MR. CLEMENTE: Yes. Good morning, Your Honor. Matthew Clemente from Sidley Austin on behalf of the Creditors' Committee.

THE COURT: Okay. Good morning.

MR. CLEMENTE: Good morning.

THE COURT: All right. I'll just say, do we have

some of our other usual participants, maybe someone from Acis, Ms. Patel or Ms. Chiarello? No?

MR. ANNABLE: Your Honor, --

THE COURT: Oh.

MR. ANNABLE: -- this is Zachery Annable --

THE COURT: Oh.

MR. ANNABLE: Your Honor, --

THE COURT: Good morning.

MR. ANNABLE: -- this is Zachery Annable.

THE COURT: All right. Good morning, Mr. Annable, also for the Debtor. Any other --

MS. ANDERSON: Oh, sorry.

THE COURT: Oh. Go ahead?

MS. ANDERSON: Yes. Sorry, Your Honor. I (inaudible).

MS. PATEL: Good morning, Your Honor. Rakhee Patel on the phone. I'm not planning on participating. We're just listening in today.

THE COURT: All right. Any other counsel wishing to appear this morning?

MS. ANDERSON: Good morning, Your Honor. Oh.

THE COURT: Go ahead.

(No response.)

THE COURT: Do we have -- is that maybe Ms. Anderson?

MS. ANDERSON: That was, Your Honor. I apologize.

This is Amy Anderson with Jones Walker on behalf of the Issuers. And Mr. James Bentley with Schulte Roth & Zabel is also on the phone this morning.

THE COURT: All right. Good morning to you both. Any other people wishing to appear?

MR. PLATT: Your Honor, Mark Platt for the Redeemer Committee of the Highland Crusader Fund. And Marc Hankin from Jenner & Block is on the phone as well.

THE COURT: Okay. Good morning to you both.

MR. HANKIN: Good morning.

THE COURT: Anyone else?

MR. CLARK: Your Honor, this is Brian Clark from Kane Russell. I'm here with Mr. Kane on behalf of CLO Holdco.

THE COURT: Okay. Good morning.

MR. CLARK: Good morning.

THE COURT: All right. Anyone else?

All right. Well, I'll start by asking: Do we have any stipulations or agreements with regard to evidence or how we're going to proceed this morning?

MR. KANE: Yes, Your Honor. This is John Kane for CLO Holdco. We do.

THE COURT: All right.

MR. KANE: I would like to note on that question that we've actually worked very well together. CLO Holdco has had a pretty open discourse with Committee's counsel and got on

the phone yesterday to go through any final evidentiary issues, and then had some follow-up late last night. And so what we'd like to announce to the Court is that there's a stipulation to the admissibility of all of the exhibits in both parties' witness and exhibit list.

THE COURT: All right.

MR. KANE: And on top of that, there are a number of factual stipulations. And I can walk through that on our kind of case-in-chief presentation, or we can walk through that now, either way, whichever is most convenient for the Court.

The actual stipulations are largely related to what is and isn't a dispute in this hearing.

So, the Committee has stipulated that, for the purposes of this hearing, there is no contest about the amount in controversy. CLO Holdco is claiming that it is entitled to the full amount of the funds in the registry, and there's really no dispute about the amount that CLO Holdco is asserting its interest in. There's no accounting concerns here.

THE COURT: Okay.

MR. KANE: There is also a stipulation for the purposes of this hearing that I do believe bears reading into the record, and I'd like to do that on the case-in-chief, just to make sure that everything is clear, we're not overstating or understating any party's position.

THE COURT: Okay.

MR. KANE: But, in summary of that, there's really no dispute that, upon CLO's obtaining the interests in the Dynamic and AROF Funds, it did not, after obtaining them, later transfer that interest to any other party.

THE COURT: Okay.

MR. KANE: And then, finally, Your Honor, this was reached late last night: There is a stipulation between the parties for the purposes of this hearing to a statement made by the Debtor in a footnote that essentially states that there was a transfer of a note from the Dugaboy Trust, it's a note payable owed by the Dugaboy Trust, to the Get Good Trust, that that $24 million note was transferred to the Debtor, and that the principal paid down on that note has reduced the obligation from about $24 million to about $17.5 million in principal obligations, and that the Dugaboy Investment Trust has been paying amounts due and owing under that note to the Debtor. We'll go into a little bit more detail about why that's relevant in our case-in-chief and in our closing argument.

THE COURT: All right.

MR. KANE: I think the way we'd like to proceed, Your Honor, is each side provide an opening statement, and then we'll transition to showing our case-in-chief and kind of a walk-through of the evidence, and then a closing argument to

kind of draw things to a conclusion, Your Honor.

I will say that, given the stipulation reached last night on the payments on the Dugaboy Trust, we do not believe that the testimony of Mr. David Klos is going to be necessary any longer.

THE COURT: All right. Let me recap a couple of things. First, there was the stipulation as to the admissibility of each other's exhibits. The Movant's exhibits, your exhibits, Mr. Kane, were filed at Docket Entry No. 782, so that's where I'm going to look today as exhibits are referenced.

Now, I know there were some sealed documents in the list of exhibits. I show Exhibits 11, 12, 13, 14, 15, and 16 are actually under seal. All right.

MR. KANE: Yes, Your Honor.

THE COURT: So, then turning to the Creditors' Committee, their exhibits are at Docket Entry No. 789 on PACER. They have three exhibits.

So those are the exhibits for the record that we're talking about, correct?

MR. KANE: Yes, Your Honor.

MR. CLEMENTE: That's correct, Your Honor.

THE COURT: Okay. Thank you.

And then the last thing I wanted to clarify is your comment about there's no contest about the amount in

controversy. So, dollars and cents, are we talking about $1,516,354.38 related to the Dynamic Fund and then $898,075.53 regarding the Argentina Fund?

MR. KANE: Yes, Your Honor.

THE COURT: Okay. Very good.

MR. KANE: John Kane for CLO. Yes, Your Honor.

THE COURT: Okay. Thank you. All right. Well, you may make your opening statement.

MR. KANE: Thank you, Your Honor.

OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

MR. KANE: So, I would like to begin with just making sure that we have -- we've set the stage for this dispute as well as I can here. I want to look at, Your Honor, the requests for relief that are before this Court.

So, CLO has requested that this Court remit funds from its registry. And there is no other (inaudible) request for leave by any other party.

There is no adversary proceeding against CLO Holdco filed by the Committee. There are no claims or causes of action of any kind asserted by the Committee. There is no objection to CLO Holdco's proof of claim on file. There is no motion for a prejudgment writ of attachment, and there is no motion by the Committee for an injunction. And we'd argue that that would be procedurally improper anyway.

The only thing that the Committee has done is objected to

this Court's release of funds from the registry to CLO Holdco.

Your Honor, this is a -- this is a registry dispute. This is a dispute under Title 28 of the United States Code, Section 2042. And under that statute, CLO Holdco has the burden of proof here to show by a preponderance of evidence that it has a valid legal claim to the funds in the registry of the Court.

So, how does it prove by a preponderance of the evidence that it has that claim? Courts looking at this issue show that CLO Holdco has to show that it has title to the funds, it has to provide evidence of ownership, and it has to show proof that that claim is current. In other words, it's not an unliquidated claim, it's not a claim that's been transferred to somebody else or that's possessed by some other party.

So, Your Honor, what is the evidence going to show in this case? And as we walk you through our case-in-chief, we think it's going to be very clear that the evidence will show that CLO Holdco obtained an interest in what we are going to refer to as the Dynamic and the AROF Funds. Those interests are evidenced by executed subscription agreements. Once they were in CLO Holdco's possession, those interests weren't transferred to any other party.

The Dynamic and the AROF Funds were liquidated. The Debtor accounted for CLO Holdco's interests in those funds. The Debtor sought to distribute those funds to CLO Holdco. There is no dispute over the amount of CLO Holdco's liquidated

interests in those funds. And now CLO Holdco is seeking a request for the remittance of those funds from the registry of the Court.

Your Honor, our evidence will completely establish that CLO Holdco has a claim, a valid, legal claim well beyond the preponderance of the evidence standard.

Your Honor, those, the facts, the evidence that proves up each of those elements are not subject to any objection and are not refuted.

Based on that evidence, Your Honor, the bigger question to CLO Holdco is why are fighting in this contested matter? We have to look to the Committee's objection here. What are they really arguing?

The Committee's argument is essentially a guilt-by-association argument. There's a suggestion in the Committee's objections that James Dondero did bad things. CLO Holdco is this related entity, and so it must have done bad things, too. The Committee needs time to investigate potential claims and causes of action, and because CLO Holdco is a Cayman entity, any judgment that it might hypothetically obtain in the future will be uncollectable unless these funds are seized and held in the registry of the Court and used as a surety against that later hypothetical judgment.

So, Your Honor, this is an evidentiary hearing, and what we would ask the Court to do is scrutinize the evidence.

So, what is the Committee's evidence likely to show? Well, there are only three exhibits submitted by the Committee. One of them is the Acis opinion that you issued on the involuntary file. The second is the Acis opinion you issued confirming the plan of reorganization in that case. And those two opinions combine for a grand total of two total references to CLO Holdco. And the third exhibit proposed by the Committee is a transcript of the March hearing on the distribution motion, in which there really were no evidentiary issues addressed associated with CLO Holdco at all.

So the better question becomes, Your Honor, what elements is missing? And as we go through our case-in-chief, we'd ask you to consider the following. The Committee will provide no evidence that it pursued any discovery from CLO Holdco in the ten weeks since CLO Holdco filed its motion for remittance of funds from the registry. There were no follow-up questions asserted by the Committee in response to CLO Holdco's deposition by written questions and David Klos' responses to those questions. The Committee did not subpoena any witness to testify at this hearing, and they've presented no evidence of wrongdoing by CLO Holdco. And finally, the Committee will show that there is no evidence whatsoever regarding CLO's ability to satisfy a money judgment, should the Committee obtain that judgment in the future.

So, if we look at the scope of the evidence that's

presented by the parties in this case, we have CLO Holdco presenting overwhelming evidence of a present valid legal claim to the funds in the registry of the Court, and no evidence submitted by the Committee to refute that fact, and no claim for affirmative relief by the Committee or any evidence that would be necessary to prove up any claim for relief.

So, Your Honor, based on the evidence that you will hear today, we ask that this Court deny the Committee's objection and grant CLO Holdco's motion.

You will see that there is no evidence supporting any kind of injunction or prejudgment writ of attachment, and that the -- that CLO Holdco has satisfied its burden of proof by a preponderance of the evidence to show ownership of the funds in the registry that this Court holds as a statutory trustee for its benefit.

Thank you.

THE COURT: All right. I am going to interject something here. I'm glad that the March 4, 2020 transcript is part of the evidence here, because I have to say -- I had wanted to go back and look at that, and had not done it, and this is why -- your words, Mr. Kane, were, Why are we fighting this contested matter? I have to say, I had the same reaction myself, but with a slightly different spin on it. I thought this was a pragmatic solution that everyone agreed to on March

4th. I don't think CLO Holdco, Ltd., your client, made a formal appearance at the hearing on March 4th, but I take it you all got notice of the hearing.

Tell me why so quickly we're revisiting this issue. That's the way I look at it. Maybe my perspective is not accurate and you're going to tell me it's not accurate. But it feels like to me we just were here on this issue with the Debtor's own motion filed February 24, wanting a court order blessing these disbursements to affiliated or potentially insider parties who were due to receive these funds, and then things just sort of evolved at the March 4th hearing where everyone would agree that the money -- I guess at least the money that was owed to your client, as well as Highland Capital Management Services, Inc. -- would be kept in the registry of the Court, just as a placeholder. Okay? So that's the perspective I come in with. That is my memory of what happened. Tell me why I'm not seeing it the way you're seeing it.

MR. KANE: Yes, Your Honor. For the record, John Kane for CLO Holdco. I'd be happy to address the Court's question.

That motion was filed seeking relief on essentially an expedited basis.

I'm sorry. I don't know if I cut out there. I had a little glitch on my screen.

But that hearing sought relief, in essence, on an expedited basis, and drew a vehement objection from both the Committee and also the Acis parties, Mr. Terry and the like.

When we looked at that issue, we determined that there was likely a reasonable solution. CLO Holdco's representative, Grant Scott, had conversations with Judge Nelms, one of the Independent Directors for the Debtor, discussing the resolution of a -- of a proposal that would resolve some of what we understood to be the Debtor's concerns about its duties to distribute those funds.

It would not be a permanent solution. At least, that was our understanding. Putting funds into the registry of the Court would preserve the issue of CLO Holdco showing this Court that it had a legal entitlement to those funds, as opposed to proceeding with some dispute over the technical merits of the Debtor's right or need legally to distribute those funds to the parties.

So we felt like it was a reasonable remedy to satisfy the Debtor's concerns and also to satisfy the Committee's concerns. The Committee would have an opportunity to continue discovery and to take discovery following the filing of that motion, as we sought to prove to this Court that we have a right to the funds, to dispel any concerns that the Court might have.

And frankly, Your Honor, I think that there is some case

law out there that would suggest that you had a right to deposit the funds in the registry of the Court. So we didn't think that there was any issue whatsoever with depositing the funds in the registry, understanding that that would allow us an opportunity to prove to you at a later date that we had a right to remove those funds from the registry.

And Your Honor, I'm happy to try and dig through it real quick, but there's language in the transcript that talks about the preservation of the rights of the parties whose funds would be pled into the registry to then go seek the funds out of the registry as part of that agreement. So that's exactly what we're doing. The issue here for us, Your Honor, is that we can establish our burden of proof that we have a right to these funds.

I understand that the Committee had concerns. Right? I mean, they're a little bit in the same position as the Debtor. I understand, as a practitioner, why the Committee had reason to want to scrutinize the transactions involving CLO Holdco as a related entity. That doesn't mean that they have a (inaudible) right to preclude those distributions, and that's why we're here.

So we've now had ten weeks for the Committee to perform discovery, to heavily scrutinize the nature of the transactions involving CLO Holdco. Leading up to this presentation to the Court of our evidence that we have a legal

and factual right to have these funds back out of the registry under Title 28 of the U.S. Code, the Committee didn't do any discovery at all on these issues. At least, not to CLO Holdco.

So we believe that we're here trying to show the Court, okay, we want to dispel the Court's concerns. The Committee has had an opportunity to scrutinize these transactions. But we'd like our money. There are operational needs and the like. We would like to have our funds. And we believe that, unequivocally, the funds that are in the registry of the Court are CLO Holdco's. They're not subject to a claim of any other party.

So that, Your Honor, is why we've submitted our motion seeking a recovery of the funds from the registry.

THE COURT: All right. So, I think what I hear you saying is that on March 4th you all were agreeable to this money being put into the registry of the Court, but everyone understood that you were, pretty promptly after March 4th, going to file a motion to get an adjudication on why you should get these funds. Is that what you're saying?

MR. KANE: What I'm saying, Your Honor, is, at the time, we didn't have any problem with the funds being pled into the registry of the Court, understanding that we had reserved our right to later seek the funds from the registry.

THE COURT: Well, --

MR. KANE: I'm not sure --

THE COURT: -- again, I --

MR. KANE: I'm not sure what the commitment says.

THE COURT: Maybe I'm splitting hairs, but we were here in March, and then April 15th you file the motion. And, you know, I'm -- it just -- I guess I'm trying to understand. You know, we were here to litigate this in March, and then this, you know, kind of status quo agreement was reached. And then a month later, about a month later, you're filing the motion to tee up the issue all over again.

It's just -- it's not what I anticipated. Yes, I knew everyone was reserving their rights, but it wasn't what I was anticipating. You know, if I had known a month later that one of the parties who was agreeing to this was going to be filing a motion, I would have just said, you know, why don't we do this today.

So, again, I'm asking: Am I just misremembering this? Did everyone but me have a clear idea that, pretty promptly after March 4th, you all were going to ask to come back on, you know, a non-expedited basis for the Court to adjudicate what was already teed up that day to be adjudicated?

MR. CLEMENTE: Your Honor, the --

MR. KANE: Your Honor, I can't speak to the other parties' understanding.

THE COURT: Okay. Mr. Clemente was kind of raising

his hand to speak up.

MR. CLEMENTE: Yes.

THE COURT: Am I going down a trail here that I'm the only --

MR. CLEMENTE: No.

THE COURT: -- I'm the only one --

MR. CLEMENTE: No, you're not.

THE COURT: Okay. Mr. Clemente?

MR. CLEMENTE: No. No, you're not, Your Honor. I have a couple comments, and I have much more to say, obviously. But just direct on what Your Honor said: Nothing has changed since March 4th. I think that is fair to say. And interestingly, in the initial motion, you know, this idea of the 28 U.S. 2042 governing and it becoming a simple issue of taking the time regarding amounts or ownership of the money in the registry was not raised in the motion. So I found that kind of interesting.

But I was before you, Your Honor. And you'll recall on March 4th that -- that's absolutely not. I thought what we were doing was merely preserving the status quo for some period of time, which is what I believe Your Honor is suggesting that she recalls as well.

It would have been, I think, a little counterintuitive for us to have all been there, ready to do that litigation, and then decide to put something in the registry, and then have

the argument that you can't look at the Bankruptcy Code to determine whether the money should come out of the registry or not, and then be back in front of you, you know, three or four weeks later to relitigate any of those issues.

So that was absolutely my recollection and understanding, Your Honor, and I think from your comments I intuit that it was your understanding as well, that this was not something that we were going to deal with again very quickly, but was something to preserve the status quo, a reasonable solution, an equitable solution under Section 105. And I believe that's what Your Honor ordered.

THE COURT: All right. Well, I'll let you go ahead and make your opening statement. I think Mr. Kane was finished before I started asking my questions.

MR. CLEMENTE: Okay.

THE COURT: Mr. Clemente, you may proceed.

MR. CLEMENTE: Thank you, Your Honor. I appreciate that. So, and I'll try and be brief on the opening.

OPENING STATEMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

MR. CLEMENTE: Your Honor, like it or not, CLO Holdco is not an independent, unrelated, third-party investor merely seeking distributions on account of its own arm's-length independent investments. Instead, CLO is a related party in literally every sense of the word. That's not in dispute.

That is part of the Jim Dondero or Mr. Dondero web of entities.

CLO Holdco is effectively controlled by Mr. Dondero. It was seeded and received assets transferred from the Debtor, including the assets giving rise to the distribution that's in the registry. None of that is in dispute. All of this at a time when Mr. Dondero controlled the Debtor as well as the parties through the various intermediate transactions that ultimately resulted in the assets arriving in CLO Holdco. That is not in dispute.

Mr. Dondero's past fraudulent conduct, including fraudulent transfers, is also not in dispute. He was on all sides of this transaction. And therefore this transaction, along with many of the others, must be viewed with skepticism and scrutinized very closely by the Committee and by this Court.

The Committee has only just begun such work, Your Honor. And given the Byzantine empire created by Mr. Dondero, it will take time and significant resources to fully and properly conduct an investigation.

And Mr. Kane referred to, did we do discovery? We did not. Our reaction to this motion was the same as Your Honor. And as you can see by the stipulations that we have agreed to for purposes of this hearing, we didn't want this to be a situation where the estate would spend a tremendous amount of

resources to deal with something that we thought that was dealt with on March 4th.

But aside from that, given the web that's been created here, we can't just isolate one piece of it. We can't just be like, I'm going to look at the CLO Holdco documents and be able to develop a full theory. This is a tapestry of interrelated entities that is opaque and vague and purposely so. So you can't just focus on one piece and then try and say, well, I know what this piece is, because that piece has many interrelated complex ramifications and relationships where, frankly, you can't just say, okay, let's focus on this one issue, because you're going to miss the entire tapestry.

We still need to examine, as I mentioned, the whole thing, and this takes time and it takes an investment. So while I understand CLO Holdco wants to receive its distribution, I also understand that my constituency wants to be paid, some of whom have been waiting for over a decade.

To be clear, Your Honor, my constituency didn't choose to be here in the bankruptcy. But CLO Holdco chose to associate itself with Mr. Dondero and to take assets from Highland in convoluted related-party transactions and reap the benefits of those transactions. CLO Holdco can't now step away from that and try and suggest to Your Honor that this is about taking time under 28 U.S.C. 2042. That was never what it was about on March 4th, and it's not what it's about today.

Instead, it's about the overall situation and why we find ourselves here.

And Your Honor, I'm here to tell you, I think, and I believe Your Honor would agree, that the Bankruptcy Code and Section 105 and all the other provisions of the Code are alive and well in this courtroom, despite the distribution being put into the registry on March 4th.

You clearly found you had the authority under Section 105 to hold the funds, nothing has changed in the intervening time, and therefore the funds should remain in the registry.

This is not a dispute under, you know, 28 U.S.C 2042 about ownership, again, or where somebody pleads an amount in the registry to let other people argue that they actually owned the money. This was always about preserving the estate and maintaining the status quo.

Such a result might be unfair if it was a different party, but CLO is a related party controlled by Mr. Dondero. It's not an unaffiliated party.

So, from our perspective, the motion should be denied, Your Honor.

THE COURT: All right. Thank you.

I assume no one else has an opening statement because there were no other pleadings filed regarding this motion.

All right. Mr. Kane, let's turn to your evidence.

MR. KANE: Thank you, Your Honor. I'll tell you

what. Just to make sure that we're hitting on the issue that was out in front of this Court a moment ago, I'd like to start by just directing the Court's attention to the Committee's Exhibit 3 or Exhibit C, which is a transcript of that hearing from March.

THE COURT: Okay.

MR. KANE: And Your Honor, Page 119, Lines 4 through 11, are your statements about what you were doing entering the order. And you know, when the funds are being pled into the registry of the Court, but I do think the Court has broad equitable powers to remedy, to fashion remedies that preserve the status quo. And I think it is appropriate here to order that most of this money, that most of the $8.6 million that would go to related investors in these three Funds -- this is the important part -- be put into the registry of the Court pending further motions, orders, adversary proceedings anyone wants to file to make a claim to that money.

So, Your Honor, that's what we did. We -- the rights were reserved. CLO Holdco made a motion, filed its essentially claim to the money that's in the registry of the Court.

So, Your Honor, I'd like now to just briefly walk through the exhibits, because I think it's important to understand exactly what CLO Holdco's claim to the funds really is.

So, Your Honor, first, I'd like to move for the admission of CLO Holdco's Exhibits 1 through 16 and all subparts.

THE COURT: All right. Well, I understood earlier there is a stipulation to the admissibility of these. So, for the record, I am admitting CLO Exhibits 1 through 16 in their entirety, and they appear at Docket Entry 782. All right?

MR. KANE: Thank you, Your Honor.

(CLO Holdco's Exhibits 1 through 16 are received into evidence.)

MR. KANE: Your Honor, Exhibit 1A is the Highland Capital Loan Fund, LP subscription agreement. Now, this subscription agreement is in the amount of $2,032,183.24 and is dated December 28, 2016.

You'll notice that CLO Holdco obtains an interest in the Highland Capital I Fund through a transfer in kind. Schedule 1 to Exhibit 1A shows the progression of this interest, admittedly, from the Debtor to the Get Good Trust down through a series of charitable entities, through the Charitable DAF, to CLO Holdco.

Your Honor, Exhibit 1B, we've included just make sure everybody's on the same page. The Highland Capital Loan Fund, LP, in which H -- CLO had the subscription interest, had a name change to essentially what we were referring to as the Dynamic Fund. It was changed to Highland Dynamic Income Fund, LP. So when there are references to the Highland Capital Loan Fund subscription, it's really a reference to the subscription in the Dynamic Fund.

Exhibit 1C is Highland Argentina Regional Opportunity Fund Limited subscription documents. This is a $2.5 million subscription dated June 6, 2018, showing that CLO Holdco obtained its $2-1/2 million subscription in the AROF Fund by payment.

Exhibit 1D is a NAV statement dated November 11, 2019 showing CLO Holdco's interest in the Dynamic Fund totaled $1.689 million and change.

Exhibit 1E is the NAV statement from December 31, 2019 from the AROF Fund showing that CLO Holdco's interests in that fund were valued at $918,905.82.

Exhibits 1F and 1G are the investment management agreements for Dynamic and AROF. And then Exhibits 1H and 1I are the Dynamic LP agreement and the AROF LP agreement.

We can skim over Exhibits -- well, actually, I'd like to point to Exhibit 2 and note that there are no (inaudible) related to any CLO Holdco wrongdoing in the Committee's (audio gap) to the -- CLO Holdco's motion for remittance of funds held in the registry of the Court.

Also, on Paragraph 10, the Committee acknowledges that, in exchange for the transfer of the Dynamic interests, the Get Good Trust transferred the Dugaboy Trust note of about $24 million.

And in Paragraphs 17 and 18, the Committee acknowledges that it had been pursuing discovery on CLO Holdco obtaining

interests in the Dynamic Fund since early February.

Your Honor, Exhibit 3 is CLO Holdco's reply to the Committee. Exhibit 4 is the notice of hearing. Exhibit 5 is the Debtor's February 4th -- or, 24th distribution motion. And Your Honor, we have a stipulation between the Committee and CLO Holdco for the sake of this hearing to the facts included in Footnote 7.

So, in Footnote 7, the Debtor states, I'll read it into the record for the Court:

> The limited partnership interests in Dynamic held by CLOH, CLO Holdco, were originally held by the Debtor. The Debtor transferred those interests to the Get Good Nonexempt Trust, defined as Get Good, on December 28, 2016, in exchange for 97.6835 percent of Get Good's interest in a promissory note in the original principal amount of approximately $24 million issued by the Dugaboy Investment Trust. Get Good subsequently transferred its interests in Dynamic to Highland Dallas Foundation, which transferred those interests to CLO Holdco. The Dugaboy Investment Trust has been paying amounts due and owing under the $24 million note, and the current principal amount is approximately $17.5 million.

Your Honor, that's an important fact, and I'll get to that in just a moment. But one of the reasons why that's an

important fact is the Dugaboy Investment Trust note is actually (audio gap) note with a balloon payment due at maturity. So, paydown of the principal means that the Dugaboy Trust is actually paying Highland Dallas Foundation principal payments on that note, despite not having a strict contractual obligation to do so until the maturity date, which expires in another 16 years. So it's been paying principal that it doesn't have to pay, and interest on the note, which was exchanged for the Dynamic and other interests transferred to the Get Good Trust.

Your Honor, the next exhibit is Exhibit 6. This is the Committee objection to the distribution motion. We'd also note that there is no reference to any bad acts by the Committee alleged against CLO Holdco other than simply having a relationship with James Dondero and the fact that its investments were managed by Highland. And that's included in Paragraph 11 of that pleading.

7 is the Debtor's reply to the Committee's objection.

8 is the Debtor's responses to CLO Holdco's deposition by written question. Your Honor, this has been stipulated as admissible in full by the Committee. And we think that this is important because, starting on Page 7 of this exhibit, David Klos, the chief accountant -- or, the chief accounting officer of Highland Capital Management, LP, the Debtor, walks through the Debtor's means for determining ownership, the

accounting for interests, the liquidation of Funds, and determining amounts due from the proceeds of those Funds to CLO Holdco for both the Dynamic and the AROF Funds.

So, again, Your Honor, the Committee is not stipulating that the Debtor has appropriately performed this function and that the amounts that are purportedly due from the Debtor's liquidation of these Funds to the Committee is accurate.

Number 9, Your Honor, is a stipulation regarding CLO Holdco's lack of a transfer of any interests in Dynamic and the AROF Funds.

I noted for Your Honor at the beginning of my open that this was a stipulation I really did want to read into the record. I want to be fair to the Committee, and there are some limitations on this stipulation. So what I'd like to do is read this, then. This is an email statement from Allison Stromberg of Sidley on behalf of the Committee. And Mr. Clemente is cc'd on this email dated June 22, 2020: "With a few edits, we can agree to the stipulation for the purposes of the June 30 hearing." And this is the edited version that Ms. Stromberg proposed:

> "The Committee and CLO stipulate to the following, solely for the purposes of this hearing. Grant Scott represented to the Committee that CLO Holdco, Ltd. did not, after obtaining the disputed interests in the entities commonly referred to as the Dynamic and

the AROF Funds, transfer those interests to any other party. The Committee, solely for the purposes of this hearing, does not contest that assertion and stipulates to that fact. This stipulation shall not be binding on the Committee in any future proceedings and shall not have any preclusive effect against the Committee in any future disputes, contested matters, adversary proceedings, or other legal matters between the Committee and CLO or any other party. Further, this stipulation shall not in any way preclude or limit the Committee from asserting claims or causes of action against CLO in the future, including but not limited to claims challenging the validity of CLO's disputed interest and/or transactions through which CLO Holdco obtained such disputed interests or claims to avoid and recover such disputed interests in the Dynamic and AROF Funds or their proceeds."

Your Honor, for the sake of this hearing, no dispute that when CLO obtained those interests, it didn't transfer them to any other party.

Exhibit 10 includes another stipulation between Committee's counsel and CLO Holdco's counsel. And this relates to some of the exhibits that are already in the record. And for that, Your Honor, we can skim over this.

When the motion was initially filed, we had a signature

page issue on one of the exhibits and a metadata strip on another exhibit that we corrected. We provided the corrected exhibits to the Committee. The corrected exhibits were included with this motion. And it's noted in our witness and exhibit list which corrected exhibits those are. They'll be 1A and 1C.

Exhibit 11, Your Honor, is an important exhibit for us. And we would direct the Court's attention to Page 3 of this exhibit. So, on Page 3, there is a list of debits and credits associated with the Highland Argentina Regional Opportunity Fund statement of accounts -- essentially, a bank statement from June 6, 2018 to June 30, 2018.

You'll note, Your Honor, that there is an incoming source, an incoming wire transfer from CLO Holdco, Ltd., which credited the AROF account by $2.5 million. That's the date of this subscription agreement, Your Honor, and it's consistent with the subscription agreement statement that shows that CLO Holdco obtained a subscription in the AROF Fund by a wire transfer. So it's not a transfer from Highland of the interests like it was with the Dynamic Fund.

Exhibit 12, Your Honor, is a purchase and sale agreement. Now, this is an exchange between the Get Good Trust and the Debtor. It's dated December 28, 2016. And I'll talk about this a little bit in our closing argument, but I did want to just have a brief walk through this. Under this purchase and

sale agreement, there is an exchange. This is not a one-sided agreement that denudes the Debtor of assets without anything in return. This exhibits shows that the Debtor receives the Get Good interests in the Dugaboy note, which was approximately a $24 million note. In exchange, Get Good received about $23 million worth of various interests. It received a $2.032 million interest in the Highland Loan Fund. And Your Honor, if you'll recall, that's the Dynamic Fund. It received certain American Airlines call options that had a fair market value at the time of about $8.7 million. And then it received various participation interests in Highland's interests in the Crusader Funds, which had a fair market value at the time of about $12.6 million.

Now, Exhibit A, which is internally attached to Exhibit 12, is a copy of the Dugaboy note. And that, Your Honor, shows that this was an interest-only note, about $2.75 percent interest, with the principal due on a 20-year term. So, annual interest payments, principal due at a later date, and there was no prepayment penalty on principal. So, Your Honor, you've seen that the principal was paid down at least about $6-1/2 million, in addition to other interest payments made under the terms of that note. So the Debtor did receive consideration in exchange.

Exhibit 13 is an amendment to that purchase and sale agreement. And we included this as what we call a full

disclosure agreement. There is an adjustment to the deal terms in which the call options are revoked, and instead of the Get Good Trust receiving the call options in the American Airlines stock, it received participation interests. There's no adjustment to the Dugaboy note, and there's no adjustment to the Crusader interests that were transferred.

Your Honor, Exhibit 14, this is also just a full disclosure exhibit. This shows that the Get Good Trust was identifying as a trust beneficiary the Highland Dallas Foundation, to make, in essence, the charitable donation that would then be pushed down to the Charitable DAF and then invested by CLO Holdco.

Exhibit 15 is the Dynamic Fund side letter exhibit dated January 10, 2017. And this really is included to show, in the last "Whereas," Your Honor, the series of transfers from the Debtor to the Get Good Trust down to CLO Holdco and how CLO Holdco came to acquire the interests in the Dynamic Fund.

And finally, Your Honor, is Exhibit 16. We think this is an important exhibit for a number of reasons. First, the Debtor disclosed in correspondence with CLO Holdco and the Committee that this exhibit was produced in November of 2019 by the Debtor to the Committee. I notice that the Bates stamp was a significantly lower number than the rest of the exhibits we received in our discovery request.

But this document shows a number of important facts. If

you look at Page 2, Your Honor, this shows that the consolidated balance sheet for Highland Capital Management, LP showed a net -- a positive net worth at the time of about $418 million. And if you look at it on a cash flow basis, the consolidated income statement for year-end dated December 31, 2016 shows about $39,356,000 of net income in 2016 attributable to Highland Capital Management, LP.

And then if you turn the Page 33, Your Honor, there is a heading called Investment Liability. And the bottom paragraph on -- over on Page 33 of Exhibit 16 shows that, in this audited financial statement, PricewaterhouseCoopers had analyzed this transfer transaction. It states:

> "On December 28, 2016, the Partnership" -- that's Highland Capital Management, LP, the Debtor -- "entered into a purchase and sale agreement with the Get Good Nonexempt Trust. In consideration for a note receivable from an affiliate, the Partnership sold or participated in certain investments that it already held, with the participated investments carrying an aggregate market value of $21.3 million as of the date of the transaction. The fair value of the agreement will fluctuate with the fair value of the securities throughout the term. As of December 31, 2016" -- that was three days later -- "the participated investment value had reduced from $21.83

to $18.7 million."

Again, Your Honor, this is in exchange for a $24 million note that it's been paying.

So, Your Honor, given the stipulation of the Debtor, we no longer need to call David Klos, so what we would propose to do at this time is close our case-in-chief and allow Mr. Clemente to go forward with (audio gap).

THE COURT: All right. Mr. Clemente, you may proceed with your evidence.

MR. CLEMENTE: Thank you, Your Honor. Just a couple of things to note (indecipherable) into argument, though I would point Your Honor to the Committee's -- so, first of all, I'd move for the formal admission of the Committee's exhibits for purposes of this hearing, Exhibits 1 through 3, which are the two Acis opinions and the transcript from the March 4th hearing. Again, it's subject to the stipulation Mr. Kane referenced earlier.

THE COURT: All right. Committee Exhibits 1 through 3 are admitted by stipulation, and they appear on the docket at Docket Entry No. 789.

(Unsecured Creditors' Committee's Exhibits 1 through 3 are received into evidence.)

MR. CLEMENTE: Thank you, Your Honor. And I'd like to point Your Honor to Page 43 of Exhibit 3, which is the transcript from the March 4th hearing, and read into the

record a statement by Mr. Lynn which says, "We'd like to suggest the following, should the Court determine" --

THE COURT: Okay. Tell me --

MR. CLEMENTE: Yes?

THE COURT: I didn't hear what page again?

MR. CLEMENTE: Oh, I'm sorry, Your Honor. It's Page 43, starting at Line 14.

THE COURT: Okay.

MR. CLEMENTE: And Mr. Lynn states, "We'd like to suggest the following, should the Court determine that the motion be denied, and that is that instead of the Debtor retaining the funds, that the Debtor distribute the funds into the registry of the Court. That way, they" -- meaning the Debtor, Your Honor -- "lose control over the funds and they can say they distributed them in accordance with their agreements and applicable law."

So, the point, again, Your Honor, from the hearing was to simply preserve the status quo yet ensure that the funds would be safeguarded by depositing them within the registry of the Court.

Additionally, Your Honor -- and Your Honor may be scratching her head as to why the Committee stipulated to all of this. It's not about taking in kind and filing three documents. That was never the issue at the March 4th hearing. Frankly, that's not the issue today. The March 4th hearing

wasn't about ownership of the Funds, which is what the exhibits Mr. Kane just walked through purports to show. The March 4th hearing was about the web and the circumstances surrounding the case and the circumstances surrounding CLO Holdco.

What Mr. Kane's exhibits don't refute is the fact that all of the interests that CLO Holdco has on which it's here today and funds were deposited into the registry on account of came from the Debtor. What Mr. Kane's factual record does not dispute is that, at that time, the Debtor was controlled by Mr. Dondero. And the Dugaboy Trust and the Get Good Trust were at various times controlled by Mr. Dondero, Mr. Scott, and Nancy Dondero, Mr. Dondero's sister.

So, again, Your Honor, it isn't about walking through account statements. It's about the context in totality.

Finally, Your Honor, and I believe the exhibits Mr. Kane referred to, including Exhibit 12, they make clear, and I think Mr. Kane admits that, that these interests did come from the Debtor.

Finally, Your Honor, the other factual point I would like to make refers to Mr. Kane's Exhibit 16, which he finished up with. These are the consolidated financial statements of Highland Capital Management. I find it all very interesting what the book values of assets and liabilities are, but I do not believe that there's any reference in these financial

statements to contingent liabilities or litigation claims, including claims with respect to Redeemer or potential claims with respect to UBS.

So, Your Honor, I would just suggest that this exhibit, although for purposes of the stipulation we agree with what the numbers, you know, that the numbers say what they are, it's entirely replete -- and I think Your Honor would know, of course, that any analysis of fraudulent transfer would have to take into a reasonable estimate of contingent liabilities.

So that's the only other point I would like to make from the factual background, Your Honor. Unless you have any questions for me, I'll just reserve the rest for argument.

THE COURT: All right. I have no other questions at this time for you.

All right. Shall we go to closing arguments, then?

MR. KANE: Yes, Your Honor. This is John Kane for CLO Holdco. I did want to make one important clarification, because it was about a characterization of the exhibits that were presented by CLO Holdco.

Mr. Clemente stated that we had no -- or, that the evidence that I've presented indisputably showed that all of the interests have been liquidated, so the funds that we're seeking here today came from the Debtor. And what our Exhibit 11 shows is that CLO Holdco used its cash that it wired to the AROF Fund to obtain its interests in AROF.

That was not a transfer by the Debtor. There is no evidence suggesting whatsoever that that flowed down from a Highland interest to CLO Holdco. That was a cash acquisition by CLO Holdco to AROF for its subscription interest in the Argentina Fund.

THE COURT: All right. Well, Mr. Clemente, let me follow up on that. Are you going back to 2011, and is that what you were referring to, that all of CLO Holdco's original seed money -- I guess it was a couple of levels up from CLO Holdco -- originated from Highland?

MR. CLEMENTE: That's correct, Your Honor. And that's what Your Honor writes in the Acis opinions, --

THE COURT: Uh-huh.

MR. CLEMENTE: -- that ultimately the DAF and the CLO Holdco were seeded by the Debtor. That's our position, that all of the assets that ultimately were used to seed the DAF came from the Debtor, and then obviously Mr. Kane's exhibits demonstrate that the particular interests with respect to Dynamic came from the Debtor.

THE COURT: All right. Mr. Kane, any comment about that?

MR. KANE: Yes, Your Honor. And this is -- we're back in an evidentiary hearing. So whether or not there were seed funds that were contributed by Dondero or related trusts, that I think this Court has found that was the case in the

past, but that does not mean that there were not other viable investments, personal funding by Dondero individually, deposits by Mark Okada individually or other third parties through Dallas Foundation, that there were not legitimate funds, legitimate means of generating revenue by CLO Holdco that allowed it to reinvest money.

And this is -- there's an inference made, Your Honor, by the Committee that because there was an initial seed of this CLO Holdco entity by Jim Dondero and various trusts, whether through Highland or other entities, that all of the funds that it forever uses are somehow inherently tied to Highland. We're talking about 2011, transitioning to 2018 for a cash investment made. I think that is a huge stretch.

I think it's important to know that there is zero evidence presented by the Committee to substantiate the statement that this $2.5 million somehow arose from Highland Capital Management, LP.

THE COURT: Okay. All right. Well, proceed with your closing argument, please.

MR. KANE: Yes, thank you, Your Honor.

CLOSING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

MR. KANE: So, I do want to go back a little bit to what you had previously stated about the March hearing. So, we acknowledge that the Court has a right to submit funds into the registry of the Court in a contested matter under rare

circumstances under Rule 67 and *In re Kim*. But it is our position that once funds are pled into the registry of the Court, there is a material shift in how those funds are treated and what the Court can really do to adjudicate matters involving those funds.

So, there are zero Bankruptcy Code references that relate to a Chapter 11 dispute and Bankruptcy Code statutes that address the registry of the Court. The only Bankruptcy Code statute in the entirety of the Bankruptcy Code that references the registry of the Court or proceeding under 28 U.S.C. 2041 and 2042 is Section 347(a) of the Bankruptcy Code, which applies to unclaimed funds only in Chapter 7, 12, and 13 cases.

So, Your Honor, we're looking at a situation here where funds are in the registry of the Court. And once funds are in the registry of the Court, under 28 U.S.C. 2041, the Court holds money as a statutory trustee for the rightful owners.

That's an issue that's been addressed by most circuits, Your Honor. And as noted by the First Circuit, the funds that are deposited in the registry of the Court are not at the disposal of the judge but held in trust for the rightful owner. That's the *Alstom Caribe* case from the First Circuit in 2007.

The Fifth Circuit has addressed this issue on a number of occasions, and noted that once funds are deposited into the

Court's registry, the Court should determine ownership and make disbursements. It's not suggesting a long hold. That's from *Craig's Stores*, a Fifth Circuit decision in 2005.

Your Honor, CLO Holdco acknowledges that the Fifth Circuit's decision in *U.S. v. Cochran* and 28 U.S.C. 2042 place the burden of proof of ownership squarely on the party seeking funds from the registry of the Court. And so here, as shown in *Craig's Stores* and *U.S. v. Beach*, which is an Eleventh Circuit decision, CLO Holdco has to prove ownership by a preponderance of the evidence. On that showing, the Fifth Circuit noted in *Cochran* that a court needs to remit the funds to the party that satisfied its burden of proof.

So, how do I satisfy my burden of proof? I have to show that -- I have to show that I have title to those funds or that CLO Holdco has title to those funds.

Your Honor, a lot of courts have addressed what title means in a 28 U.S.C. 2042 dispute. And proving title means demonstrating a present right to the funds. A present right is a right that is not hypothetical, it's not unliquidated, and it isn't presently possessed by some other party.

So, applying the evidence here, there is overwhelming evidence that CLO Holdco has a present right to these funds. The Dynamic subscription proves that CLO Holdco had an interest in the Dynamic Fund. The AROF subscription proved that CLO Holdco had an interest in the AROF Fund. We provided

proof to the Court of either how those interests were transferred to CLO Holdco or how they were acquired by cash payment by CLO Holdco. The Committee has stipulated that, once obtained, CLO Holdco did not transfer those interests to any other party. So, Your Honor, that hits the no other party presently possessing title.

We can show Your Honor through Mr. Klos' testimony and testimony previously presented to the Court that the Debtor liquidated all of the parties that had an interest in the Dynamic and AROF Funds interests. Those Funds are done.

Mr. Klos' testimony and his deposition by written questions shows that the Debtor calculated the pro rata interest due to CLO Holdco, and the Committee has stipulated to those amounts. They're not in dispute.

So, Your Honor, frankly, I'm not entirely sure what else CLO Holdco would need to show to concretely establish that it has a present valid legal claim to the interests in the registry of the Court. It's satisfied every element of its claim to the funds.

And right there, under a 28 U.S.C. 2402 dispute, that should end the discussion about whether we're entitled to remittance of the funds from the registry amount. We have a proven, current, valid legal title hold. And that's all that's required for relief under Fifth Circuit case law, Fourth Circuit case law, Eleventh Circuit case law addressing

these registry motions.

Your Honor, we understand that the Committee is arguing that the funds should just sit in the registry of the Court. We'd like to reiterate, we think it's very important that the Committee has not asserted any form of affirmative relief in this Court. There is no adversary proceeding. There is no motion for some kind of prejudgment writ of attachment or anything like that. This is a defensive play by the Committee. It is an -- it is solely an objection to CLO Holdco's position. That objection wants to maintain the status quo. That's it.

So, what is maintaining the status quo? Well, if we're going to address the Committee's objection, we need to look at *Rosen v. Cascade*, which is an Eleventh Circuit case that says, when a party issues this type of objection, or even a motion for (audio gap) relief, you need to look at the actual nature of the relief sought by the party, not necessarily just the description of the relief sought.

Well, what is the nature of the relief? The Committee has noted in its pleadings that it wants this Court to leave CLO Holdco's funds in the registry so that it can use those funds as security against a potential hypothetical future judgment because it believes that collection against CLO Holdco, a Cayman entity, may otherwise be difficult.

Okay. So the Committee wants this Court to keep CLO

Holdco's funds, after it's proven title to those funds, to serve as surety against a potential future judgment. As we noted in our pleadings, Your Honor, *Black's Law* defines attachment as seizing of a person's property to secure a judgment. We believe that that's exactly what's happening here. The Committee wants the Court to hold CLO Holdco's property pending a potential future judgment.

Your Honor, a prejudgment remedy like attachment invokes Bankruptcy Rule 7064, and at least here the Committee is willing to -- or, CLO Holdco is willing to acknowledge that 7064 is applicable in a contested matter like the one before the Court. But to obtain relief under 7064, the party would have to satisfy Texas law and the requirements for a prejudgment writ of attachment.

Your Honor, that falls under Section 61 of the Texas Civil Practice and Remedies Code. But importantly, Judge Houser has addressed that specific issue in the *Atlas Financial Mortgage* case. And she hits the nail on the head. She notes that, To prove a claim for a right to a writ of attachment, prejudgment writ of attachment, the party seeking that relief must have made, and this is a quote, "a certain and liquidated demand or a demand whose amount is reasonably certain." And she cites the Fifth Circuit case *In re Fredeman Litigation* .

There is no demand by the Committee, and there is certainly no demand for an amount certain. There is no claim.

There is no cause of action asserted by the Committee against CLO Holdco.

Judge Houser went on to state that, If the amount of damages can only be ascertained by the fact-finder, a writ of attachment is inappropriate.

Your Honor, again, we have no idea what is asserted. Presumably, any damage model that the Committee asserts that it has would have to be thoroughly litigated and the damage modelled by the Court.

Also, prejudgment writ of attachments are only available in liquidated claims that arise out of contract. That doesn't exist in this case.

So the Committee is just flat out ineligible for any kind of prejudgment writ of attachment.

So, next, Your Honor, that flows to, well, is an injunction available? Arguably, the Committee is defensively, not affirmatively, but defensively asking this Court to enjoin CLO Holdco from removing its funds from the registry of the Court or otherwise using those funds. Well, that was what happened in *Atlas Financial Mortgage*. Judge Houser said, well, you're not eligible for a prejudgment writ of attachment, but you actually are eligible for a preliminary injunction. But she went into a very detailed analysis of when a preliminary injunction would be obtainable.

And Your Honor, I think before I get to Judge Houser's

kind of final analysis on that issue, I'd like to look at what do the Bankruptcy Rules say? Bankruptcy Rule 7001, Subsection 7, notes that an adversary proceeding is a proceeding to obtain an injunction or other equitable relief other than when that relief is in the plan. So, plan injunction, totally different animal. And CLO Holdco readily admits that. But an injunction against the assets of another party requires an adversary proceeding.

Bankruptcy Rule 7065 incorporates Federal Rule of Civil Procedure 65, which is -- which addresses the means of obtaining a preliminary injunction. Importantly, Bankruptcy Rule 9014 excludes 7065 in Bankruptcy Rules applicable in a contested matter.

So, again, Your Honor, the Bankruptcy Rules essentially trickle down on this idea that if the Committee wants some form of injunctive relief, it must file an adversary proceeding to obtain that relief against CLO Holdco.

And Judge Houser's analysis in the *Atlas Financial Mortgage* case is very consistent with that position. The party seeking the injunction, she said, must assert a cognizable claim to specific assets or must seek an equitable remedy involving those assets in its adversary proceeding and complaint.

There is no adversary proceeding here. There is no complaint. The Committee has not asserted any claim or cause

of action against any specific assets owned by CLO Holdco. And the Committee has not asserted any equitable remedy against any specific asset in an adversary proceeding against CLO Holdco.

Your Honor, as Judge Houser noted, Federal Rule of Civil Procedure 65, as incorporated by 7065, enables a court to issue preliminary injunctions -- and I stress this -- pending trial. It is a prejudgment, post-commencement of adversary proceeding remedy.

And before Judge Houser is willing to issue -- and, really, any court under the Fifth Circuit -- is willing to issue a preliminary injunction, those courts consider four key factors that must be proven by the movant before the injunction can enter. And that is: A substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction does not issue; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of injunction will not disserve the public interest.

That's from *Janvey v. Alguire*, which is a Fifth Circuit decision in 2011 and is incorporated into Judge Houser's *Atlas Financial Mortgage* decision.

So, let's look at those elements, Your Honor, even assuming that the Committee is somehow asserting a claim for

injunctive relief.

The Committee has the burden of proving that there is a likelihood of success on the merits of its claims against CLO Holdco. The Committee has not asserted any claims against CLO Holdco. Moreover, CLO Holdco is unable to identify any potential claim that the Committee could assert based on the facts that are in evidence.

There is evidence of a $2.5 million cash payment by CLO Holdco to obtain a subscription in AROF. There is evidence of an exchange of reasonably equivalent value between Highland and Get Good for the initial transfer of the Dynamic interests. Your Honor, the Dugaboy Trust note has been paying down. There is no evidence of insolvency at the time of the transfer as a result of the Dynamic transfer. In fact, Exhibit 16 shows the Debtor had a very large equity value and made actually a million dollars. And there's no evidence of any fraudulent intent at any time related to the Dynamic transfer. There is simply no evidence whatsoever, and no attempt by CLO -- or, by the Committee to obtain any evidence from CLO Holdco.

So, Your Honor, there is no substantial likelihood of success on the merits. As Judge Houser noted in *Atlas Financial*, the Committee would have to prove the estate's entitlement -- or doesn't -- the Committee wouldn't have to prove the estate's entitlement to summary judgment on its

claim, but it would have present a prima facie case in support of its claim. And in stating that, Judge Houser cited to *Janvey's* Fifth Circuit decision.

So, Your Honor, is there a prima facie case presented by the Committee? The answer is a resounding no. It cannot satisfy the first element of the factor test required to issue an injunction against CLO Holdco.

How about a substantial threat of irreparable injury if an injunction is not issued? Your Honor, this goes back to the Committee performing no discovery against CLO Holdco. If the Committee wanted to prove up this point, presumably it would have to present evidence to the Court that CLO Holdco was either financially unable to satisfy a judgment or wouldn't satisfy a judgment for some other reason. The simple fact that CLO Holdco is a Cayman entity does not mean that it is incapable of satisfying a judgment. CLO Holdco, through its counsel, has had conversations with the Committee about the assets in CLO Holdco. And, in fact, there's not a whole lot of dispute that CLO Holdco does possess a significant value of assets.

It is not, inherently, Your Honor, some judgment-proof entity.

But, again, CLO Holdco does not have the burden of proof on disproving this potential issue. It would be the Committee's burden of proof. The Committee can't satisfy

either of the first and most important elements of a test for an injunction. Your Honor, that injunction simply cannot issue.

Now, the Committee will say, well, the Court should be able to issue a naked injunction under Section 105(a) of the Bankruptcy Code because the Court has these broad, equitable powers. And in its pleas, it cites to a number of decisions that it alleges support that position.

It cites to *King Louie Mining*. Well, *King Louie Mining* granted an injunction and cited to Section 105(a), but the injunction was granted against property that was subject to a pending adversary proceeding. Again, injunction issued under 7065.

The Committee cites to *In re Momentum Manufacturing*. Well, in that case, 105(a) was used to grant equitable estoppel, not a preliminary injunction.

The Committee cites to *Caesar's Entertainment* repeatedly for this proposition this Section 105(a) can be used by the Court to grant this naked injunction, but the injunction granted in *Caesar's* was granted against a third party where there was a pending adversary proceeding to claw back the assets of that third party.

The Committee also cites to the *DeLorean* decision. Well, in that case, there was a 105(a) statement by the Court when it entered an injunction in an adversary proceeding filed

seeking the injunction. The Court went through the 7065 factors before it issued the injunction.

And then the Committee cites to *Sire Plan*. Well, there was 105(a) relief granted, but it was also granted in an adversary proceeding, and the relief was consistent with the language of the Bankruptcy Act, albeit the Court even admitted that it was a liberal interpretation, again.

So, what case law or actions have been cited by the Committee in support of this Court's ability to grant a 105(a) injunction outside of the parameters of a plan? Well, it cited to the *Lewis v. Celotex* decision, which is a Fifth Circuit case. I think it's worth discussing, Your Honor, because we readily acknowledge that, in that case, there was a preliminary injunction that was incredibly broad in that it addressed five parties who were seeking to recover on supersedeas bonds after the case was commenced, after the *Celotex* bankruptcy case was commenced.

And I want to note that there's a Supreme Court decision on a separate dispute called *Edwards v. Celotex*. Now, in the *Edwards v. Celotex* dispute, the Fifth Circuit disagreed with the lower court's decision and its ability to enter the injunction. It did so -- officially made its ruling on jurisdictional grounds. But the U.S. Supreme Court reviewed the Fifth Circuit's decision and overturned it. But when it overturned it, the Supreme Court did two things. One, it

refused to address whether a court could actually enter the injunction under 105(a). It addressed (audio gap) jurisdictional argument.

But the Supreme Court also noted that while the Fifth Circuit allegedly ruled on a jurisdictional basis, it certainly appeared that the Fifth Circuit was partially ruling because it found the 105(a) injunction inappropriate at that position of the case.

So there is at least some dicta from the Supreme Court and the Fifth Circuit that that 105(a) injunction issued in the *Celotex* case was inappropriate.

Also, Your Honor, the Third Circuit notes in a footnote in its decision in *Lewis v. Celotex* that while it would uphold the injunction, it noted that the injunction was narrow in scope as far as what it actually did. And once the bankruptcy judge reviewed the judgments against the debtor, the avoidability, if the judgments were voidable for one reason or another, the Court would have to lift the stay to allow the party in that case to proceed against the assets.

And Your Honor, that's basically where we are in this case. The Court used its equitable rights under 105(a) to deposit funds in the registry of the Court, and now the Court has an opportunity to review CLO Holdco's evidence to see if it can meet its preponderance standard to prove that it has a right to the funds in the registry of the Court. And once it

does, it should release those funds to CLO Holdco. That analysis is really pretty consistent with the *Lewis v. Celotex* decision, which is the only case that's cited by the Committee that includes an injunction outside of the scope of an adversary proceeding.

So, Your Honor, there really is nothing here supporting the Committee's position. The Committee hasn't proved up any right to a writ of attachment. It hasn't satisfied any of the elements, procedurally or factually, to be able to obtain an injunction against CLO Holdco's assets.

So, Your Honor, based on the evidence presented, we request this Court grant CLO Holdco's motion and allow us to withdraw funds from the registry of the Court.

THE COURT: Thank you, Mr. Kane. All right. Mr. Clemente, I hope that you will focus in your closing argument, I suspect you will, but the arguments, the primary arguments of Mr. Kane that this is -- this holding of money in the registry of the Court in this context is tantamount to a prejudgment remedy, there is no adversary there in order to have a preliminary injunction under 105, you really need an adversary under 7001: I hope you'll address those arguments, among others. All right. Mr. Clemente?

MR. CLEMENTE: Yes. Thank you, Your Honor. Matt Clemente from Sidley on behalf of the Official Committee of Unsecured Creditors.

CLOSING ARGUMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

MR. CLEMENTE: Well, Your Honor, I think Mr. Kane's arguments overall generally miss the point, and the issue is really about context.

Mr. Kane referred to the monies being pled into the registry. That is not the case at all. Your Honor ordered them placed into the registry at the March 4 hearing. That, in my view, distinguishes it almost entirely from all the cases that CLO Holdco cites in their papers.

This is not a dispute about ownership. This is not an interpleader. This is not some party saying, I don't know what to do with these monies and so I'm pleading them into the Court and please, Court, give me direction. That is absolutely not the circumstance or context in which the monies were ordered by this Court under Section 105 to be put into the registry.

So, from my perspective, I think that, Your Honor, effectively distinguishes the current situation from the situations that Mr. Kane cites.

Belatedly, Your Honor, and I'll touch on this in a moment, none of this about 28 U.S.C. was ever raised in the actual motion, which I found to be fairly interesting.

So I wanted to start with those comments, but then I want to take a step back, because I do believe that the context and

background of this bankruptcy case is critical to this dispute.

CLO Holdco would have the Court view it as an independent third-party investor merely requesting the release of proceeds of its investment that Mr. Kane referred to in his argument as another party. It's not just another party. I would do that as well and I would try and distance myself from Mr. Dondero, but the fact of the matter is CLO Holdco cannot.

The Committee, as Your Honor knows, never objected to distributions to independent third parties, including in connection with the initial distribution motion, and the Committee is not doing that now.

And recall just a bit of context around the March 4th motion, Your Honor. Under the protocol that the Committee negotiated, the Debtor -- related-party transactions needed the consent of the Committee if they exceeded a certain threshold. The Debtor came to us with respect to these distributions, and the Committee said, no, because of the related party involvement and given the web that Mr. Dondero has created. And so the Debtor then filed a motion in front of Your Honor seeking Your Honor's authority to make the distribution.

Again, this is entirely unlike the cases that Mr. Kane talks about. This is about the context in which that distribution -- and these were funds that the Debtor

controlled -- I agree, weren't funds that the Debtor owned, but the Debtor controlled them, and I believe that is an important factor that I'll touch on later, Your Honor, in distinguishing it from the prejudgment cases and other things that Mr. Kane talks about.

Importantly, Your Honor, CLO Holdco is not an independent third-party investor, and CLO Holdco and other related parties hold a special place in this case in the hearts and the minds of the Committee, and I think also of Your Honor.

Again, and just a little bit of a background here, because I do need to sort of create the picture here. Mr. Dondero has created a web of over 2,000 related entities, which includes a sub-web involving CLO Holdco. At the outset of the cases, Your Honor, the Debtor's advisors could not even identify all the Debtor's affiliates.

As we laid out in our papers, CLO Holdco, through its parent entity, and this is not disputed, and it's proven up -- out by the documents that Mr. Kane walked through, controlled by a patent attorney, not an investment professional but a patent attorney that was a college roommate of Mr. Dondero, it has at all times, including when the transfers were made, been advised by the Debtor, which, when these transfers were made, then it was controlled by Mr. Dondero.

Mr. Dondero credited and directed each of the beneficial owners, which are the foundations, and the assets and

interests gave rise to the distribution that CLO Holdco is seeking now that were Debtor assets that were either transferred through a series of conduit and intermediate transfers, which is what Mr. Kane's papers, you know, bear out, and which -- with which we agree with, into the hands of CLO Holdco, again, at a time when Mr. Dondero was in control of the Debtor and in control of the intermediate parties and in control of CLO Holdco. So he therefore was on all sides of the transfer.

Your Honor, to be specific -- and, again, there's no dispute over this; we lay this out in our papers -- the Debtor transferred its interest in what was ultimately renamed as the Dynamic Fund, along with other interests and assets, to something called the Get Good Nonexempt Trust, in exchange for not a hundred percent, but 97.6 percent of a $24 million note issued by something called the Dugaboy Investment Trust. That note itself, Your Honor, from Exhibit 12, if you read the introduction to the note, was a substitute for a previous note issued by Dugaboy to the Get Good Trust. And at least on the (audio gap) note, (audio gap) unsecured note bearing interest at 2.75 percent. We don't know whether that note in and of itself had been exchanged for a different note. We just don't know.

We do know that there was a note with Get Good and Dynamic, or Get Good and Dugaboy, and that note was replaced

in a series of transactions, however, documented together, Your Honor. The Get Good Trust then transferred the interests to the Highland Dallas Foundation, and then ultimately through the DAF entities into CLO Holdco.

And, again, this is not in dispute, and it's bore out by the documents. Both the Get Good Trust and the Dugaboy Trust are Dondero family trusts for which Nancy Dondero, the sister of Mr. Dondero, and/or Grant Scott are trustees, and for which it appears Mr. Dondero was at some point also a trustee. That's evidenced on Committee Exhibit 12, where it talks about that prior note. It was issued or made by a Mr. Dondero as Trustee, I believe, for the Get Good Trust.

And I just would note, these transactions also support the basis or form the basis for CLO Holdco's purported $11 million claim that they filed against the estate.

Your Honor, from my perspective, this is all very confusing and it raises many questions, not the least of which is why was this done, what is the Dugaboy Trust, what did the Debtor actually receive relative to what transferred, and, frankly, what was the purpose of all this? And did the Dugaboy Trust ultimately pay on the note? And I'll address Mr. Kane's discussion about payments that were made on the note in a moment.

Your Honor, I don't believe any of this is in dispute. And indeed, this Court previously found that CLO Holdco's

parent was seeded by the Debtor, managed by the Debtor, and CLO Holdco's quote/unquote independent trustee was a longtime friend of Mr. Dondero. That's in the record. That's where he makes his case.

The key point of all this, Your Honor, is that CLO Holdco is anything but an independent third-party investor merely seeking the return of its invested funds, and its argument should not be viewed through that lens and instead should be viewed through the lens of Mr. Dondero being on all sides of the transactions and transfers and pulling the strings and controlling it all. And this lens is clearly tainted by the previous documented conduct of Mr. Dondero.

As the Court is well aware, (inaudible) as controlled by Mr. Dondero, has a history of engaging in misconduct, breaches of fiduciary duty, and fraudulent transactions in multiple settings, with its principal, Mr. Dondero, taking a central role. And Your Honor, as you know, this bankruptcy case is the result of arbitration proceedings, awards, judgments, and other litigation against the Debtor arising from this misconduct.

Therefore, the Committee and the Court must approach and consider each of the related-party Dondero-controlled transactions with skepticism, including the transactions with CLO Holdco.

Now, Your Honor, CLO Holdco provided voluminous documents

and other information which Mr. Kane meticulously walked through, none of which, for purposes of this proceeding only, the Committee takes issue with.

But Your Honor, as I've mentioned before, this discussion isn't about taking in kind, columns of numbers, and signatures on documents. What it is about is the context in which CLO Holdco's interests arose and the relationship that it has with this Debtor prepetition. And despite the documents and admissions, what CLO Holdco doesn't do and cannot do is refute any of that, including the fact that CLO Holdco was seeded by the Debtor, and the very interests which gave rise to the distributions came from the Debtor at a time when it was controlled by the Debtor.

This is not new money third-party investment or anything close to it. Instead, again, and as the Court found in the Acis case, CLO Holdco was seeded by the Debtor, and as its own exhibits demonstrate, the interests were transferred from the Debtor.

Your Honor, I don't think I'm painting with too broad of a brush, then, to state that transactions with Dondero on both sides, as we have here, must be subject to scrutiny by the Committee and the creditors -- and, frankly, the Court -- to determine their legitimacy.

And yes, Your Honor, the distributions are not property of the Debtor's estate. We've never argued that they are.

However, allowing it to be distributed to this entity, through the holding company, a Cayman Island entity, controlled by Mr. Dondero, would have the effect of prejudicing the estates and rewarding Dondero for potentially fraudulent conduct, which is something we cited in the *Sire Plan* case, where a party should not be allowed to benefit from its fraudulent scheme.

All the Committee is asking to do -- and, frankly, what the Court did at the March 4th hearing -- is something the Debtor should have done, and that is let's keep the status quo to allow the investigation to proceed to determine the legitimacy of the transfers to CLO Holdco. This best balances the interests of all parties. CLO Holdco's money is safeguarded. As Mr. Dondero's attorney claimed, stated on the record at March 4th, the registry is, Your Honor, not surprisingly, a place that is safe.

And Your Honor, the burden of keeping those distributions with the Court isn't that onerous at all on CLO Holdco, in particular relative to the burden that is on the creditors, some of whom have been seeking recompense for almost a decade. To be clear, Your Honor, the Committee and its constituencies did not ask to be in bankruptcy. It was thrust upon them by the actions of Mr. Dondero and his team. Now that they are in bankruptcy, the creditors are forced to deal with the consequences of that decision by Mr. Dondero.

Similarly, CLO Holdco must deal with the consequences that

flow from being controlled by Mr. Dondero and having been seeded at the direction of Mr. Dondero and taking transfers of assets from the Debtor at the direction of Mr. Dondero, which I submit here should be having the distributions continue to be maintained in the Court registry.

Your Honor, I will turn to some of the arguments raised by Mr. Kane. First, the Bankruptcy Code and Section 105 continue to apply to these issues. As I mentioned before, I was a bit surprised and, frankly, taken aback, Your Honor, when I saw CLO Holdco's response to our objection. Their motion is completely silent on this argument that somehow the Bankruptcy Code doesn't apply and instead the only issue this Court would have to determine would be dictated by a non-bankruptcy statute, 28 U.S.C. 2042.

Putting aside any discussion of whether this should have been in the motion to begin with, as I mentioned at the outset, Your Honor, I was before you pre-COVID when we addressed these issues, and I certainly did not view placement of the funds into the registry as some mechanism which would divest the Bankruptcy Code from continuing to be applied.

Again, it's all about the context of that March 4th hearing. This wasn't a dispute about ownership of the funds. This was about the Debtor coming in and doing something that the Committee took issue with under the protocols that it had negotiated. That's entirely different and distinct from just

placing money into a registry and then allowing all parties to come in with their document to show that, based on my account statement, my book balance, this is my funds, these are my funds. Which I agree with Mr. Kane on that. It's not -- I mean, Your Honor has no stake in that fight from that perspective.

But this is different. Your Honor does have a stake in this fight because it was to preserve and protect the estate and maintain the status quo.

As I mentioned earlier, I don't presume to speak for Your Honor, but I would suspect that Your Honor didn't think that she was divesting herself of discussion under Section 105 by placing the funds into the registry. Instead, it was simply a mechanism to deal with them and maintain the status quo. They could have been held -- they could have been held in (inaudible) account, for example, but they weren't. This seemed like a logical, practical solution to the issue that was presented to the Court.

Had we understood that, Your Honor, had I understood that -- and, again, I was before you -- I wouldn't have agreed to that. And, frankly, I wouldn't have -- wouldn't have understood -- if I understood that we'd be here today belatedly arguing about that, I would not have agreed to it, either.

Additionally, Your Honor, the cases cited by CLO Holdco

are just not applicable on their facts. Unlike the cases cited by CLO Holdco, this has never been a dispute about the ownership or pleading -- interpleader-type action regarding the funds. This is all about preserving the estate and the status quo. This is why the monies were placed into the registry, not as a mechanism to determine ownership.

Therefore, the Bankruptcy Code and Section 105 clearly continue to -- continue to apply. And Your Honor found on March 4th that you already had the authority under Section 104 to do this, and nothing has changed in the interim, aside from Mr. Kane has come in with documents showing -- which we don't dispute -- that if you tick and tie everything, it adds up to the money that he asserts that CLO Holdco should be given, should be distributed.

Your Honor, regarding the 105 issue, there is clearly an issue as to whether the seeding of CLO Holdco and transfers of Debtor assets to it involved transfers that are fraudulent or otherwise avoidable. And I'll touch on the payment on the note in a moment.

Those actions, of course, are assets of the estate for the benefit of the creditors, and in fact, under the governing protocol, the Committee negotiated to have standing to pursue those claims. And CLO Holdco is just that, a holdco. And a Cayman entity, to boot. And despite Mr. Kane's references to conversations that may have been had about what it is CLO

Holdco has or doesn't have, we have no idea. And it's controlled, ultimately, let us not lose sight of the fact, by Mr. Dondero.

So, allowing CLO Holdco to take distributions will place them with an offshore entity, potentially outside the jurisdiction of this Court, or at the very least, placed in five or six entities removed or who knows where, including potentially other foreign entities.

Therefore, exercising authority under Section 105 is consistent with preserving, protecting, and maximizing the value of the Debtor's estate, which estate includes claims, causes of action, and avoidance actions.

As you know, 105 is the means and -- circumstances (audio gap) preserve and protect the estate.

And to be sure, this is not inconsistent with any other provision of the Bankruptcy Code, and it's, in fact, from our perspective, in furtherance of the goals of the Code.

Your Honor, regarding the payments that Mr. Kane (audio gap), the fact that a few payments were made on the note doesn't change the fact that Section 105 applies and the Court should deny the motion.

As with all that is Highland, nothing is simple or easy. First, CLO Holdco received millions more in assets and transfers, aside from the interests giving rise to the distributions at issue. So the fact that there were payments

on the notes really speak nothing to the fact of whether the overall transaction was for reasonably equivalent value or otherwise problematic, especially when there is nothing in the record regarding the Dugaboy Trust, its wherewithal to pay, or the fairness of the terms of the note, or any of that. Or why the note was structured this way or, you know, what the Get Good Trust and the Dugaboy Trust do, how they interact, who makes decision on what gets paid and doesn't get paid.

The few payments, while interesting, Your Honor, again, do not establish reasonably equivalent value or the propriety, in our view, of the transfers.

Finally, as this Court knows, reasonably equivalent value is not determinative of whether the transfer was intentionally fraudulent or otherwise potentially avoidable or problematic. So, while deeds are interesting, Your Honor, I would submit that they don't move the needle in changing the fact that the motion should be denied.

Now, Your Honor, to the point that you raised with me before I started my remarks here. Much has been made about inappropriate prejudgment remedy or attachment or similar arguments. I submit this case is moot, Your Honor. Again, at the risk of repeating myself, I will emphasize that CLO Holdco is not an independent third party. Like it or not, it is tied up in a ruinous web with Mr. Dondero, and that in and of itself makes this case unique and distinguishes it from the

other cases cited by CLO Holdco.

Additionally, Your Honor, the current circumstances are distinguishable because the Debtor had control over these funds. That's why we were in front of you on March 4th. I agree, and I'm not arguing, that the Debtor did not own these funds. But it clearly had control over them at the time that it sought to make the distributions on March 4th. So, in my humble opinion, Your Honor, that means the Court had control over that.

Having them held in a registry while an investigation occurs is not akin to slapping a lien on someone's house or taking possession of an automobile, like the cases cited by Mr. Kane where they require there's some -- an adversary proceeding or some type of complaint.

The situation here, again, Your Honor, matters. The Debtor was before you seeking your authority to make this distribution. That is entirely different than if I were to walk in here and say my colleague, Mr. Twomey, I think that, you know what, I don't like him and so I have a claim against him, and I want Your Honor to enjoin him from being able to sell his automobile. That is entirely different, and in my view completely distinguishes it from any of the cases that Mr. Kane cited, including, of course, I have much respect for Judge Houser, but including the case authored by Judge Houser.

So, Your Honor, again, having them held in the registry is

not akin to the type of situation -- to the situation that Mr. Kane discussed in his cases.

In fact, Your Honor, although the Board chose not to do so, a decision with which Your Honor knows I vehemently disagreed, I think the Debtor could have not and frankly should not have sought to make the distributions to CLO Holdco in the first place, and instead have come to this Court, and this Court clearly had the authority to provide them with the protection in doing so. Because, again, the Debtor had control of the funds.

And I understand there's contractual arrangements, and Mr. Kane walked through some of those. But at the end of the day, if the Debtor has control over it, that means Your Honor has control over it. And Your Honor clearly could have ordered -- and, in fact, did, under Section 105 -- the authority to tell the Debtor, don't make the distribution.

That is not the same as the Committee walking in and trying to argue it's entitled to some prejudgment remedy or something on a stranger to the case, where there was already the relationship and the establishment and the nexus that existed in this case was already there. I'd submit those other cases that Mr. Kane cites are designed to protect against, and reasonably so: This is not that situation, Your Honor.

As a result, Your Honor, of what the Debtor did, the

Committee finds itself placed behind the proverbial eight ball. Its constituencies have waited -- literally decades, in some cases -- for recompense from an entity with a documented history of fraudulent conduct. And it's forced to deal with a bankruptcy it did not choose. It must spend literally millions of dollars from the estate that could be part of its recovery investigating an intentional take and obfuscating whatever transaction with literally thousands of entities, while on the other hand the Cayman Island holding company that is controlled by Mr. Dondero, the funds over which the Debtor had control and came to this Court seeking authority to make the distribution, and seeded by the Debtor when Mr. Dondero controlled it, takes distributions on account of interests which were previously the Debtor's and the transfer of which may very well be avoidable.

Your Honor, I'd submit this is precisely an appropriate use of Section 105. And talk around prejudgment remedies and attachment, frankly, is simply not on point, Your Honor, because I think this situation is distinguishable.

And to be clear, Your Honor, Rule 7064, which is cited by CLO Holdco, as I read it, does not preclude the use of Section 105 to achieve this outcome. To the contrary, Rule 7064 might even expand the tools available to the Court to include those available under state law. It does not restrict them, in my view.

And there was a reference to Rule 7067, which does not apply, because the Court ordered the funds placed into the registry. They weren't pled into the registry. The Debtor didn't want them put in the registry. The Debtor wanted to distribute them, which is why it came to the Court in the first place.

So, Your Honor, I'm at the end of my remarks, and I would like to say that I think -- not that I think; I know -- what we are seeking is an equitable result which is clearly within this Court's authority and discretion under the Bankruptcy Code, including Section 105.

CLO Holdco's motion cannot be viewed in a vacuum. The circumstances surrounding, the reason why the distribution motion was brought in the first place, including the Debtor's control over those funds, the circumstances surrounding CLO Holdco, Mr. Dondero's involvement, how it was seeded, how it obtained the interests giving rise to the distribution, all matter, Your Honor, as does the documented history of fraudulent transfers and inappropriate conduct of Mr. Dondero. Viewed appropriately in this context and the balancing of the harms resulting from keeping the distribution in the registry, I submit there is more than ample justification for this Court to deny the motion and order the continued holding of the distributions in the registry.

With that, Your Honor, I've concluded my remarks. Am

happy to address any questions you may have.

THE COURT: Just one. Could you remind me of the relevant provisions of what I'll call the protocol order that was negotiated with the Committee? Because as you pointed out in your argument, the Debtor filed the motion to make these disbursements from the Dynamic Fund and the Argentina Fund because of concerns about the do's and don'ts of that protocol order. So if there's relevant language in there you think I should be reminded of, could you --

MR. CLEMENTE: Yeah, that --

THE COURT: -- read it?

MR. CLEMENTE: Your Honor, that's exactly right. That's exactly correct. I don't -- I'm pretty sure I have it somewhere, but I don't have it right in front of me. But the point there was, Your Honor, when the Committee came to the case and it began to understand all of the related parties, the Committee clearly was concerned that value that either rightfully belonged to the Debtor or had been inappropriately transferred or siphoned away from the Debtor would be distributed to related parties, and then the Committee would be in the position of having to chase after that money.

So we negotiated a series of very complicated protocols that Your Honor ultimately approved, and the protocol at issue here was, if distributions, I believe, from any fund where the Debtor managed it and maintained an entity in excess of $2

million was to be made, that the Debtor would come to the Committee and the Committee would have five days, I believe, to say, We think you -- you know, we agree with it or we don't. And if the Committee didn't agree with it, that then the Debtor would go to Court before Your Honor to seek the authority to do it.

And so, again, back to an argument I made earlier, that's how we found ourselves here on March 4th. The Debtor had control over those funds in the sense of he was the party making distributions and doing other things. They had to come to Your Honor to actually get Your Honor to rule one way or the other to make those distributions. That, to me, distinguishes it from the cases Mr. Kane cites regarding prejudgment remedies and attachments and things of that nature.

THE COURT: Thank you. All right. Mr. Kane, the Movant always get the last word. And in making whatever quick rebuttal you have, I'll just ask you to please address Mr. Clemente's argument that context matters.

This is not as though someone requested an injunction without an adversary proceeding against CLO Holdco. This order of the Court that money go into the registry of the Court resulted from a Debtor motion, several responses thereto, and then a suggestion that was made by Mr. Dondero's counsel that others embraced: Let's just stick the disputed

money into the registry of the Court for now and we'll sort this out in due time.

You know, you've made some very compelling legal arguments, I have to say, Mr. Kane, but we have this overarching issue of the context. So, your response, please.

MR. KANE: Yes, Your Honor. I'm happy to start with that. I do think the context is important. I think that Mr. Clemente and I would disagree about what elements of the context are most important.

I would note that the portion of your order that I previously cited during this hearing, whether the -- that funds are to be pled into the registry of the Court and that that would allow parties seeking those funds to file whatever motions or to seek whatever orders were necessary to obtain those funds. And so what we're looking at here is, right, there is a related-party entity. But let's talk about generally what the context of this dispute is about.

Mr. Clemente noted repeatedly in his closing argument that this is not a dispute about Debtor assets. Okay? And I think that's really important. This is a dispute about funds that are not owned by the Debtor. The Committee readily admits that. The Debtor readily admits that. And so what we're talking about here is tying up assets that are not assets of the Debtor's estate.

And so an indefinite freeze on assets that are not assets

of the Debtor's estate is disturbing from a procedural perspective.

So, I get the Committee's concerns about, hey, this is a related entity. Right? This is CLO Holdco. There are ties to Jim Dondero. We're not trying to hide that fact. We're not trying to say, no, that's not really true. But what I would also say is that there is no evidence that the seeding of CLO Holdco from Highland assets was necessarily a fraudulent transfer or effectuated by seedings of fraudulent conveyances. Okay?

Mr. Clemente even noted, as he was giving his presentation, that there is no factual investigation into the Dugaboy Trust by the Committee or anything like that. These are baseless allegations, or at least allegations that entirely lack evidence. So we're at a spot right now, contextually, Your Honor, where the Court has CLO Holdco's funds in its registry. No other party is laying claim to those funds. The Committee wants those funds to stick in the registry for an indefinite period of time, even though they're not assets of the Debtor's bankruptcy estate. And the only reason it wants to do that is for the funds to serve as security against a potential future judgment or claim.

And so, contextually for us, well, if there aren't -- if there's no competing claim for the assets and they're stuck in the Court's registry, you know, contrary to Mr. Clemente's

argument, a vacuous argument on the balancing of harms, we're deprived of the use of $2.4 million and change of assets that could go to additional investments or to satisfy operating costs.

So there is real harm on a going forward basis from CLO Holdco's perspective.

So that, Your Honor, is the context as we see this. This is about non-debtor assets frozen to serve as potential security of a hypothetical judgment on claims that have never been ascertained, asserted, identified.

So let me address a couple of issues on rebuttal, and I'll be pretty quick about this.

THE COURT: Please.

MR. KANE: Mr. Clemente was making hay about the fact that I said pled into the registry of the Court and that -- because, Your Honor, pled into the registry of the Court, this isn't an interpleader action, that this was an order entered by the Court. That's a distinction without difference. And the reason that's the case is, if you look at 7067, which is the only Bankruptcy Rule that addresses pleading funds into the registry of the Court, 7067(b) notes, Money paid -- not pled, not ordered -- money paid into the registry of the Court is treated under 28 U.S.C. 2041 and withdrawn pursuant to 28 U.S.C. 2042.

So, you know, regardless of whether Mr. Clemente

appreciated how I had described the transition of funds from the Debtor's control into the Court's registry, the reality is that 28 U.S.C. 2042 does create the legal thresholds that are required to withdraw funds from the registry of the Court.

Mr. Clemente argues that, well, cases where a car is repossessed or a lien is placed on a party's assets under a prejudgment writ of attachment or injunction are dissimilar from this case, is really legally -- it's inaccurate. Those are erroneous statements. There is no difference. If this Court retains CLO Holdco's assets, it's the exact same thing as another -- a third party's assets being held in a blocked account or a third party's assets being retained by a court or third party pending a future judgment. We're in the exact same procedural position there.

Mr. Clemente got into a balance of harm's analysis when he was discussing this Court's application of an injunction under Section 105(a), arguing that an adversary proceeding is unnecessary or that injunctive relief could be issued under 7064. Your Honor, 7064 and 7065 are there. And there is a distinction from the courts between a prejudgment writ of attachment that would be applicable under 7064 and an injunction that would be issued under 7065. Injunctive relief is addressed under 7001(7) and 7065.

So you can't just say, well, no, you can do it as a -- as -- on a motion like you would a prejudgment writ of

attachment. Bankruptcy Rules aren't structured like that.

But importantly, Mr. Clemente presented no facts to support his balancing of harms argument and presented no facts to establish that he has any viable claims against CLO Holdco. Arguments that James Dondero participated in frauds does not mean that there's a claim or cause of action that the Committee can assert against CLO Holdco, which is what would be required to obtain an injunction.

This is a big if. If the Committee is seeking to obtain an injunction, it must satisfy its burden of proving under 7065 and the four-factor test established by *Janvey v. Alguire* in the Fifth Circuit in 2011 and the many cases before that. And it just can't do it.

So I want to leave the Court with one case citation, because if the Court is considering some means of entering a preliminary injunction outside of an adversary proceeding, I was able to find a grand total of one case that address that in the Fifth Circuit. And that is the 1995 decision of *In re Zale* in which the Fifth Circuit noted that the only way a 105(a) preliminary injunction could be issued, after a finding of these unusual circumstances and the like, was if all of the protections of an adversary proceeding had been afforded to the non-movant and if the party that was requesting the injunction satisfied the four-factor test that's found in 7065.

There are no extraordinary circumstances or unusual circumstances here. And if this Court believes that the context of this case warrants that, then the Committee would still have to satisfy that four-factor test for a preliminary injunction. And it has the burden of proof on those four factors. It hasn't presented any evidence whatsoever to support that it can meet the first, let alone the second, third, and fourth factors of that test.

So, Your Honor, with that, I'll close our case, unless you have additional questions, and request that the Court grant CLO Holdco's motion.

THE COURT: A couple of follow-up questions. I have certain facts in my brain, and I can't remember if they're in evidence or stipulated to or I read them in a pleading. So, I just want to ask: Somewhere I remember seeing that CLO Holdco, or, you know, maybe it's its parent, I think -- Mr. Clemente said we have a Byzantine structure here and we have a sub-web within a bigger web with regard to CLO Holdco. But, anyway, CLO Holdco or its parent has assets of approximately $225 million? Is that evidence or undisputed?

MR. KANE: Your Honor, that was contained in one of the pleadings asserted, I believe, by the Committee, and that was the Charitable DAF entities, not necessarily CLO Holdco. There hasn't been any evidence presented by the Committee of the assets held by CLO Holdco other than what we have before

the Court.

THE COURT: Okay. So it's not something you would stipulate or offer one way or another?

MR. KANE: No, Your Honor, I think that's factually incorrect and I don't stipulate to that.

THE COURT: Okay. I think my notes show that that was the alleged amount of assets as of September 30, 2019. But, again, that may have just been a pleading, not anything in evidence.

All right. And are Mr. Scott or Mr. Dondero on the phone today or on the video? I'm just curious.

MR. KANE: Your Honor, I lost you on the video a little bit, but assuming you can hear me, though, Mr. Scott is not. We had conversations with the Committee about various exhibits and whether or not Mr. Scott would be here to testify to prove up exhibits. Once the exhibits were all stipulated as admissible, then there was no need for Mr. Scott to participate.

THE COURT: Okay. I was not going to ask him anything. I just was curious if he was listening in. Or Mr. Dondero, for that matter. I guess Mr. Dondero is not on the line, correct? (Pause.) All right. I'll --

MR. KANE: Your Honor, I -- I think -- I'm sorry. I've had no conversations with Mr. Dondero. I have no idea whether he's on the line.

THE COURT: Okay. I'll take silence to mean he's probably not, but --

All right. I asked that question for, I guess, a couple of reasons. But the main reason I asked is -- and I'm going to say this as kindly as I can. They're not here to hear it anyway. But I feel like perhaps they are a little tone deaf, for lack of a better term, on how this all looks to the Court today. And what I mean by that is, obviously, I assume it was their decision to bring this motion, at least Mr. Scott's, and likely Mr. Dondero as well had some involvement in that decision. And the reason I say that it feels like they're a little tone deaf about how this looks is that we just had an extensive hearing and some very thorough pleadings, a lot of evidence uploaded, on a $2.5 million issue. And I don't -- you know, I appreciate that that is a significant sum of money, but we've used the word context a lot this morning: In the context of this reorganization, it seems like a very big deal was raised here, at the choice of Mr. Scott and Mr. Dondero, over a $2.5 million issue, in the context of a reorganization that involves at least hundreds of millions of dollars of debt, if not over a billion. UBS says they're owed a billion.

And I just asked my question a minute ago about the value of assets that the DAF or CLO Holdco or that sub-structure has managed, because while no one will commit, is it $225 million

or not, you know, I take it that the Committee had a good faith basis for saying that, and if it's not that, it's probably a quite sizable number.

Again, so I'm kind of thinking out loud about the proportionality of this issue. $2.5 million, not anything to sneeze at, but we're talking about a Charitable DAF that probably has many, many, many more times that of assets. And so there was certainly no equitable argument of hardship or, you know, significant detriment that's befalling CLO Holdco by the tying up of this money in the registry of the Court for this relatively short time period. So, again, it feels a little tone deaf to be bringing this argument, occupying so much time from the parties, the lawyers, the Court, over this issue.

And just to further elaborate on that, it matters to me, and I say this about the tone-deafness, partly because I thought -- I said this at the beginning of the hearing, and I still say it -- we already put this issue to rest, albeit temporarily, in March. And in April, we get this new motion. Again, I recognize the language of the March order reserved everyone's rights to come back and argue about this, but, again, the buzzwords for this hearing are going to be context matters, I guess. Mr. Clemente, you get credit for that buzz phrase, those buzzwords.

Again, I issued the order with regard to putting these

monies in the registry of the Court at the suggestion of Mr. Dondero's very wonderful lawyer, retired Judge Lynn. And, again, the context was we had a protocol order early in this case that the Committee negotiated heavily with regard to monies being disbursed out under the control of the Debtor, and heavily negotiated. I remember the CLO Issuers, I think, had some pause and concerns and got their language into that order.

So we had this protocol order. Debtor was worried about violating the protocol order, so Debtor files the motion February 24th, wanting the blessing of a court order before it transferred these monies to CLO Holdco and some other Highland-affiliated entities. There were vehement objections, and the Court issued the order saying, Let's put these monies into the registry of the Court, at the suggestion of very able counsel as to how we could resolve that contested matter we were there on on March 4th.

So, you know, a month later, April, we have this new motion of CLO Holdco reviving the dispute, the $2.5 million dispute that we had just put to rest temporarily in March at the suggestion of lawyers. I didn't issue a 105 injunction outside the context of an adversary proceeding just on my own, *sua sponte*. It was suggested to me that this was a good solution. People embraced it. That's what we did. And I sure didn't have in my brain that a month later we'd have a

brand new motion regarding whether these monies should be disbursed to CLO Holdco all over again, when that was the issue that was already before the Court in March.

I, again, fully recognize that everybody reserved their rights, but I focus on this context because, again, I wish Mr. Dondero and Mr. Scott were on the call to hear this: This almost feels like a good faith issue to me. You know, maybe I would feel slightly different if there had been a broad emphasis, heavy emphasis, CLO Holdco standing up through a lawyer that day saying, We're just letting you know, we're going to get together a motion in very short order and tee this up again. Because I would have probably said no. You know, if -- let's just hear it right now today, if this is only a three-week mandate or whatever. So, good faith is something that I can't help but scratch my head and be troubled by.

So, I want to emphasize that CLO Holdco's lawyer has made perfect arguments regarding the potential legal issues here. There are some valid arguments here about is this tantamount, holding the money in the registry of the Court that a non-debtor asserts is its property, is that tantamount to a prejudgment remedy? You know, did it require an adversary proceeding? Did it require the traditional four-prong prove-up for a preliminary injunction? And did the Court just give short shrift to those legal technicalities?

Again, these are compelling arguments, but I'm overruling the arguments because, again, I believe it ignores the context that CLO Holdco essentially consented, acquiesced, in this placeholder keep-the-status-quo solution. And I question its good faith in, so quickly after consenting, bringing this motion.

But moreover, I do find that in the unique context of the disputes before the Court on March 4th, I did have authority to issue a 105 injunction. 105, as we all know, at Subsection (a) gives a bankruptcy court authority to issue orders necessary or appropriate to carry out provisions of Title 11, and the last sentence even provides a mechanism for the Court to *sua sponte* take action to, among other things, prevent an abuse of process or just do what's necessary or appropriate to implement court orders or rules.

So I think, again, in the context before the Court, it was not only a consensual thing, but the Court had authority. And the backdrop of this, again, cannot be overstated. Again, to use Mr. Clemente's word, we have this Byzantine structure here. It's a lot for the Committee to get its arms around. And even the CLO Holdco structure -- again, I'm looking at my notes, my fancy chart -- we have CLO Holdco, a Cayman Island entity. Its parent is Charitable DAF Fund, LP, another Cayman Island entity. It, in turn, is owned by Charitable DAF Holdco, Ltd., yet another Cayman Island entity. Its general

partner happens to be a Delaware entity, Charitable DAF GP, LLC, but the beneficial owners of it are the three Highland Foundations, of which Dondero is president and director, and Mr. Scott the treasurer and director.

So, I'm not saying the Byzantine structure is in and of itself problematic, although one might wonder why a charitable organization needs to have three offshore entities as part of its structure. I digress. But we all know a Byzantine structure and ties to Dondero do not mean something is attackable in and of itself, but we have had issues raised about the Dynamic Fund and the various transfers with regard to Dugaboy, the Dondero Family Trust, and Get Good Trust and the note. All of that is worthy of examination, and the Committee has not had all that long in this case to investigate it.

So, I'm going to say a couple of more things. First, the motion is denied, but I'm going to put more strings on it than that. I'm denying the motion, but as part of this ruling I'm going to order that the Committee has 90 days, unless the Court happens to extend that on motion or agreement of the parties, to file an adversary proceeding against CLO Holdco or the money shall be released. Okay?

So, again, I intended it, as I think everybody did, to be a placeholder, to keep the status quo little bit. Again, Mr. Kane has raised good arguments that maybe an adversary

conceivably was necessary or might become necessary. So here we have a requirement of an adversary within 90 days or the money shall be released to Holdco -- again, unless someone moves to extend that or I get an agreement to extend that and I happen to decide to issue an order extending that.

I presume that if an adversary is filed, then if the Committee wants that money to continue to be held in the registry of the Court, then they would have to file an application for injunctive relief, essentially, to keep the money in the registry of the Court pending the resolution of the adversary proceeding.

So that is the ruling of the Court. Mr. Clemente, I'll ask you to draft up the order. And I reserve the right to supplement this oral ruling in that form of order. And please run it by Mr. Kane before electronically submitting it to the Court.

Now, I'm going to say a couple of other things, and then I'll, before closing, I'll ask if there are questions or other announcements. I have told the parties and the lawyers to focus on a plan and problem-solving how we're going to pay creditors. And I think I expressed my strong hope that people would stop litigating everything. I think I'm remembering saying this most recently at the UBS hearing a few weeks ago on a motion to lift stay. Once again, we had a very lengthy hearing that day. I denied the motion. And here we are

again.

You know, I want certain people to understand that it's time to stop fighting everything. The Debtor is in bankruptcy because of years and years and years and years and years of litigating everything to the nth degree. I'm fed up with it, and I tend to believe that behind the scenes -- I have no doubt that behind the scenes there are people working hard towards crafting a plan, and I think we're coming up on an exclusivity deadline in late July, maybe. What do I have to say to make it clear: People need to stop litigating and start focusing on a plan to get creditors paid. I don't want to do something drastic like appoint a global mediator, but it is definitely dancing around in my brain if we keep having, again, sideshows. Okay?

So, Mr. Pomerantz, what do you want to tell me about what's going on behind the scenes? Again, I am certainly not probing into settlement discussions, but do we have progress being made, or is everyone just threatening to file new litigation?

MR. POMERANTZ: Yes, Your Honor. For the record, it's Jeff Pomerantz; Pachulski Stang Ziehl & Jones; on behalf of the Debtors.

Your Honor, the Debtor took to heart the comments that Your Honor made at the conclusion of the UBS hearing. It's been the Board's desire to move this case forward, both in the

plan process and in terms of a claims resolution process. And I think I mentioned to Your Honor that at least with respect to the UBS hearing, I think that we needed to get by that hearing before until I think we can make any progress with them.

Since that time, and in anticipation of the hearing that is going to occur on July 8th, when I indicated to Your Honor that we would hopefully present a structure and a mechanism to do exactly what Your Honor said, there has been a lot of work and a lot of effort, both at the Board level to come up with a concept, a structure, and a timing for the mediation process, and I personally have spoken to not only Mr. Clemente but counsel for every member of the Committee, to hopefully coalesce around a concept, identification of mediators, what would be mediated, and how that would take -- process.

We understand the Committee is meeting today to discuss that. Right after this hearing, we have a weekly meeting between the Board and the Committee. We will discuss that further. But your message was taken by the Debtor, and I believe by the other parties, loud and clear, that Your Honor would (audio gap).

At the same time, we recognize that that might be impossible. Since the last hearing, we filed our objection to the Acis claims. UBS filed its claim on Friday, the 26th. As Your Honor is aware, we're preparing an objection to that

claim as well, as well as others.

We do not want to litigate while we mediate. However, this case has progressed for a while, and I think it's going to be important for all parties to understand that if the mediation is not successful, they and I will be called on to make some difficult decisions on the claims that are asserted against the estate to go forward.

At the same time, and separate and apart from the mediation process, the Debtor has been working on a plan with the Creditors' Committee. It is in its advanced stages. And while it's not ready to be imminently filed, we think in short order we will be able to file a plan. What the plan says and whether it's just essentially putting assets in a monetization vehicle and resolving the claims after confirmation, or whether something can be done more globally, what has been referred to with the parties as a grand bargain, is still something that we are trying to flesh out.

But make no mistake, Your Honor: The Board has wanted to move this case forward. Your comments, I think, have been extremely helpful in telegraphing what your thoughts are. I think the Committee understands that, the Creditors' Committee understand that, that it's just not sustainable on a number of levels to keep on fighting and litigating and have these types of hearings.

So we will present, hopefully, on July 8th, as -- a game

plan. Hopefully, we'll have everyone's approval. But even if we don't have every -- anyone -- everyone's approval, it'd be the Debtor's thoughts to present to Your Honor how the Debtor believes we should proceed.

THE COURT: All right. Well, thank you. I had forgotten we were coming back so soon. July 8th. Next week. I had in my brain late July. But that -- is it a status conference or an actual motion that's set?

MR. POMERANTZ: Your Honor, we have a couple of hearings on calendar for that day.

THE COURT: Okay.

MR. POMERANTZ: I believe one is exclusivity, --

THE COURT: Okay.

MR. POMERANTZ: -- which I do not think is going to be contested, based upon my conversations with Mr. Clemente, although I understand he'll want to explain to the Court what the Committee's position on any further extensions would be.

There is also a motion to extend the removal deadline.

So, thus far, there is nothing contested, but we intend to be able to use that, Your Honor, to present an approach that hopefully will resolve this.

Your Honor, I have one other comment that I wanted to make in connection with the motion Your Honor just heard.

THE COURT: Okay.

MR. POMERANTZ: As Your Honor recalls and as we

mentioned today, there were distributions from a variety of different Funds to a variety of related parties. In June, distributions were set to be made to those same parties. And with the consent of CLO Holdco and with the consent of HCM Services, those monies were not distributed to them, but are in the process of being submitted to the Court's registry.

THE COURT: Okay.

MR. POMERANTZ: The expectation would be that they were going to be treated the same way as the old funds, based upon Your Honor's ruling.

We understand from the Court that we, Your Honor, that we probably need a separate order with respect to that, and that's with respect to the CLO and HCM Services. So we would prepare that order.

Whether both those distributions would be made to Mark Okada -- and if Your Honor recalls, at the last hearing, Your Honor only withheld the amount necessary to pay Mr. Okada's note, which was ultimately paid, and the remaining amounts were distributed to him. And in light of that, we advised the Committee that we would distribute additional monies to Mr. Okada, and there was no objection.

(Echoing.)

MR. POMERANTZ: So, in sum, Your Honor, we would submit to Your Honor a further order to Your Honor for the additional funds, otherwise payable from those funds to CLO

Holdco and to HCM Services, to be put in the Court's registry.

THE COURT: All right. Someone needs to be put on mute. I don't know who that is, but we're getting some background. Okay.

MR. CLEMENTE: Again, Your Honor. Your Honor, Matt Clemente, very, very quickly, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: Again, the Committee obviously took to heart your comments at the last hearing and very much appreciate the comments you just gave in terms of where you're at and how you're viewing and feeling about things. And so I will obviously discuss those very, very carefully with the Committee.

Just to point out to Your Honor, Mr. Pomerantz talked about the distribution to Mr. Okada. And, again, you talk about context and optics and understanding where we are. I read and understood -- I was in front of you -- regarding the ruling from the last time. Remember, we objected to the distribution to Mr. Okada last time. We did not do that this time, Your Honor.

So the Committee does very much understand Your Honor's desire for this to not continue to be a litigation issue. We could have easily tried to object to Mr. Okada's distribution again, and we did not, Your Honor.

So I want Your Honor to understand that the Committee very

much understands where Your Honor is thinking and how she's viewing things, and I suspect that the Committee will be very responsive and respectful of your comments, Your Honor.

THE COURT: Thank you. All right. Well, then, Mr. Pomerantz, I'll be on the lookout for your order that the Clerk's Office needs for more money to be deposited in the registry of the Court. And, again, I understand that it is the newest disbursement that would otherwise be due to Highland Capital Management Services, Inc. and to CLO Holdco, Ltd., and that would certainly be my intention after today's ruling, that the newest distribution for those entities go into the registry of the Court.

So, we'll be on the lookout for that. And I guess I will see you on July 8th for other case matters, and we'll see where we are next week.

All right.

MR. CLEMENTE: Thank you, Your Honor.

MR. KANE: Your Honor?

THE COURT: Thank you.

MR. KANE: Your Honor, this is John Kane.

THE COURT: Okay.

MR. KANE: Sorry. I have mainly just a brief statement. And I have no intention of trying to persuade you a different way from your ruling. I understand that ruling is already there.

But I was -- I was on the phone representing CLO Holdco on the last Acis plan status conference and listened to your directives to the parties about the litigious nature that's been taking place in this case. And I've had lengthy conversations with my client, Grant Scott, about those same concerns.

So I did want to disclose to Your Honor, first, that nothing in our motion was trying to contradict the Court's ability to initiate plead funds into the registry of the Court or order that. We weren't trying to relitigate the same proceeding a second time.

But, importantly, at the outset of this, I had conversations with the Committee about our efforts to try and locate a feasible bond to put up as collateral to remove the funds from the registry so that we could satisfy both the Committee's concerns but also CLO Holdco's concerns about liquidity issues at the CLO Holdco level.

Unfortunately, we were not able, after discussing with two different bond brokers, to locate a bond that we thought was going to be economically feasible, given the potential time period that the funds could be in the registry, given that there was no temporal limitation on how long the Committee would be investigating these claims, or, really, how long litigation could take, depending on the complexity of the claims and the number of parties included on that complaint.

We were looking at a potential even, you know, two percent cash bond on an annual basis was going to be hundreds of thousands of dollars, potentially. And that's something that we decided really wasn't feasible.

And I also want to make abundantly clear that I would not have attempted to relitigate any issue whatsoever. I personally viewed that this is a separate and distinct legal issue. I was not present at that March hearing. So I apologize if this came across as some kind of litigation tactic.

But the reason that our motion was filed is because of liquidity concerns at the CLO Holdco level relayed to me by Grant Scott. There was no evidence presented of that because, Your Honor, we did not believe that we had the burden of proving any kind of harm issue because we were not the party seeking that injunction, and that wasn't an issue that had been subject to any kind of discovery whatsoever.

So, I just -- I always get very uncomfortable when there are allegations of good faith, bad faith, the like. I want this Court to understand that CLO Holdco's counsel is advising CLO Holdco regarding your views on the litigious nature of proceedings in this case, this bankruptcy case, that that is something that is very real, that I have taken to heart, that I am using to influence my client's decision-making, and that this was not an attempt by CLO Holdco to unnecessarily address

or relitigate an issue for some small balance.

CLO Holdco, most of its assets are either encumbered or are illiquid. There is a large portion of illiquid assets that are not encumbered. So we are able to pay any kind of judgment. Let me restate that. That we would -- we would likely have to liquidate considerable assets to do that, which is where the settlement gives a potential opportunity cost and appreciation of asset value, which is why we proceeded with this motion.

I'm not intending any of those statements to be admitted into evidence or to persuade you to either rule differently for some reason or another, but I did think that, given your concerns, that it was important to provide the Court with context for why we took the tactic that we did to try and obtain funds from the registry of the Court.

This, on the CLO Holdco level, was not a bad faith effort. We weren't trying to relitigate an issue that was already there, and certainly we weren't trying to litigate unless litigation we felt was necessary from a financial cost-benefit analysis. And that was a real analysis that we discussed between me and my client.

I just wanted to share that with the Court. I've shared with the Committee counsel that we understand that there are major concerns about Jim Dondero, about his control over various entities, about transfers. I'm trying to work as hard

as I can to distance CLO Holdco from that taint, because understanding that it's in what has been alleged as a Byzantine web, we think it's important to separate CLO Holdco and its operations to ensure that things are done in an appropriate fashion with square corners.

That's all I have, Your Honor. We have no objection to the additional funds being pled into the registry of the Court. We can agree those funds would be adjudicated as part of this dispute. We understand that we did not prevail, and we appreciate your Court hearing our argument.

(Proceedings concluded at 12:06 p.m.)

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CERTIFICATE

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

/s/ Kathy Rehling **07/02/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBIT 13

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	) Case No. 19-34054-sgj11
	) Chapter 11
	)
HIGHLAND CAPITAL	) Courtroom 1
MANAGEMENT, L.P.,	) 1100 Commerce Street
	) Dallas, Texas 75242-1496
	)
	) July 21, 2020
	) 1:38 p.m.

TRANSCRIPT OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS EMERGENCY MOTION TO COMPEL PRODUCTION BY THE DEBTOR (808); DEBTORS MOTION FOR ENTRY OF (I) A PROTECTIVE ORDER, OR, IN THE ALTERNATIVE, (II) AN ORDER DIRECTING THE DEBTOR TO COMPLY WITH CERTAIN DISCOVERY DEMANDS TENDERED BY THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, PURSUANT TO FEDERAL RULES OF BANKRUPTCY PROCEDURE 7026 AND 7034 (810)
BEFORE HONORABLE JUDGE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY JUDGE

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* * *

(IN INSTANCES WHERE CONNECTION IS FADING IN AND OUT, AN INAUDIBLE RESULTED DUE TO THE LACK OF AUDIBILITY. IN INSTANCES OF MUFFLED VOICES OR REVERBERATION OF THE TELEPHONIC PARTICIPANTS ON CHANNEL 2, AN INDISCERNIBLE RESULTED)

THE COURT: This is Judge Jernigan, and we are ready to start a hearing today in Highland. Before I take appearances, let me just kind of say where I think we are.

We have a document production dispute on the calendar today, primarily between the Unsecured Creditors' Committee and the debtor. Basically it's an ESI protocol dispute, as I understand it.

We have had eight other parties in interest weigh in on the dispute with pleadings. So I'll do a roll call.

(The Court engaged in off-the-record unrelated colloquy)

THE COURT: I'm a little hamstrung here because I don't have my glasses, but my law clerk is working on that. I guess I do have a magnifying glass here.

All right, well, why don't we do a roll call while he's getting my glasses, of the different parties in interest. I'm going to call parties one-by-one to avoid talking overlap.

For the Committee, it looks like we have Mr. Clemente, is that correct?

(No audible response heard)

THE COURT: Oh, you're on mute.

MR. CLEMENTE: My apologies, Your Honor. Matt

Clemente from Sidley on behalf of the Committee. My partner, Paige Montgomery, is also here with me, and she will be addressing the Court today, as well.

THE COURT: Okay. Very good. For the debtor, who do we have participating today?

MR. KHARASCH: Good morning, Your Honor. It's Ira Kharasch of Pachulski Stang, and we also have John Morris from Pachulski Stang, as well.

THE COURT: Okay; good afternoon.

All right. Mr. Dondero's counsel weighed in. Who do we have appearing for Mr. Dondero this afternoon?

MR. LYNN: Yes, Your Honor. Michael Lynn and John Bonds for Jim Dondero.

THE COURT: Okay, very good.

Now I'm going to go through the seven other parties that have weighed in. For the party Atlas, do we have Paul Keiffer or some other lawyer participating?

MR. KEIFFER: Yes, Your Honor, Paul Keiffer here.

THE COURT: All right; good afternoon.

For H.C. and Fund Advisors, who do we have appearing?

MR. WRIGHT: Good afternoon, Your Honor. You have James Wright and Steve Topetzes at K&L Gates.

THE COURT: Okay; very good.

All right, CCS Medical, who do we have appearing?

MS. STRATFORD: Your Honor, it's Tracy Stratford from

Jones Day.

THE COURT: Okay; thank you.

MS. STRATFORD: Thank you.

THE COURT: CLO Holding, who do we have?

MR. KANE: Your Honor, John Kane for CLO Holdco, Limited.

THE COURT: Okay, Holdco, excuse me; thank you.

What about NexPoint?

(No audible response heard)

THE COURT: Anyone appearing for NexPoint? Jason Rudd, Lauren Drawhorn perhaps?

(No audible response heard)

MR. WRIGHT: Your Honor, this is James Wright again at K&L Gates. We represent one of the NexPoint entities, NexPoint Advisors. But I understand there are some other NexPoint entities that we don't represent, and they may have a separate objection, just to be clear.

THE COURT: Okay. Yes, there was a separate objection. The same firm, Wick Phillips, filed an objection by MGM.

So, again, I'll ask, is there anyone on the phone for those clients?

(No audible response heard)

THE COURT: All right, well, we may -- oh, I see Lauren Drawhorn on the video; are you muted, Ms. Drawhorn? Ms.

Drawhorn, we can see you but we can't hear you. Cannot hear you. We definitely see you.

If we can't -- yes, if you could call on your cell phone, we can hear you that way, and you can keep your visual on, as well.

Okay, I'll go on. What about HCLOF, do we have someone from King & Spalding?

(No audible response heard)

THE COURT: Okay. I'm not hearing anyone from King & Spalding.

MR. MALONE: Your Honor, this is Mark Malone. I'm not sure if you can hear me, I'm only dialed in on my phone.

THE COURT: Okay, I --

MR. MALONE: Can you hear me?

THE COURT: I do hear you, Mr. Malone; thank you.

MR. MALONE: Yes, and Rebecca Matsumura is trying -- I suspect feverishly, I don't have the video. I know she's plugged in on the video. She'll be handling any argument, assuming we can get her on. If not, I'm happy to handle it. But we are here, Your Honor; thank you.

THE COURT: All right, thank you.

MS. MATSUMURA: Can y'all hear me now?

THE COURT: Yes. Who is that?

MS. MATSUMURA: This is --

THE COURT: Was that Ms. Matsumura?

MS. MATSUMURA: This is Rebecca Matsumura; sorry about that.

THE COURT: Okay, we hear you and we see you; very good.

All right. I'll go back to Ms. Drawhorn, do we have you on the phone yet?

(No audible response heard)

THE COURT: All right. Well, hopefully -- hopefully we can get whatever technical difficulties there worked out.

I'll ask, for the record, are there any other parties in interest wishing to make an appearance? And I'm going to forewarn you that I'm not going to be inclined to let any other party make an argument today unless you give me a reason I should that absolutely knocks my socks off. So I assume we might have people wanting to appear, but who are not going to make an argument. If so, go ahead.

MR. ANNABLE: Your Honor, this is Zachary Annable and Melissa Hayward of Hayward & Associates, local counsel for the debtor. We just wanted to let you know we're here, too.

THE COURT: All right; thank you.

Anyone else?

MS. MASCHERIN: Yes, Your Honor. Terri Mascherin and Marc Hankin from Jenner & Block on behalf of the Redeemer Committee of the Highland Crusader Fund.

THE COURT: All right; thank you, Ms. Mascherin.

MR. SLADE: Your Honor, it's Jared Slade and Jonathan Edwards of Alston & Bird. We're here on behalf of NexBank. And I'm not sure if it's going to knock your socks off, but we were engaged just this week by NexBank as a party in interest, the issue about the ESI disclosures. We have been negotiating with the Creditors' Committee about the issues, and we hope to have an opportunity to present a minute or two at the end about why we were differently situated than some of the other objectors, if the Court entertains it.

THE COURT: Okay.

MR. SLADE: Thank you.

THE COURT: Thank you.

MR. CLUBOK: And, Your Honor, Andrew Clubok and Kimberly Posin for UBS.

THE COURT: Okay; thank you.

MS. PATEL: Good afternoon, Your Honor. Rakhee Patel and Annmarie Chiarello on behalf of Acis Capital Management, but we don't intend on making any presentation, Your Honor, unless anyone specifically asks to address things. Our matters are after this.

THE COURT: Okay, correct.

Anyone else?

(No audible response heard)

THE COURT: All right. Well, let's talk --

MS. DRAWHORN: Your Honor?

THE COURT: Oh, go ahead.

MS. DRAWHORN: This is Lauren Drawhorn, I got my -- I'm sorry, I got the audio -- the speaking to work.

THE COURT: Okay.

MS. DRAWHORN: I'm appearing on behalf of the NexPoint Real Estate entities, there's 15 of them. I can go through them, if you want, or -- they're listed on Docket 847.

And then I'm also appearing on behalf of MGM Holdings, Inc.

THE COURT: Okay, thank you, Ms. Drawhorn. We've got you loud and clear now.

All right, well, I want to talk for a moment about how we are going to proceed here today, and I'm hoping we don't go late, late, late with ten or so parties wanting to weigh in on document production because we do have the Acis status conference regarding the September 10th setting on the objection to Acis's proof of claim, I want to make sure we get to that today.

And then I do want to talk a little bit about where we stand on getting the mediation going.

So for everyone's benefit, I'm just going to let you know that I think I have a handle on the primary disputes between the Committee and the debtor. There's a lot of finger-pointing that is going on in the papers.

The UCC is suggesting that the debtor has been

dragging its heels; and the debtor saying no, it hasn't.

I really don't want to get bogged down by that today. I really just want to focus on the handful of things that seem to be in dispute between the Committee and the debtor, and so we're going to obviously start with the Committee and the debtor. I want to hear about are we going to have evidence today. I know there were a couple of declarations filed.

And then I'm inclined to, thereafter, just give these eight or nine other parties five or ten minutes each to present any arguments that they think I need to hear.

But I'll tell you, I closely read the Committee's pleadings, I closely read the debtor's pleadings, Mr. Dondero's pleading.

And then, frankly, I skimmed very rapidly the other seven or so pleadings because of being pressed for time, but I do think I get the gist of them. And I think a lot of them kind of have the same theme.

But before turning to the debtor and the Committee, let me just tell you what my understanding is that we're going to primarily focus on:

We're obviously talking about emails of nine different custodians of the debtor, three of which I understand to be in-house lawyers. And whether it's the Committee's protocol that should be ordered here, or the debtor's protocol, and the way I see the two protocols differing is the debtor

wants independent contract -- or contract attorneys for the debtor to do a relevance review. UCC says no, that's going to be time-consuming, and strangers can't meaningfully do that.

It looks like there's a dispute about the search term request. Committee thinks what debtor is wanting is too stringent.

And then, of course, we have some competing views about how the privilege review process would work, and the debtor has obviously this overriding concern about confidentiality obligations it has, either contractually and/or shared services agreements, or through other law.

So now I will, at long last, turn -- I'm going to, I guess, start with the Committee because it is first in time with its pleading the motion to compel. And then, of course, the debtor came quickly behind that pleading with its own motion for protective order.

And so -- I don't know, Mr. Montgomery, or Mr. Clemente, let me hear from you on how you --

MR. MORRIS: Your Honor?

THE COURT: -- want to go forward today.

MR. MORRIS: Your Honor, this is John Morris from Pachulski. I greatly apologize for interrupting, but I have a slightly different suggestion.

We had made a proposal to try to resolve our disputes with the Committee a few days ago. The Committee responded

with its own proposal about an hour before this hearing, and we'd like an opportunity to confer with them. But under -- even under the -- even if we were to reach an agreement, I think the Court needs to rule on the other objections.

So my suggestion, subject to the Committee's acceptance and Your Honor's acceptance, of course, is that we allow the Committee to proceed and let the --

(Technical interference)

THE COURT: Okay.

MR. MORRIS: Let the other objectors be heard.

And then after the conclusion, and the resolution of those objections, some of which I understand may have been resolved already, we take a short break, and allow me to confer with Ms. Montgomery to see if we can resolve the balance of the issues, that's my suggestion.

THE COURT: Okay. So start with the Committee, hear their argument, and then any objectors who haven't otherwise been taken care of through agreements, hear from them, all right. Well, I am perfectly happy to go forward this way, especially if it means that we'll save some time in court, and the debtor and Committee can get on the same page without the Court ordering something.

So will it be Ms. Montgomery or Mr. Clemente? Which one of you wants to start us off?

MR. CLEMENTE: Your Honor, it's Matt Clemente. My

colleague, Ms. Montgomery, will be handling it. So I'll turn it over to her, please.

THE COURT: All right. Ms. Montgomery?

(Pause)

MS. MONTGOMERY: ... the objection that the debtor has filed --

THE COURT: All right. Ms. Montgomery, I'm going to ask you to start from the beginning, we missed the first few seconds, okay?

MS. MONTGOMERY: Sure. Can you hear me now?

THE COURT: Yes.

MS. MONTGOMERY: So consistent with the proposal that Mr. Morris laid out, I plan to reserve any arguments with regard to the dispute between the Committee and the debtors for now in the hopes that we can get those resolved at the conclusion, and we'll just focus on the objections, if that works for the Court.

THE COURT: Okay, that's fine.

MS. MONTGOMERY: We've been working diligently with all of the objectors that Your Honor is aware of, as well as a few that did not file objections over the last week or so in an attempt to resolve as many of their concerns as possible before today's hearing.

And we're happy to tell the Court that we have resolved some of those objections. We were able to negotiate

an out-of-court resolution with regard to an entity called Omnimax International, Inc. without them filing an objection.

And we have resolved the objection of Highland CLO Funding Ltd. And pursuant to that agreement with Highland CLO Funding, Highland CLO Funding has requested that the Court order, at the end of today's argument, include a statement that any documents that they produce pursuant to joint privilege aren't subject to a privilege waiver by virtue of their production to the Committee.

THE COURT: Okay.

MS. MONTGOMERY: And if I missed anything there, I'm sure that counsel for Highland CLO will correct me at the end.

THE COURT: Okay.

MS. MONTGOMERY: We also have an agreement in principle with Highland Capital Management Fund Advisors, LP and the remaining entities that submitted their objections at Docket 841.

Pursuant to that agreement in principle, we have no objection to those entities being treated as parties to a protective order or to having certain data being isolated from review as a preliminary matter subject to reservation of rights.

What we don't have an agreement on, Your Honor, is how those documents will be isolated. And we intend to continue working with Highland Capital Management Fund Advisors

and K&L Gates to try to knock out the details of that in the coming days. We preliminarily don't believe that it's necessary for you to hear the details of that objection for today.

THE COURT: Okay.

MS. MONTGOMERY: So with regard to the remaining objections -- my apologies, Your Honor.

There are essentially three categories of documents that make up the assorted objections -- the issues that are set forth in the objections. There are some documents that are allegedly confidential, and I think that Your Honor has probably read quite a bit about that in the pleadings that have been submitted to the Court.

It's our position, Your Honor, that there's a very strong protective order in place in this case. And that the protective order should be sufficient to handle any confidentiality concerns that have arisen pursuant to the objections.

We also believe, Your Honor, that a number of the documents at issue are subject to a joint privilege, and we've briefed this, and it sounds like Your Honor is very familiar with the materials that we've submitted to the Court. And as a result of that joint privilege, we believe that many of the documents that are included in the ESI that we've requested should be made available to the Committee.

As you know, Your Honor, there are thousands of companies that have been identified as affiliates of the debtor. Many of those affiliates have shared service agreements with the debtor, in which the debtor provided business functions for these purportedly separate entities.

And if you look at my briefing, there isn't any segregation of employees of the debtor that represent each of these affiliates. And instead, the debtor maintains a centralized pool, and whoever can perform the service for the affiliate does so.

The basis for most of the remaining objections that we're talking about here today is that these shared service agreements include provision of legal services. And in some instances, for shared IT -- like shared service servers for emails and other documents.

Under those shared service agreements, the debtor's in-house legal department provides legal advice to these thousands of entities on as-needed basis. And you're going to hear from the objectors in a moment some of those separate companies are objecting to production of their documents by the debtor, even though those documents are on the debtor's servers, in the debtor's employees' files, and generally available to debtor personnel.

We wanted to begin, Your Honor, with the objections to NexPoint Real Estate Advisors. We previously -- we

previously discussed NexPoint Advisors and its affiliates, represented by K&L Gates, but obviously there's also a separate objection for NexPoint Real Estate Advisors and affiliated entities.

NexPoint Real Estate Advisors argues that it would be unduly burdened if the debtor were to produce documents related to it to the Committee. It's unclear, however, how NexPoint would be burdened by the debtor producing documents, nor is it clear what expense NexPoint would incur as a result of that production.

In fact, it appears that NexPoint is attempting to raise defenses that belong to the debtor instead. This may be because NexPoint shares many things with the debtor under the shared services agreement:

First, they have shared employees who are employed both by the debtor and NexPoint Real Estate. Although pursuant to the shared service agreement, only the debtor pays the salaries of those shared employees. It shares back- and middle-office services, it shares administrative services, including cohabitating in the same office space on information and belief, and it also shares IT services, possibly including servers, and in-house counsel that provide assistance with advice with respect to legal issues.

Despite all of the shared services, NexPoint is arguing that it should be given a separate and independent

opportunity to review all documents possibly related to it, and to decide what it relevant, responsive, and privileged.

Your Honor, it's the Committee's position that NexPoint chose to commingle its data with that of the debtor; to share in-house counsel with the debtor; to co-office with the debtor; to share employees with the debtor; and to generally allow the debtor to provide many of its services. But now it believes it has a separate ability to review documents in the debtor's possession before they're produced to the Committee. And this is the sort of gamesmanship that we've been trying to avoid through the motion to compel.

NexPoint may very well be the subject of estate claims, it's impossible for us to know at this point because we don't have access to the data that's necessary for us to determine what estate claims might exist. And we don't believe that NexPoint should also have the ability to dictate to the estate which documents the estate -- that the estate already possesses and needs to investigate those claims.

With regard to the various Rand entities and Atlas, I believe Your Honor referenced Atlas when we began. Essentially the same argument appears to apply with Rand, although to a somewhat lesser extent.

The objection for Rand is slightly different in that it focuses on the shared IT infrastructure with the debtor, and not necessarily the custodial data for nine individuals that

were the subject of the motion to compel.

Unlike with NexPoint, it doesn't appear that Rand has legal services provided by the debtor.

And their objection primarily focuses on the potential that there is Rand data on servers that are accessible by the debtor which, in itself is an indication that the data may not have been maintained separately as to Rand and, therefore, confidentially. And as such, any privilege related to data contained on that server as to Rand would be waived.

That said, we are amenable to their request to be made party to the protective order. And that all data related to them be produced as highly confidential as a preliminary matter, subject, of course, to our ability to request a de-designation of that data where the default designation appears to be improper.

The next objection is CLO Holdco. CLO Holdco also argues that there may be data among that of the nine custodians, all of whom are employees of the debtor, that relate to a privilege held exclusively by CLO Holdco. We don't believe that that position is tenable.

The briefing on this particular objection, Your Honor, includes some back and forth with regard to Teleglobe, and related cases.

Teleglobe is one of the foundational cases on the

issue of privilege with regard to business affiliates. And it provides that communications between affiliates can maintain privilege because the members of a corporate family are joint clients, and this reflects both the separateness of the entity and the reality that they are all represented by the same in-house counsel.

We don't believe that Teleglobe stands for the position that there can be completely separate privileges held by affiliates with the in-house counsel that is employed by the parent company, or any other member of an affiliate family.

As a result, either the communications are subject to a joint privilege, and the debtor having access to the communications isn't a waiver of confidentiality requirements of privilege, or there is no common interest. There is no joint client interest, and the debtor having access to the documents is a waiver. But either way, the Committee should be provided with the documents under the terms of the final term sheet because the Committee is standing in the debtor's shoes with regard to those estate claims, and the debtor has conceded, and the Court has, you know, ordered that those documents should be -- that the privilege isn't waived. The privilege should be shared with the Committee, it's not waived.

Separately, CLO Holdco has argued that it should be able to conduct an independent review of the documents. As you

know, and I think we referenced in our hearing last week, the impetus for the motion to compel is specifically the need for expedited access to documents related to CLO Holdco so that we can comply with the Court's 90-day deadline.

CLO Holdco entered into the shared service agreement, it agreed to allow the debtor have access to this material, the debtor has that data. And we don't think they can now seek to claw back access to the ESI that's in the debtor's possession.

The remaining objectors, Your Honor, stand in a slightly different position. CCS Medical and MGM, in particular, are bringing objections, not based on the shared service agreement, but based upon the facts that there are employees of the debtor that have served in board positions for each of those entities.

But, you know, based on the information that we have to date, we understand that that -- that those board positions were obtained pursuant to investments or other relationships with the debtor, and that the debtor has or had relationship with those entities outside of the board position. And those additional relationships that are separate from board membership make it very difficult to craft searches that would exclude only outside information related to board service.

And so while the Committee doesn't necessarily have an objection to attempts to isolate the communications that are truly related to board service, we've had difficulty

negotiating the terms of what that would look like with MGM, at least. We haven't had an opportunity to speak with CCS Medical because -- because of its overlap, Your Honor.

We also think -- and this is set forth in our documents -- that it's possible that the documents that were shared with the debtor are -- have been waived, to the extent that there was any privilege associated with it because of the way that the debtor maintains its email servers.

And then I believe finally, the last objection that has been filed with the Court for today is from Mr. Dondero. And he argues that any data related to information that's being produced under the protocols should not be made available to Josh Terry, Acis Capital Management GP LLC, or Acis Capital Management LP.

But there's nowhere in Dondero's briefing that sets forth a basis of law for a categorical restriction of that nature. And as you know, Mr. Dondero and his affiliated entities are at the center of the Committee's investigation of the estate claims. And we believe imposing a categorical confidentiality ban against one member of a Committee would considerably complicate and impede that investigation.

We understand a desire to have any documents that are created in connection with pending litigation between Acis and the debtor, Dondero, and other Dondero-related parties, that that information be marked as attorneys' eyes only, highly

confidential so that only outside counsel has access to it, but that's not really the basis for Mr. Dondero's objection, and as a result, we don't believe that objection has value.

And then, Your Honor, I don't know to the extent you intend to hear from NexBank Capital and its affiliates, and so if -- I would like to reserve any sort of response to them --

THE COURT: Okay.

MS. MONTGOMERY: -- to the extent that you allow them to speak.

But, you know, in concluding, Your Honor, the debtor and its affiliates have interwoven so much of their operations, their legal services, and even their data storage, that it's incredibly difficult to try to pick apart the data, with the exception of MGM and CCS, the objectors here today agreed to those shared services, and now they want to argue that what was shared was actually separate.

The Committee has been tasked with investigating the estate's claims against the very affiliates that now seek to unwind their information and said that unnecessary burdens to production. And as a result, we request that those objections be overturned, that the motion be granted, and that the ESI subject to the motion to compel be produced to the Committee.

THE COURT: All right. Well, let me -- I'm just going to go down the list of objectors.

Let me start with the two that Ms. Montgomery

announced have been resolved: Highland CLO Funding Limited. Matsumura, were you going to be the one to weigh in on confirming that?

MS. MATSUMURA: Yes, Your Honor. I can confirm we've reached an agreement with the Committee that the documents that are -- contain confidential and privileged information of HCLOF will be produced on a highly confidential designation under the protective order, so that will be only the Committee's professionals.

And that as Ms. Montgomery stated, any of the documents produced by the debtor pursuant to this agreement will not be construed as a waiver of any privilege that the funds share of those documents.

THE COURT: Okay; thank you.

All right, what about HMC Fund Advisors? I understand that your issues have been resolved, you're still working out a couple of things, but who wants to weigh in on that to confirm that?

MR. WRIGHT: Good afternoon, Your Honor. It's James Wright at K&L Gates for -- actually a number of entities that are all at Docket 841. There was an objection at 841 that's HMC Fund Advisors, NexPoint Advisors, and then a number of individual funds, and I will not burden the record with listing each of them out.

THE COURT: Thank you.

MR. WRIGHT: I agree with the Committee's summary, that we have made a lot of progress.

There are some technical things that we're still working out, but I think that we're -- you know, we've been -- we've made a lot of progress, we've been working in good faith, and -- get there -- but we just need a minute to -- we were on the phone with them, frankly, ten minutes before this hearing started, I think we just need a little bit more time.

THE COURT: Okay; thank you.

All right. Well, why don't we start with Mr. Dondero, and your objection which I understand deals mostly with Acis and Josh Terry.

Go ahead.

MR. LYNN: Thank you, Your Honor.

As you've gathered, our concerns are somewhat different from the other parties who are objecting. Mr. Dondero agreed to the arrangement involving shared privilege in allowing the Committee the kind of discovery that they're seeking here.

And accordingly, we would (indiscernible) object to what they're doing.

But as I understand the Committee's response to the Dondero response to the motion to compel, (indiscernible) because, first, there is no basis in law (indiscernible) Acis and Mr. Terry (indiscernible) and participate (indiscernible)

in consideration of the estate claims.

And second, (indiscernible) and I quote, "considerably complicate and impede the Committee's investigation."

Even assuming for a minute that Acis and Mr. Terry are so central to the investigation that their absence from it could not be tolerated by a Committee, just as there may be nothing in the statute that permits the Court specifically to restrict Mr. Terry and Acis's access to information so, too, there's nothing in the Bankruptcy Code or the Bankruptcy Rules that prevents the Court from doing so.

There is (indiscernible) the authority for the Bankruptcy Court to grant what Mr. Dondero asks, which is that Acis and Mr. Terry be excluded from the information gained by the Committee during the course of its investigation. Section 105, as this Court is acutely aware, is the problem-solving section of the Bankruptcy Code that allows the Court to fashion results that may be necessary to fill in gaps that the Code leaves open.

There was nothing in the law that authorized it, even before the passage of Section (indiscernible) of the Code, it was common for (indiscernible) representatives are (indiscernible). And, indeed, (indiscernible) representatives are also (indiscernible) in other (indiscernible).

Similarly, I know of nothing in the Code or the Rules

that provides for the retention of a Chief Restructuring Officer. Yet, Section 105 has allowed for that necessary post, as is true (indiscernible) which are also not provided for in the law.

In this case, (indiscernible) Section 105 has been used to justify an independent board, and to justify the very same privilege that is at the root of the disputes. Section 105 (indiscernible) to justify the removal by a court of a member of the Creditors' Committee. That's in the First Republic Bank Corporation case, Judge Felsenthal determined that he had the authority to remove, and he chose to remove, a member of the Creditors' Committee. A similar result was reached in the MAP International case out of the Eastern District of Pennsylvania, and a similar result (indiscernible) following Judge Felsenthal was reached by the Bankruptcy Court for the District of Arizona in In Re America West Airlines.

If the Bankruptcy Court has authority pursuant to Section 105 to remove a Committee member, clearly Section 105 gives authority to the Court to eliminate a member's access to and involvement in an investigation that will give that Committee member a leg-up in discovery in another case.

In the litigation commenced by Acis is, indeed, in another case, not in this case, and the litigation is intended to provide a benefit -- a windfall to Mr. Terry, not to provide (indiscernible) who he is supposed to be representing as a

member of the Creditors' Committee.

As pointed out in an article in The Review of Banking and Financial Services in October of 2016, "Members of a Creditors' Committee may not use their positions as Committee members to advance their individual interests." And I'm quoting there the MAP International case. Similarly, that fight has been made by Collier in Paragraph 1102.05[3] of the Collier treatise.

Indeed, the Acis litigation may not only drain assets from Highland, it may reduce the (indiscernible) Dondero and other potential defendants in the same causes of action as to their ability to (indiscernible) any judgment that defendants may manage to obtain.

Under those circumstances, unsecured creditors represented by Acis and Mr. Terry will have their recovery reduced by virtue of those judgments.

It is clear that the Bankruptcy Court may restrict a committee member's access to information, as Collier points out, where a member of a committee is a competitor of the debtor, as, indeed, Acis is, the member may be restricted as to the information that the member gets so it does not obtain competitive advantage.

I recognize that the same claims may be, indeed, a central concern of the Committee, (indiscernible) with Acis and Mr. Terry creates serious problems, perhaps Mr. Terry should

resign from the Committee or be removed.

In fact, in this case, when UBS filed the motion for relief from stay in order to pursue litigation in New York, very properly, UBS excluded itself -- recused itself from discussion of the motion for relief from stay. And Mr. Terry, I respectfully submit, should do the same here.

Further, as far as complicating and repeating the Committee's investigation, and the Committee did not elucidate how that would happen, whatever trouble or cost (indiscernible) Acis and Mr. Terry may cost is nothing compared to the trouble and cost to the debtor of complying with a request for millions and millions of communications.

In conclusion, Your Honor, in litigation such as that being pursued by Acis in the Acis case, as courts have said, the Federal Rules were designed to create, quote, "a level playing field," end quote.

A couple of those cases, the Hillsborough Holding decision of the Bankruptcy Court out of the Middle District of Florida; Allstate Insurance versus Electrolux out of the Northern District of Illinois; and Passlogix, Inc. versus 2FA Tech out of the Southern District of New York.

Yet the motion to compel is brought without protection from (indiscernible) that Acis seeks, there clearly will be no level playing field in that litigation. And the commitment of this Court (indiscernible) in general to

(indiscernible) litigation processes will be undermined.

Your Honor, if anybody wants cites to any of these authorities that I provided to the Court, I'll be happy to provide them.

THE COURT: All right. Thank you, I appreciate that.

I'm going to go next to --

MR. LYNN: Your Honor, I didn't hear you.

THE COURT: Pardon? I thanked you for your argument, and I do not need those case cites.

I'm going to go next to CLO Holdco. Mr. Kane, will you be making the argument there?

MR. KANE: Yes, Your Honor, I will; thank you for the time. This is John Kane for CLO Holdco, for the record.

And first, I want to start by kind of acknowledging that we really did take to heart what you said previously in attempts to avoid unnecessary litigation. I've been working with Ms. Montgomery for over a week now in an effort to try and resolve some of our concerns about the discovery requests, at the same time trying to be mindful of what I believe to be my client's privileges and our right (indiscernible) the party that reviews documents and produces them.

We are -- CLO Holdco is subject to a request for production of documents from the Committee. We are working to prepare a review, to obtain all of the requisite documents to

have a fulsome production to the Committee. And Ms. Montgomery and I have had conversations about how that production will take place. While we acknowledge that there are obviously some timing concerns here given the 90 days relating to that registry order that was relatively recently entered.

So we've mindful of all of those issues, and our dispute here is about whether we're giving up privileged documents or whether we aren't.

It's our position that since that request for production of documents to CLO Holdco, CLO Holdco has a right to review those documents, and to produce documents in accordance with the Federal Rules. And that the request by the Committee to have all ESI produced by these various custodians basically provides an end around to the request for production of documents delivered to CLO Holdco. And it does look through the guise of this joint client privilege exception to the general privilege rules.

But we've got a fundamental misunderstanding of the law by the Committee as the exception applies to the general rule of privilege. And it basically breaks down to a simple analogy, one we can apply to the case of law. The analogy would be like if our firm, Kane Russell Coleman and Logan, represented Texas Capital Bank and Wells Fargo on a bunch of separate matters, and then because we had a great relationship with both, we are going to represent Texas Capital Bank in a

merger with Wells Fargo, and we are going to be retained as kind of a mutual third party counsel by both sides to help manage this merger.

Now if that merger representation turned into a later dispute between the parties, the correspondence between Wells Fargo and Kane Russell Coleman and Logan, and the correspondence between Texas Capital Bank and Kane Russell Coleman and Logan would not be precluded from production to either party as long as it were (indiscernible) representation. They have the same counsel for the same representation. So that this idea of privilege doesn't really apply the same way. Those documents pass back and forth, I have a duty to both of those clients equally.

But what they wouldn't be able to obtain is, let's say, Texas Capital Bank's request for production of documents to me, counsel, seeking all correspondence that I have ever had with Wells Fargo on any other matter, regardless of whether it was -- it was related to or unrelated to a joint representation. And really, that's what the Committee is trying to do here, they want all ESI, there are no parameters. So it doesn't matter if there's a joint representation on a specific matter between CLO Holdco and the debtor, what the Committee is asserting is because they use the same counsel, that all matters or all correspondence between counsel for the debtor, all internal counsel, and counsel for CLO Holdco, since

it was essentially the same person, the same people, all of that is subject to production.

So here's an example of how this plays out, Your Honor. At our last hearing, you heard a bunch of testimony about a transfer of Highland, the debtor's interest in the Dynamic fund, and how on December 28, 2016, with one document, we can trace -- I'm sorry -- we can trace this trail of transfers from Highland to CLO Holdco, and we know that Highland's internal counsel was representing both sides of the deal. They were representing the debtor, they were also representing CLO Holdco as the creation of those documents was done for both parties by the same entity and the same transaction, that's critical.

So do I have an assertion of privilege for CLO Holdco in that situation? No, I don't believe that I do. I think that joint client exception that's addressed in Teleglobe, and Nguyen, and in the Nester decision that's cited by the Committee in their pleadings precludes me from stopping the -- or the disclosure of documents that were between internal counsel and CLO Holdco as they're related to that dynamic transaction because internal counsel at Highland represented both sides of the deal.

But there are other representations taken up by internal counsel for Highland under the shared services agreement between CLO Holdco and Highland that really don't

have anything to do with Highland. So much (indiscernible) litigation, we'll say, between CLO Holdco and some other party like U.S. Bank that does not have Highland Capital Management as a party to that litigation, and could not have Highland Capital Management as a party to that litigation.

(Indiscernible) under this joint client privilege exception that the Committee is asserting should control this entire deal. So in a situation like that, I would still be able to review and withhold documents that were privileged, attorney-client communications, or work product communications without having to disclose those to the Committee even though the Committee stands in the debtor's shoes. Because there is this isolation, Highland is not a party that is jointly represented in that transaction.

So all of the documents that have been exchanged between CLO Holdco and the debtor in representations where the debtor is not an active participant as a party in a joint representation, all of that documentation is the sole property of CLO Holdco. It shouldn't be subject to disclosure simply because one of these custodians engaged in correspondence with CLO Holdco.

So, for instance, the Argentina Bank, let's say, if Highland is not being represented in a transaction with CLO Holdco related to the Argentina Bank, and Grant Scott, as trustee of CLO Holdco, inquires internally about a -- let's say

a NAV statement related to its interest, that's not necessarily a document that would have to be produced to the Committee because it is a potentially privileged communication if it was with one of the attorneys in-house.

Now that doesn't mean that everything is going to be privilege, or that there aren't going to be a significant number of these joint client privilege exceptions where we have to disclose attorney-client communications because Highland was on the other side of the transaction, but that's something that I should be reviewing as CLO Holdco's attorney, and identifying documents for a privilege log, and then having a conversation with the Committee's counsel about whether these are subject to the joint client privilege exception, or whether they are truly privileged documents or not.

So we've already got a request for production out there. I mean presumably, Your Honor, this is already -- you know, this is already underway. What we just want to do is try and protect the documents that are actually privileged communications or work product communications from disclosure to the Committee.

THE COURT: All right; thank you, Mr. Kane.

Let me hear next from NexPoint Real Estate Financial.

(No audible response heard)

THE COURT: All right. I can't hear you. Is this Ms. Drawhorn who will be addressing this one?

MS. DRAWHORN: Can you hear me -- can you --

THE COURT: Yes.

MS. DRAWHORN: Can you hear me now?

THE COURT: I can.

MS. DRAWHORN: Okay. I had to unmute both my phone and the -- and the computer, okay.

Lauren Drawhorn on behalf of NexPoint Real Estate Finance and the 15 related entities and -- that are listed on Docket 847, I won't go through them all.

So our -- one of the -- we've got a couple issues with the motion to compel relative to our shared services agreement with the debtor, and largely because of the breadth of the request wanting ESI from all nine of these custodians. And we have concerns that because there are no limits on that request, that we've got our confidentiality and privilege issues that are concerned about.

The real estate entities are -- NexPoint Real Estate entities are typically traded, and there are some regulatory constraints that we have on the dissemination of information and it being public. And so obviously we need to protect those interests and try and prohibit the disclosure of information.

While there -- while the NexPoint Real Estate entities do -- did have a shared services agreement, it is the businesses unrelated to and separate from Highland, except for

the occasional times when they co-invested.

So generally speaking, they were separate businesses. Any use of services from Highland employees under the shared services would be for separate deals. And so because they're separate, we believe that it's unlikely that they would be relevant to the estate claims.

In other words, the request should be narrowed to limit the amount of information that's not related to the Committee's estate claims, (indiscernible) related to NexPoint Real Estate entities' deals and confidential information and business information.

The other issue we have in connection with confidentiality is in connection with NexPoint Real Estate's entities business operations. They continue to receive information electronically from third parties that have been the subject -- that information was provided subject to confidentiality agreements there. So under those agreements with other parties, there are requirements and obligations for NexPoint Real Estate entities to notify those parties and provide them an opportunity to object.

So we are wanting the additional protections and limits on the discovery to protect this confidential information and our obligations to other parties, and to regulatory entities.

We also have concerns on the privilege -- any

privilege information, again, since these custodians were counsel, and provided -- occasionally provided legal advice in connection with NexPoint Real Estate entities' deals that, again, were unrelated to Highland and separate from the debtor. That information will be -- would be privileged and (indiscernible) NexPoint Real Estate entities' privilege (indiscernible) position you just heard, and the Committee's response is that that was waived or part of this joint client, and we disagree with that. Where the legal advice was given on a separate matter, there would be no joint privilege between the NexPoint Real Estate entities and the debtor. We think that that privilege should be protected, and the privileged documents should be withheld from the production.

The Committee responded by their -- that we -- that NexPoint Real Estate entities are not burden. We did argue in our objection that this request, under 26(b) (indiscernible) because it was also an undue burden because it's so broad -- so broad. And that burden (indiscernible), as you know, isn't required to be the physical burden of us going through and producing documents. An undue burden encompasses the invasion of confidential information and privilege concerns. So we think that there is a good basis to limit the information that is being produced to protect NexPoint Real Estate entities' confidential information and business information.

So what we're requesting we suggested in our

objection was to allow NexPoint -- the NexPoint Real Estate entities to have input on the search terms that would narrow the production and potentially exclude the NexPoint Real Estate entities' confidential information, information that would be unrelated to the Committee's estate claims.

We also requested that NexPoint be given an opportunity to review the documents -- the NexPoint documents before produced -- and this is similar to what is my understanding the debtor would -- for all of the -- the previous production that was provided. So it is my understanding that before the debtor produced any document that instituted the shared services agreement, confidentiality privileges, they contacted that party and said "Here's this document that we're going to produce, are you okay with it? Are you okay with it, is there any objection?"

And so that's all we're requesting is an opportunity that the NexPoint documents that -- that are potentially giving -- to make sure that they're designated correctly under the protective order, so as highly confidential versus confidential, again, because of those confidentiality concerns that I mentioned earlier. And then also to confirm the privilege designation and to make sure anything privileged is not being produced.

And then the last request we have is just to make NexPoint a party to the protective order so that we are able to

obtain those protections as the highly confidential and confidential designations.

THE COURT: All right; thank you, Ms. Drawhorn.

All right, let's see. How about we hear from Atlas IDF GP next.

MR. KEIFFER: Thank you, Your Honor. Paul Keiffer for the Atlas IDF entities and parties located at -- or I should say named at Docket Number 837, I won't burden the Court, as others have not done, as well, with the full list of parties.

And also taking in mind -- or keeping in mind what the Committee has done as far as discussing issues, I want to -- I have just a few points:

First off is that my clients don't have a specific concern with the ESI request. The shared privileges and the joint privilege is supposed to hold, we want that to hold as it has been requested for everybody else, and I think that was the intent of the Committee in regard to that point.

It's also, as the Committee indicated, between the debtor and the -- I'm sorry -- between the Committee and the Rand Advisors' related entities that they want to be expressly involved or brought into the agreed protective order. Lots of documents are being requested, not so much through the electronic -- the ESI, but through the fourth production of documents request that we got that -- which we received on the

9th of July that gave us six days to respond to, and that's why we started talking and having discussions with the Committee about this.

But there -- there there's all these document requests, and we have our own fiduciary duties, we -- either contractually, statutorily, or regulatorily. And as the Committee noted, they'd be perfectly fine with having us being brought into (indiscernible) -- whatever you want to call the right under the coverage of agreed protective order. We're not expressly under it because we're -- we're not a specific party to it, but we need to be -- we feel it's the most appropriate for us, too, in this context, and they've acknowledged that it's a reasonable step to be added to the agreed protective order, so we're happy with that.

As far as the documents being produced, the only -- the principal attached -- the principal issue for Rand Advisors there is that it's principally its email server issue. Rand Advisors, and the others, have their on documents on its own servers, as best as I understand. And so it's really more documents that would be appended to emails and discussions between the parties, either in the context of (indiscernible) some of the nine individuals that are custodians, that they're described as custodians or otherwise.

But the UCC has agreed to let whatever documents are produced in that context, both through the ESI and through the

request for production that's outlined there, that we're having to respond to under the shared services agreement with the debtor. But those would also be subject to highly confidential status, subject to the Committee seeking to downgrade to confidential, or not confidential at all.

Now the other issue is the attorney-client privilege where Rand Advisors and the others were generally using RandAdvisors.com suffix, would have negotiations and discussions with its own private counsels. And the question here, we don't -- I'm not sure whether or not the shared -- I mean the servers are or are not sufficiently silo'd or otherwise.

But we really don't have that hard of an issue here -- that difficult of an issue here as we only -- there's only three defined suffixes that are out there that would be of concern to the Rand Advisor entities, and those are suffixes such as romclaw.com, our law firm, we didn't realize that that was the case. Also, there would be maybe Sadis -- Sadis or -- another law firm, maybe three or five suffixes we need to have set aside for attorney-client privilege review. And if we have those, I think that the Rand Advisor group has gotten what they -- what they think is reasonably appropriate under the circumstances.

And we're not asking the Court to, you know -- well, we don't see this as truly a request for production, it's kind

of a hybrid kind of a (indiscernible). But under the shared services and the final term sheet, and that allows access, lets the Committee be the debtor and get to many things, but yet they use request for productions as a methodology to say what they're looking for, but they're not really requests for production, per se, because it's -- I've already got it now, this is (indiscernible) debtor, it's what we can look at.

And so we're wanting to make sure that we have under our side of this relationship under the shared service agreement some modicum of protection for its specific attorney-client issues that it has. We recognize the joint privilege issue, that's going to (indiscernible). But there are three to five very simple suffixes as we can give to the Committee for doing its search (indiscernible) romclaw.com, that's my law firm, it would know not to go -- you know, set those aside. There's one or two other law firms that they deal with specifically, and if they go through the next step, and it turns out that there's three or four other people on the email that aren't part of Rand Advisor that's something with the debtor or some third party altogether, then sure, there's no privilege there.

But if it's the discussions between Rand Advisor entities and its counsels specifically, then it should be something that's set aside and reviewed in a different manner. And I don't think it's really even close to burdensome in the

context of how much is going on in this case, and how many documents are going to be reviewed.

That's principally our concern. We are -- that's another suggested solution to deal with the two elements that we raised in our response on Pages 6 and 8 to a likely solution, which is to basically deal with attorney-client privileges, subpart C, is just to have these exclusion -- exclusionary suffixes to address that, very simple.

The rest of this, as far as having a log to keep produced items in its context, to be able to (indiscernible) what documents were produced, well, that's probably a bridge too far. We don't need to have that, we don't think that's (indiscernible) concern for us.

So keeping up with the few things, the agreed protective order being made expressly applicable to us so that for our purposes, when we have to deal with issues of confidentiality regarding our clients contractually, statutorily, or regulatorily, that's the (indiscernible) I think there's always a legal process (indiscernible).

Two, that everything gets a highly confidential status initially, and subject to being downgraded, obviously with notice and opportunity to object.

And then lastly, just that the three suffixes be added to the review standard so that -- three to five suffixes, and I'll have those easily enough in the next few days to give

to the Committee to allow me to preserve its attorney-client privilege without having to go into the issue of whether or not this is a means by which Rule 34, or the other appropriate discovery rules, are really being invoked or not in this context, or whether this is just "I'm standing in the debtor's shoes, and I should be able to do these things." It's -- that's an odd -- we can bypass that oddity by dealing with those requested suffixes being set aside.

THE COURT: Okay; thank you.

All right, let's hear from CCS, please.

MS. STRATFORD: Good afternoon, Your Honor. This is Tracy Stratford from Jones Day on behalf of CCS Medical.

THE COURT: Okay.

MS. STRATFORD: Our concern is relatively narrow and unique. CCS is one of the country's leading providers of home delivery medical services. And so they deliver things like insulin pumps and orthotics to people in their homes.

Two of Highland's employees, Mr. Parker and Mr. Dondero, were directors of CCS Medical. And so CCS Medical sent information to them, sensitive business information about the strategic direction of the business, about pricing, about what the business would be doing or wouldn't be doing, about decision-making that would happen within CCS Medical. That sensitive information was sent to the director, including these two individuals who were employed by Highland at their Highland

email addresses.

All we're asking is for the ability to look through these emails first so that we can identify anything that is competitively sensitive, so that we can identify anything that is privileged, and talk to the Committee about it separately.

We don't know, frankly, what the claims are that the Committee is looking to press, so I can't say that none of it is relevant, although it doesn't seem to be particularly relevant to what's being discussed today.

But to the extent that some of those documents might be relevant, the non-privileged ones, but commercially sensitive ones, we want to have that discussion. We would like the ability to look at those documents first, and that would be at our cost, so there's no cost to the estate. We don't think it would take particularly long.

And we would have offered the solution directly to the Committee, but they wouldn't return our phone calls. So we've sent emails, we've called them, and heard nothing back. We would have loved to have negotiated this, but that didn't happen.

The only argument that the Committee makes in response to our suggestion, which were laid out pretty clearly in our very short objection, is that there's a privilege waiver here, or a waiver of confidentiality because we sent this information to these two board members who were employed by

Highland. (Inaudible) as a matter of law. And the very case that they cite in their papers explains that.

If you take a look at the In Re Royce Homes case that they cite in their response to the objection, what they say is that once you send confidential information to another corporation, the privilege is automatically waived. That's not the case.

In fact, if you look at that case, it's very lengthy because the Court looks at a number of factors. And amongst those factors is the expectation that the sender has that the recipient will be able to maintain the information as confidential or protected.

Here we have two executives at Highland who were receiving information as members of the board of directors, they controlled the company, they had the ability to control who reviewed their email, and CCS Medical had every reason to believe that those two directors would preserve their duty of loyalty to the company and maintain their individual emails as confidential. There's no waiver under that circumstance.

But to the extent that this issue is one that needs to be decided, it can't be decided on these papers because none of those facts are before the Court. None of the factors that are discussed in the In Re Royce Homes case are -- have been briefed.

And so to the extent that we're going to discuss a

waiver, we would like the opportunity to do that. We don't think the Court ever needs to reach this issue because we think that we can, in a very efficient and effective way, screen the emails by just having the vendor search for particular domains, review them ourselves, identify what's privileged. And what's not privileged, we can turn over.

To the extent there's any dispute later on, we can bring it before the Court at that time, but we think this is an easy problem to solve, Your Honor.

THE COURT: Thank you.

MS. STRATFORD: Thank you.

THE COURT: All right.

Well, let's see who I missed. Ms. Drawhorn, did you have a separate argument for MGM?

MS. DRAWHORN: Yes, Your Honor.

THE COURT: Okay, go ahead.

MS. DRAWHORN: I do.

THE COURT: All right.

MS. DRAWHORN: And so MGM is in a similar situation to the party you just heard. And the only reason that MGM is being pulled into the discovery dispute is because Mr. Dondero served as a director on the -- on the board of directors for MGM.

So we also believe -- and we have been in discussions with the Committee about potentially pulling out or excluding

certain MGM information just by providing a list of the emails, the dot-com of the other executives, or executive assistants, or other board of directors members who would be sending confidential information that was circulated just because -- for purposes of the board of directors of MGM and for MGM business matters.

So we -- we agree and -- or disagree with the Committee, and agree with the position you just heard. The Committee's response to our -- to MGM's objection is that we waived by sending confidential MGM information to Mr. Dondero's account at Highland, that waived conference or privilege, and we disagree with that. We -- we just heard that sending to an employer's email account in and of itself is not sufficient to waive privilege or confidentiality. There are a multitude of factors that need to be considered, including the expectation of privacy in considering the fiduciary duties of board of directors under California law, which is where MGM operates. That that confidentiality is one of the fiduciary duties.

We would expect that sending information to our directors would remain confidential. And just the mere fact that he utilized his -- Mr. Dondero utilized his Highland email account would not be sufficient to waive any confidentiality or any privilege.

And then I -- I -- it is hard to believe that anything MGM-related would be extremely relevant to the

Committee's claims, but regardless, I think there's an easy way to pull that information and make sure that nothing is being disclosed, which would be by providing these specific email addresses of outside counsel to MGM's board of directors. We've got, you know, two -- two counsels that would not have provided any services to the debtor, that we can say anything at those email addresses should get excluded from production.

Same with the outside advisors to the MGM board, we can easily provide that email address and have that information excluded.

And then as to the other confidential MGM information, we have a list of the executives and their assistants, we would have provided -- and other board members, we would have provided that. I just think it should be fairly easy to give those email addresses and exclude them from the production, and make sure that that confidentiality and privilege is maintained and protected.

THE COURT: All right; thank you, Ms. Drawhorn.

Okay, NexBank's counsel, you were going to try to knock my socks off with a reason why I should hear your argument today when you didn't file an objection. So, Counsel, now's your chance.

MR. SLADE: I appreciate it, Your Honor; thank you very much. Jared Slade of Alston & Bird for NexBank.

NexBank advances the same arguments about concern of

counterparty confidential information, as well as attorney-client privilege concerns. And to that end, it's requested some preview time to be able to review the documents and provide the appropriate search terms.

I think there are three things which will happen in the next 50 seconds that make us differently situated:

The first is unlike the other objectors, our shared services agreement provides expressly that debtor shall take all options, legal or otherwise, that are necessary to prevent the disclosure of confidential information by the receiving party or any of its representatives. So we have a different legal basis that was addressed in part in the debtor's motion originally on this issue.

The reason we have that is because we're a bank, and we have two other categories of information that are particularly sensitive and we're concerned about being disclosed:

The first are bank examination materials. Privilege is a part of those, and we are very concerned about an issue or problem with our regulators in connection with the fact that we have, in fact, taken appropriate steps to try to protect those and treat those as privileged and confidential information.

The other category of information is consumer information. We're talking about things protected by (indiscernible) and other consumer information which are

protected in the statutes.

Again, we're willing to go through the effort and expense to be given an opportunity to be able to review that because (indiscernible) that any of that is going to be relevant to what the Creditors' Committee is looking at, that we understand where we are. And provided that we are able to do that, and are also afforded an opportunity by the Court to be a party to the protective orders so we can take advantage of the designations and not be prohibited from the (indiscernible) third party beneficiary provision, we should be able to meet our obligation.

Thank you, Your Honor.

THE COURT: All right; thank you.

All right, Ms. Montgomery, I'm going to turn back to you. And let me make sure I understand entirely your position on all of these objectors.

You have said -- correct me if I'm wrong -- the Committee has no problem with making all of these objectors subject to the protective order that was negotiated with the debtor way back when in January, or did I overspeak -- overstep on that one?

(No audible response heard)

THE COURT: Ms. Montgomery, I can't hear you.

(No audible response heard)

THE COURT: Ms. Montgomery, you must be on mute.

Michael, is she still on there?

ECRO: (Inaudible).

THE COURT: Okay. Ms. Montgomery, we're showing you're on mute. There you are, okay.

MS. MONTGOMERY: Can you -- can you understand me now?

THE COURT: Yes.

MS. MONTGOMERY: Okay. I don't know what happened, I didn't touch anything.

THE COURT: That's okay.

MS. MONTGOMERY: Technology.

No, Your Honor, you're accurate -- that is accurate. We don't have any problem with any of the objectors being made parties to the protective order for purposes of, you know, for their clients to be subject to the same -- the same protections.

THE COURT: All right. And then my next thing I wanted to confirm is that protective order, is it already worded that it's UCC professionals' eyes only or no?

MS. MONTGOMERY: So the current -- the current protective order has two tiers.

THE COURT: Okay.

MS. MONTGOMERY And the highly confidential tier has a very -- a much more limited disclosure group, it includes the Court, it includes the outside professionals, so I guess it

would be also FTI, etc.

And then, you know, other parties that would be, you know, fundamentally necessary for us to use those -- that data, like court reporters. It does not include the members of the Committee.

THE COURT: All right, so you said it's two tiers. You mean like there's highly confidential, that's professionals and those people you named only; and then there's a second tier, confidential, then the Committee members, the actual businesspeople could see it?

MS. MONTGOMERY: That's absolutely right, but the confidential data would still be subject to protection. So we think it's a strong protective order, and should meet the needs of all of the objectors.

THE COURT: Okay. Let me -- I'm giving you the last word. You can respond in any way you want to all of these eight or so separate arguments, but I would like you to start first with CCS Medical and MGM. I think you acknowledged at the beginning they're in a little bit different category, but now that you've heard their lawyers articulate how they are different, do you think that at least with these two, their ability to first review anything you produce, or the debtor is going to produce, relating to CCS Medical and MGM might be reasonable?

MS. MONTGOMERY: Yes, Your Honor.

I'd even go a step further. I mean we were working to negotiate with MGM, and my apologies to Ms. Stratford because I must have missed her communications, it was not intentional; we would have happily negotiated the same with regard to her. That those documents might even just be excluded from the review subject to some specific, you know, protections so that we can make sure that things aren't being overly included.

So I think that the UCC would be open to a limited review. The devil's in the details with all ESI, Your Honor, so it would really just be determining to make that as targeted as possible so it's not -- you know, it's not including documents that don't have anything to do with the board's service.

THE COURT: Okay. It's -- let me ponder what you just said.

It would exclude anything not having to do with their board service, Dondero or Trey Parker's board service.

MS. MONTGOMERY: Yes. So we believe that because the debtor has separate relationships potentially with these other entities, we understand the concern with regard to the data that's related to their role as a director.

But, for example, if there is communications between Mr. Dondero and someone else at the debtor that just says like, you know, "MGM stock is trending up," I don't know that that's

necessarily related to his status as a director as I don't know that it's related to an estate claim. It's perhaps a bad example, but the concept remains, Your Honor, we think that there has to be a way to slice that so that all the parties are getting the protection that they need for their confidential board communications without overly dipping into the data that's otherwise in the debtor's position.

THE COURT: All right.

Well, let me -- let me go to Mr. Keiffer's client. I'd like to hear your specific rebuttal to his idea that maybe you can come up with three or five categories, suffix as he called them, to just, at the outset, carve them out from the possibility of Committee review.

MS. MONTGOMERY: So I'm not entirely certain that I completely understood the proposal, Your Honor, and my apologies for that. But I don't know that Mr. Keiffer is suggesting that those categories be excluded from these nine custodians that are the subject to the motion to compel, or if he was requesting that there be some sort of exclusion that applies to data that's otherwise produced related to his client by the debtor, so maybe it's not in the nine custodians' data.

In any case, Your Honor, we're open to discussions to try to resolve any of these objections. I don't know that we've specifically discussed that with Mr. Keiffer, but we're happy to do so. If it's limited in nature, and it's not going

to unnecessarily slow down production, you know, we're open to talking about it.

THE COURT: Okay. Well, let me -- let me make sure I understand -- and I know this is subject to discussion with the debtor when we break, but the UCC's proposed protocol here was -- let me go through a couple of mechanics.

All the files of the nine custodians would be provided to this E discovery vendor to put in a repository. And then hopefully the debtor and the Creditors' Committee would come up with a set of mutually agreeable privilege terms to hopefully identify what would -- you agree be attorney-client privilege or work product privilege so that the search terms don't get to that privileged information.

If you have disputes, you're going to have a third party neutral, you've discussed, to resolve the disputes about those search terms.

And then all documents, not including those agreed privilege terms, would get produced to the Committee, obviously subject to the earlier agreed upon protective order, and then the debtors contract attorneys would review the held back files to see if they're really privileged, or not. And if not, they'd be produced. And if they are, they would -- if they think they are, a privilege log would be produced, and then any disputes could be resolved by this neutral third party.

I don't know if that's still your protocol on the

table, but that's how I understood it to work from your papers.

I guess what I'm getting at is -- I'm pondering Mr. Keiffer's argument, and really a few others. I mean if this is what you're still holding fast to, I mean there's a lot of opportunities along the way to protect attorney-client privilege information of these affiliated entities, right? You're going to first try to craft appropriate search terms so as not to get at privileged information. If you can't get agreements on those, you'll have the third party neutral weigh in.

And then the documents that are turned up ultimately through the search, the debtor's going to get a chance to review for privilege and hold back.

I guess -- I guess the thought is the debtor's only going to be looking towards its own privileged information, not necessarily NexPoint, or Highland, CLO Funding, and the others.

So -- I mean if you could address -- first off, is that the protocol that's still on the table? Did I correctly described the Creditors' Committee's proposed protocol?

MS. MONTGOMERY: Sorry. Yes, Your Honor, that's what's set forth in our motion. We've been working with the debtors to try to make that more functional; we haven't reached an agreement yet. Perhaps we'll be able to do that when we take a break in just a moment.

But, you know, we've been trying to figure out, Your Honor, if there are ways that we can further limit the production based on search terms in some way so that we can limit the privilege logging and review that has to occur. But like I said, that's -- that's outstanding at the moment, and I don't know that the parties have an agreement or would be able to reach an agreement. We're hopeful, but I'm not entirely certain.

But otherwise, yes, Your Honor, I think you've pretty well explained the protocol, with one exception, which is that the privilege review that was proposed, that review would be to determine whether or not the documents that were being produced -- that were, you know, presumptively privileged were related to estate claims. And if they were related to estate claims, then those would be produced to the Committee under the terms of the final term sheet.

If they are attorney-client privileged, and not related to estate claims, then those would be withheld and logged.

THE COURT: All right.

Well, let's go back to Mr. Keiffer's suggestion. I mean if he -- okay. I was confused; I think Ms. Montgomery was confused, too.

Mr. Keiffer, you had talked about these three or four suffixes, and one of them would be your law firm if -- I think

what I was understanding, communications that went between Atlas and your law firm; communications that went between Atlas and one or two other outside counsel. Is that encapsulating what you think could be crafted in here --

MR. KEIFFER: Yes, Your Honor.

THE COURT: -- and excluded?

MR. KEIFFER: Yes, Your Honor, that's exactly what we're talking about.

The reason I used "suffixes" just as a term because after the act. So it's ROMCLAW.com is the suffix. And so if you look for that -- if that is the part of the search terms and, you know, you see that, and that means set aside, you see my law firm's suffix on the email somewhere in that, then you know that that's something you need to set aside, as well as another law firm that they had would be SGLawyers.com, those are the -- that's what was referencing, it's just an easy way.

We don't have a lot in our specific circumstance -- and I think it was also some of the more attenuating parties that come in and -- complaining have been -- would be looking for something like that, so if they had a -- maybe that's the same thing that they're kind of looking for. But for us, it is very simple terms, it's what the law firm email addresses are. And when they show up, that's the search term that pushes them aside.

THE COURT: All right.

MR. KEIFFER: Because that would okay, it's probably something -- because before we even knew what was going on, we were working on putting that proof of claim together that we filed, we would have emails out there concerning circumstances between myself and my client. And those would -- those ostensibly would be available under the -- under the -- if it were (indiscernible) litigated, and the Committee won that issue, those would be available.

But we think the easier thing to do is just set them side, let's not go down that road.

The other -- we think there's very few of those, and we'll be happy to give them -- the suffixes in a few days. I'll make sure Mr. Honis -- that my client representative gives me all of those.

THE COURT: All right.

Well, Ms. Montgomery, again, I'm just looking through my notes of your early comments. I mean you had put Mr. Keiffer's client in a little bit of a separate category, right? Saying it didn't appear that Atlas or Rand entities -- they're one in the same, right? Or -- well, same group of clients or same group of entities: Rand, Atlas --

MR. KEIFFER: They are, Your Honor, that's all -- they're all in my group.

THE COURT: Okay. So you had made the comment, Ms. Montgomery, that they did not appear to share legal counsel.

MS. MONTGOMERY: I did.

THE COURT: In other words, the three in-house lawyers that are custodians, right?

MS. MONTGOMERY: That's right, Your Honor. And I think that our position would be because they don't share legal counsel, if there were communications essentially from these three law -- like law firm email addresses that are in these nine custodial data, then those documents might not be privileged.

If what Mr. Keiffer's concerned about is communications not to these nine custodians that involve those three or four addresses where there isn't sort of a debtor representative involved, then I think that's a separate situation, and we'd be more than willing to reach an agreement regarding how those documents should be treated, whether it's by review by Mr. Keiffer in logging or just exclusion from review.

MR. KEIFFER: Your Honor, may I ask for one quick clarification. We still want to maintain that to the extent I don't know for sure whether -- what extent legal services were or were not provided.

And to the extent that their joint privileges waived, a way around those things, that's the better way of doing it than to say that they've been waived and things. So let's just let the joint client privilege point, which we previously

discussed, be the main means by which those go through. There might be (indiscernible) discussions with one of the nine folks that -- when Highland was involved in the transaction. There may be a common interest privilege, etc. I think it has to stay at that highly confidential level just because it's (indiscernible) had it lowered in its tier -- I mean a tier -- or possible references, whether it's confidential, highly confidential, confidential or not confidential at all.

THE COURT: Okay. I just --

MR. KEIFFER: That's the only --

THE COURT: I just got very confused. I think we were discussing if -- if there are --

MR. KEIFFER: May I, Your Honor?

THE COURT: Yeah, I -- I -- well, if there are communications from folks at Highland to these three or so law firms that Atlas uses, then there could be an agreement those are cut out -- carved out.

But if there is -- if there are communications from the six other custodians who are not lawyers to Rand entity -- or -- or these law firms --

MR. KEIFFER: No, Your Honor --

THE COURT: I -- I --

MR. KEIFFER: Pardon me, Your Honor. The law firms aren't really the issue here. Only the issue with regard to seeking things through what is the shared server circumstance

in the email server.

An example may be that when there's an email that comes in from Isaac to my client saying "You've got some production requirements," and I'm on that email, I would initially show up on that email, but that wouldn't be one that would be as part of a shared services type of potential legal discussions about current circumstances and telling me, "Oh, by the way, we've been requested for this information under a shared services agreement, you have X days to produce."

If, on the other hand, it's -- some years ago, back when things were happening, not current, but years ago when things were going on, that there was -- that there was an email between my client's counsel and the debtor's counsel, there would be the shared privilege or the joint privilege element that would keep it at a different level, even though there may be some other issues in regard to the shared services related to privilege.

What we mentioned earlier -- and I think the Committee's okay with this -- with the joint client privilege is not affected by the process. And so that -- the only thing that's really, really out here that adds to the circumstance is where emails show the three to five dot-com addresses. That they get set aside to go through a different -- go through a process of review, you know, to see if they're attorney client between myself and my client, or between previous counsels and

my clients, just as between them.

THE COURT: All right.

MR. KEIFFER: That's all we're really looking for in that.

THE COURT: Okay.

Ms. Montgomery, again, I'm giving you the last word in rebuttal to any of this you want to say at this point. But I do hope you'll address one more thing as part of that, and that is Mr. Dondero's arguments about Acis. I just want to clarify I understand where you stand on that.

MS. MONTGOMERY: Yes, Your Honor. With regard to Mr. Dondero's arguments regarding Acis, we have no qualms with the position that communications that are related to the Acis litigation should be treated as outside counsel or highly confidential -- at the highly confidential level, right? That makes sense, Your Honor, and we're not trying to bypass discovery on behalf of any of the members of the Committee, or anything of that nature.

Our concern with the objection was that's not what's being asked for. If Mr. Dondero had asked that communications or documents that relate to the underlying litigation be not provided to the members of the Committee, and held at only the lawyers' eyes only, we wouldn't have had a problem with that.

Instead, what he's asking is that all documents not be shared with one of the members of the Committee, and we

think that's overly broad. And, frankly, I'm unclear as to why that would be necessary.

THE COURT: Okay; all right. Anything else you want to say?

MS. MONTGOMERY: Only to the extent that you have questions about any of the arguments that they made, Your Honor. We don't want to take up more of your time than necessary.

THE COURT: All right. Well, I'm going to carve out three specific areas, and then I'll just give you the more broad ruling.

With regard to CCS Medical and MGM, I think they have shown themselves to be in a more unique -- a unique situation in contrast to the others since we certainly don't have any issues of shared in-house lawyers, shared IT, and whatnot. We just have the board connection to Mr. Dondero and Trey Parker on CCS Medical, and with regard to Mr. Dondero and MGM.

So I do think these objectors should have the independent ability to review before disclosure to the Creditors' Committee, at their own cost, any information pertaining to those two entities to make sure there's not any privileged information they want to argue should be held back or commercially sensitive information.

So, again, hopefully you all can amicably work out the wording of that, but that is the concept of the ruling of

the Court.

Second, with regard to the Atlas/Rand parties, I think that they should be entitled to a separate review of any items that involve those dot-com law firm names to weigh in on whether those are privileged.

And, of course, these are all subject to further Court review and litigation before the Court if people cannot agree on that. I say that, or the third party neutral, I guess that would hopefully be the first step before any of this comes to the Court.

So that is the special category as to Atlas/Rand.

As far as the Dondero argument, I do like the suggestion, Ms. Montgomery, that you made that if there is any documentation relating to Acis litigation that is produced to the Committee, that it should be considered in that first category that it's highly confidential, so it's for professional eyes only; Mr. Terry or Acis businesspeople cannot see that. But that it -- that's just a special category of documents, any ESI that pertains to the Acis litigation, wherever that litigation is pending, this Court, Guernsey, State Court, wherever.

So all other objections are overruled except -- obviously I do think it's important to do, Ms. Montgomery, what you said you would do, and make all of these objectors expressly parties who are subject to the original agreed

protective order. Okay, so I think that gives them some level of protection. But I have been strongly persuaded in everything I've heard today that there is a very strong chance with regard to most of these entities that share legal counsel with Highland, and share IT, and servers that we have had a waiver of privilege, we have common interest privilege, joint privilege, something of that regard to have impaired their privilege arguments. So I'm just throwing that out there for the benefit of everyone as far as future disputes that there might be.

All right, Ms. Montgomery, do you have any questions about that ruling?

MS. MONTGOMERY: (No audible response heard).

THE COURT: No? All right.

MS. MATSUMURA: Your Honor, may I make one brief comment? This is Rebecca Matsumura for Highland CLO Funding.

THE COURT: Yes.

MS. MATSUMURA: I just wanted to clarify, we didn't make it as an explicit part of our deal with the Committee that we also be made party to the protective order. But we'd also ask for that relief, as well as, you know, such being given to all of the objectors.

THE COURT: Okay, the Court grants that request.

All right, Ms. Montgomery, anything else?

MS. MONTGOMERY: (No audible response heard).

THE COURT: Shall we break now to let the Committee counsel and debtor counsel talk about their remaining unresolved issues? How long of a break, Ms. Montgomery, do you think you will need?

MS. MONTGOMERY: (No audible response heard).

THE COURT: Okay. I think you're on mute.

MR. MORRIS: Your Honor, this is John Morris from Pachulski on behalf of the debtor.

THE COURT: Oh, okay.

MR. MORRIS: I just -- yeah, I just need to put some -- a couple of bells and whistles, it will probably take me two minutes to finish-up an email from Ms. Montgomery. And then if we could just -- I would suggest give us until -- 45 -- until I guess 3:45 --

THE COURT: All right.

MR. MORRIS: -- local time.

THE COURT: All right. Well --

MR. MORRIS: And then see -- hopefully we'll know -- at least narrow the issues, if not reached a complete agreement, by that time.

THE COURT: Okay. I'll come back at 3:45.

UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

(Recess 3:23 p.m./Reconvene 3:46 p.m.)

THE COURT: All right. This is Judge Jernigan again. I'm going back on the record in Highland Capital. Do we have

at least Mr. Morris and Ms. Montgomery available from their session?

MS. MONTGOMERY: Can you guys -- can you hear me, Your Honor?

THE COURT: I can hear you now; thank you.

MS. MONTGOMERY: Okay, I have no idea why it keeps muting, so my apologies for that.

We just briefly met. We need just a few more minutes, Your Honor, to run one issue past our client, but we do believe we're going to have at least one matter outstanding for the Court to consider hopefully, but we've managed to resolve everything else.

THE COURT: Okay. So do you literally mean one minute, or were you being general? Do we need five minutes or --

MS. MONTGOMERY: I think five would be sufficient, Your Honor.

THE COURT: All right. Well, I'll take another break. I'll be back in five minutes.

MS. MONTGOMERY: My apologies.

THE COURT: Okay; no problem.

(Recess 3:47 p.m./Reconvene 3:59 p.m.)

THE COURT: All right. This is Judge Jernigan, we're back on the record in Highland after a break.

Mr. Morris, I see you there. And do we have positive

news to report?

MR. MORRIS: I think we do. We haven't completely resolved every single issue, there is still one remaining one that we'd like to present to the Court.

THE COURT: Okay.

MR. MORRIS: But we have otherwise, I think, reached an agreement with respect to all other matters.

Ms. Montgomery, I don't know if you want to share with the Court or -- I don't even know if Your Honor wants us to present the agreement to her or we'll just submit it in a proposed order later.

THE COURT: Well, if you could just hit the highlights so we have it on the record that we have an agreement, and the pertinent points.

MR. MORRIS: Okay. So I'll just -- I'm just reading from the email.

The Requested ESI will be securely delivered to Meta-e. Meta-e is a third-party service provider, (indiscernible) the Committee. So the requested ESI for the nine custodians will be delivered to Meta-e.

Number two, the debtor will proceed with the production of the 800,000 e-mails previously identified by use of agreed search terms, subject to the Court's prior rulings with respect to the third party objections, and subject further to a privilege review using terms agreed by the parties, with

the resolution of any disputes on those privileged terms resolved on an expedited basis in accordance with the Committee's proposal in their motion to compel. And that really is just longhand, I guess, for a special master.

If and when the UCC wants to conduct further searches on the requested e-mails, it will give the debtor with three business days to consent to the search terms, with such consent not to be unreasonably withheld. In the absence of any objection, the e-mails will be produced subject to the Court's rulings on the third-party objections, as well as privilege review previously described. Search terms need not necessarily be tied to formal requests for production, and may be provided to the debtor on a rolling basis.

If debtor does not consent to search terms, it must lodge an objection with the Committee. The parties shall confer in good faith and if no resolution is reached within two business days, the debtor may seek judicial review on an expedited basis. It will be debtor's burden to establish that the search terms are not reasonably designed to identify data relevant to Estate Claims. Initial caps because the "Estate Claims" is from the governance settlement back in January.

All ESI containing search terms not subject to objection will be produced to the Committee pending determinations on those terms, if any, as to which there is disagreement.

Next, Your Honor, taking into account the speed with which the parties intend to proceed and the volume of documents, all ESI produced that is not subject to the privilege term search shall be produced on a "highly confidential" basis under the protective order, and the debtor shall respond within two business days to any designation challenge by the UCC. Documents that have been reviewed for privilege will be categorized by debtor in the first instance as either highly confidential, confidential, or not subject to confidentiality.

Next, all persons or entities who objected to the UCC's motion to compel or who are otherwise identified in the debtor's motion for a protective order shall be deemed to be parties to the court-ordered protective order that was entered in January.

All documents from any custodian -- any of the non-custodians that are related to or otherwise concern the pending Acis litigation shall be marked "highly confidential" and not subject to privilege challenge.

And finally, any disputes regarding the privilege review process will be resolved by the special master and both parties expressly reserve their rights thereto.

So there's one last issue --

THE COURT: Can I -- before we --

MR. MORRIS: Of course.

THE COURT: -- go on and I forget, can we call this human being a third party neutral instead of a special master? And I'm -- I'm splitting hairs on that because there is a rule somewhere -- is it -- is it in 105 or is it a rule that says a bankruptcy judge can't appoint a special master?

MR. MORRIS: I don't know, but let's just call him or her a third party neutral.

THE COURT: Yeah, I'm not crazy, isn't that -- I think it's in one of the 9000 rules.

MR. MORRIS: I'm sure you're right.,

THE COURT: I'm not sure how different this third party neutral is in substance from a special master, but it will just make me feel better.

MR. MORRIS: Yeah, it's just somebody who can --

THE COURT: If the Fifth Circuit ever looks at it --

MR. MORRIS: Yeah, it's just somebody who can help us resolve either issues of creating these privilege terms or resolving any other disputes so that we don't have to burden the Court with such issues.

THE COURT: Okay; very good.

Well, let's hear the unresolved issue then.

MR. MORRIS: Okay. So the last issue, Your Honor, is as Your Honor knows -- Your Honor, I need to, if I may, just provide some perspective here because these issues are very, very important to the debtor. I take personal responsibility

for all discovery matters in this case. I've had the support of the independent board, and of all of Highland's employees who have worked very hard to get these documents in this case.

We produced -- really we were substantially complete with all (indiscernible), and we did it with the following principles in mind: We wanted to, of course, eliminate or at least limit any potential liability exposure to the debtor, and that's what prompted us to make the motion to compel. And as Your Honor saw, there were eight separate objections brought by 40 or 50 different parties, and it's exactly for that reason that we were seeking the ability to do the review initially because we have -- you know, we may have wound up disagreeing with some third parties as to the scope of their obligations, but we knew there were obligations that existed and the board was very specific in instructing me to make sure that we (indiscernible) liability (indiscernible). So I'm really pleased that the objecting party stepped up, and that the Court issued its rulings. But that was really one of our (indiscernible) principles.

Another one is to make sure that we protect the privilege to non-estate claims. We negotiated very (indiscernible) term sheet with the Committee. We gave the Committee standing to pursue estate claims. We gave the Committee a shared privilege to all privileged communications of estate claims.

But what we did not do, what we did not agree to was to waive the privilege with respect to non-estate claims. So that's the second principle that we've been trying to protect because the board and (indiscernible) we have an obligation to the estate and to the Committee, so we're trying to protect the estate's privilege for non-estate claims.

And the third thing is just to make sure this process runs as efficiently as it could. You know, I don't know that going from 800,000 emails to eight million is -- can be categorized as a success, but that's what the Committee's wanted to do, and the board has been very specific not to be obstructionist here, but just to be guided by the principles that I've articulated. And that's kind of how we got here.

And so the last issue here, Your Honor, touches on the principles that I just described, and that is the nine custodians at issue, three of them are lawyers: Scott Ellington, Isaac Leventon, and Mr. Surgent. They're all lawyers, they're all licensed to practice law, they all give legal advice, they give legal advice to the board, they give legal advice on countless issues that are completely unrelated to estate claims for which the Committee does not have standing to pursue, and for which the Committee does not have a shared privilege.

So the third issue, Your Honor, is just to say that for those three out of nine custodians, we actually do a real

privilege review on a document-by-document basis.

Now I'll just leave it at that, that's what the issue is. And the Committee, I think -- I'll let them speak for itself.

THE COURT: Okay. I -- I didn't know there was any disagreement about debtor lawyers or debtor contract lawyers doing a privilege review. I thought it was just a -- you know, the two-tier, first a relevance review and then a privilege review.

MR. MORRIS: It's in our objection, Your Honor.

THE COURT: Pardon?

MR. MORRIS: We did raise it -- we did raise the issue in our objection.

THE COURT: Oh.

MR. MORRIS: This isn't the first time I --

THE COURT: Well, no, no, no, no, I thought --

MR. MORRIS: Maybe I'm mistaken.

THE COURT: I thought it was already part of the UCC's proposed protocol that there be a privilege review by debtor's lawyers.

MR. MORRIS: That's right, and that's just using kind of garden variety search terms. What I'm saying is that when it comes to -- and that's fine to take the six non-lawyers, that's fine for Mr. Dondero, that's fine, you know, for Mr. Waterhouse, and for the other non-lawyers. But for a lawyer,

Your Honor, I think -- I think -- I mean this is of such vital importance, and is -- almost everything they do is -- not everything; I overstated. Sometimes they're engaged in business advice. But for the most part, they're practicing lawyers.

And I think we just need a heightened standard of protection for those individuals, and it's just the three of the nine. I mean it's for three of the nine who are licensed lawyers, and we're asking for a wholesale privilege review for those three people, not just searching to see if their email says they privilege or work product, you know, there are other search terms that may come up.

THE COURT: Okay. Ms. Montgomery, elaborate on where the difference is on your proposed procedure versus the debtor's, all right?

MS. MONTGOMERY: Yes, Your Honor.

The proposal that is before the Court, you're correct, does provide for a privilege review. We've never argued that there shouldn't be a privilege review. We understand that the creditors stand only in the shoes of the debtor with regard to the estate claims, and not more broadly.

The dispute really here, Your Honor, is on the nature of the search when it comes down to these three custodians that are attorneys. And Mr. Morris is suggesting that all of the documents -- every document that has a custodial file, is in

their custodian file should be touched by the debtor so that they could look at it and determine whether or not it is privileged. And if it is privileged, whether or not it's related to an estate claim.

And our position, Your Honor, is that that's unnecessary, and that it's going to cost a lot of money, and also slow down the review process.

And the basis, Your Honor, for our position is that this sort of assumption stands on the ground that every document a lawyer touches can be -- you know, is automatically privileged. And as a general rule, we all know that that's not the case. Not every document a lawyer touches is protectable. And that's particularly true with regard to in-house counsel. Their roles by their nature involve providing both legal advice and business advice, and only the legal advice is protectable.

Several courts have held that the presumption might -- regarding privilege that might exist for law firm counsel is not the same presumption that should be held with regard to in-house counsel. In fact, the presumption should be that the advice is business advice, unless it's establishing legal advice.

And of the three custodians that the debtor discussed, two of them -- they're all, in fact, licensed attorneys. But one of them is not in the legal department, he is acting as the head of compliance. And as you know, the case

law on compliance is fairly well-settled that there isn't a presumption of privilege with regard to the compliance issues.

And so as a result, we think it's most appropriate to use robust privilege terms. You know, think of things like privilege, lawyer, attorney-client, work product, etc., and we've proposed a list of those terms to the debtor, and we're willing to continue to work that out with this third party neutral.

But we don't believe that it's appropriate for every single document that is related to these three custodians be reviewed for privilege purposes, that's just excessive and expensive.

MR. MORRIS: Your Honor, if I may?

THE COURT: You may.

MR. MORRIS: I dare say that not ten percent of what I write has the word "privilege," "attorney-client," "work product" in my emails. That is -- you will never be able to create a list that's sufficient to protect a lawyer from producing privileged communications.

There's no dispute here that the Committee's rights extend no further than estate claims. And I might feel differently here, Your Honor, and maybe there's some wiggle room here, but they can create six terms that are actually designed to elicit information relating to estate claims, right? And we've asked them to do that for many months. And

if they're -- if I thought that they were actually looking for information that related to estate claims for which the debtor has agreed the Committee would share the privilege, my concerns would be much more modest in scope.

But here, you have individuals who have been acting as lawyers for five years. To expect them to write the word "lawyer," or "privilege," or "work product" in every email, or to suggest that if they haven't done that, then it's fair game. Even if you have no idea if it relates to an estate claim is just -- it's just (indiscernible). It's just -- it's not right.

They're getting the emails of six custodians. They're getting the emails using the search terms with the six custodians. It is costly, it will slow it down for three of the nine people, but that's because they haven't given us -- they haven't given us search terms that are designed to elicit estate claims. They're just -- they're asking for everything. And I've never ever seen anybody -- any court allow, you know, the unfettered access subject to only search terms that may or may not be sufficient. I just -- we feel very, very strongly about this. They're getting six out of nine custodians, and we're not even saying that they won't get the lawyers in these three custodians' emails. We'll give them whatever relates to estate claims.

MS. MONTGOMERY: Very briefly. I think what Mr.

Morris has raised is dealt with by virtue of the agreement that we just told you about, which is that we're going to be using search terms that are aimed at identifying estate claims. And that the review and the production process to us would be only of the documents that contained that search term, and the privilege would be for the subset of documents that contain that search term and also contain a privilege term.

And it's not limited to just privilege, Your Honor. There are things in there like "lawsuit," or "litigation," or "claim," or -- and we're open to continue to discuss those.

Like I said, we only object to a wholesale review of every document, we don't really think that that's necessary.

MR. MORRIS: We're -- we're -- and I just want to clarify, we're not talking about reviewing every document. We're only talking about the documents that would come up using whatever search terms the Committee devises.

So by our count, there's between one point five and two million emails from the three lawyers. We're not suggesting that we would look at every one of them, there would be no need to do that.

But what we would do is review the emails that are the subject of search terms to make sure there (indiscernible).

THE COURT: Okay. Let me -- at the risk of repeating myself -- go through the explicit protocol the UCC had in its pleading:

Number one, all files of the nine custodians, including those three lawyers, would be provided over to the E-discovery vendor to put in a repository.

Then you come up with this robust list of privilege terms to ferret out what might be privileged. You try to agree on that robust set of privilege terms. If you can't, you get the third party neutral to work out your disagreement, hopefully.

So you get that resolved, and the search protocol is executed, and all documents, not including one of those robustly created privilege terms, get produced to the Committee subject to that agreed protective order from January, 2020 where there's carve out and, you know, ability to pull back, right, if there's inadvertent production of privilege, right? That's an essential term, right? If something accidentally gets produced that shouldn't, then there's always a mechanism to pull it back.

And then the debtor's contract attorneys would review all of the held back documents, the documents held back, you know, because the privilege terms were triggered, and they were held back, to determine if they are really privileged. If not, then they get produced.

But if you decide they are, in fact, privilege, then you create a privilege log, and that gets shared with the Committee. And if there are disputes about that, then you go

to the third party neutral to resolve those.

Okay, is there anything I misstated about what the Committee has proposed?

(No audible response heard)

THE COURT: Is there anything I've misstated? Ms. Montgomery's shaking her head no.

MS. MONTGOMERY: No, Your Honor, I don't believe so.

MR. MORRIS: So --

THE COURT: So I really am -- if that's the case, I'm not getting, Mr. Morris, why --

MR. MORRIS: Let me try one more time, because --

THE COURT: You're going to get your chance to review stuff that's --

MR. MORRIS: No, but -- but we're not, and here's -- here's the gap in what you have just described. Everything you have just described is perfectly fine for the six non-lawyers.

Our concern is if you don't have -- if -- there's no question that the lawyers have engaged in the provision of legal services, there's no question that the provision of legal services extended beyond estate claims.

And the concern is no matter how hard you devise search terms, and this is just a matter of practice in my experience, you're always going to get documents that don't get captured by the search terms.

And so what you've described works very well if the

document -- if the search terms actually work.

What our concern is for lawyers only, that that's not sufficient. That we will lose too many documents that will not be captured using the search terms for which, you know, clawback -- clawback issues are just -- we're talking about millions of documents that are going to be reviewed and produced. Under these circumstances, more than any other, Your Honor, these lawyers privileged communications that do not relate to estate claims should be subject to protection. They should be subject to more protection than non-lawyers are getting.

THE COURT: The clawback --

MR. MORRIS: And given --

THE COURT: The clawback isn't enough. The clawback isn't enough.

MR. MORRIS: It's not enough. You can't unring the bell, Your Honor.

And given the massive amount of information that the Committee is seeking that we are willing to provide, frankly, I don't think it's unreasonable to say, yeah, no, we're going to treat lawyers like lawyers.

THE COURT: So balance is you think, you know, those lawyer eyes that can't unsee what they see, okay, if they get it, yeah, you can claw it back, but they can't unsee it. And so somehow, it's going to, you know, be harmful.

But the flip side of that is -- well --

MR. MORRIS: I did try to create a little more --

THE COURT: A great delay and expense, right, for you all to first go through the gazillion documents, and then, you know, there's a privilege log that might be --

MR. MORRIS: I --

THE COURT: -- much larger than --

MR. MORRIS: I did --

THE COURT: Go ahead.

MR. MORRIS: I did try to create a little space for Your Honor, a little comfort zone, and that is that the Committee actually use search terms that was designed to get communications related to estate claims, right? Because these lawyers have countless emails, for example, relating to the board's deliberations on settlement with UBS, or with the Redeemer Committee, or with Acis, these things have been going on for months. That shouldn't be subject to clawback, they should never be produced.

And so if there's -- you know, if the Committee were to devise actual search terms that were intended to get estate claim information, like I said before, that may make more -- that might provide a little bit more comfort. But to allow them to just use, you know, regular search terms on those emails when you have non-estate claim information, and they have -- I'm telling Your Honor, just countless emails over the

last six months with the board, responding to board inquiries, responding to claims dispute resolutions, responding to all kinds of things.

You know, at a minimum, I would want -- I would want it to stop as of the petition date. But I think -- but I think even beyond that, they're lawyers, they're licensed practitioners who are rendering legal advice, and they're doing so in the kind of context that have nothing to do with estate claims. And you have six other custodians, six, with whom the Committee's proposal is completely acceptable.

THE COURT: Well, this is a hard one. This is a very hard one, Ms. Montgomery. What -- I mean what do you have to offer me other than delay/expense? And that's -- you know, those are not small considerations, but that's really what it boils down to, right?

MS. MONTGOMERY: Well, there's delay, there's expense, and then there's the protections that are already put forth in the protective order, Your Honor, which we think are, as we've said already today, robust.

We understand their concern with regard to clawback. They have an attorneys' eyes only highly confidential designation that they can use, and that will be used under the agreement we've reached with regard to any document that they haven't looked at. So those will only be going to outside counsel and the Committee's professionals.

And I just don't know -- you know, I think the protections are there, and that the cost, you know, when balanced against what we're really asking them to do and the protections that are in place for them, just -- they don't -- they don't balance out, Your Honor.

MR. MORRIS: Your Honor, with all due respect, it's a little -- it's a little difficult for me to listen to cost being a concern when you have a Committee who's asked for the emails of nine custodians over a five-year period. Actually they've asked for ESI, the eight million number is just emails. So it's not -- it's emails and attachments.

So the notion that cost is now an impediment while we've gone from 800,000 emails to eight million doesn't (indiscernible) with me.

THE COURT: All right. Well, again, I don't find this to be at all easy. But I am going to sustain the debtor's objection on this, if that's the right way to say it. I'm going to accept the position, and order that these three custodians, Scott Ellington, Isaac Leventon, and Tom Surgent, that before any production, those three individuals' files can go through, will go through separate review by the debtor. So they're carved out of the rest of these protocols, and presumably as promptly as possible, there will be rolling production. Debtor will produce non-privileged files and will create a privilege log.

And if there are disputes about that privilege log, either the third party neutral will work them out or I guess I'm the ultimate arbiter, if need be. I don't know exactly how you have those mechanics. Maybe you don't have the judge involved; I don't know.

Why don't you tell me so I can know whether to be expecting a request to weigh in. Do you have it set up where the third party neutral's the final say on things like whether something belongs on a privilege log or if it's really privileged?

MR. MORRIS: I don't think we've addressed that, Your Honor.

THE COURT: Okay.

MR. MORRIS: But I'm sure we can --

MS. MONTGOMERY: I think it may be already be covered in the protective order, Your Honor; I'm just checking to see.

THE COURT: Okay. And I just want to say that I understand very well from my months working on the Acis bankruptcy that these in-house lawyers -- I'm inclined to say they wear many hats. I don't know if that's the right way -- I had Mr. Ellington on the witness stand once; I had Mr. Leventon on the witness stand many times. And I will tell you the Court's impression is that they are both businesspeople, as well as lawyers. And I never had Surgent, the compliance fellow, in here.

But I'm just letting you know I hope there aren't, you know, umpteen disputes about things held back as privilege. The way I view it, there may be things that are privileged, and things that absolutely were not -- are not. I know we've got privilege related to estate causes of action versus attorney-client privilege or work product that doesn't relate to causes of action. And I'm already bracing myself for how hard is that going to be to ferret out is it related to an estate cause of action or not.

I'm really -- while I feel good that we've worked out a lot today, I am really bracing myself because I don't think this is the last discovery dispute I'm going to see. I just don't. We have a lot of things that kind of sound good when you say them fast, but just -- you know my view. Well, you know my views. I've seen two of these in-house lawyers on the witness stand before. And, again, part businessperson, part lawyer, and I know what the case law says. If it's really a communication that is about rendering legal advice, that's one thing.

But if it has nothing to do with that, or little to do with that, it's mainly in their role as a business consultant, or other capacities, there might not be a privilege.

MR. PATEL: Your Honor, this is --

THE COURT: Go ahead.

MS. PATEL: Your Honor, this is Rakhee Patel. If I can briefly be heard on a point of clarification on the agreement.

THE COURT: Well, okay, what are you talking about on the agreement?

MS. PATEL: Well, Your Honor, what I heard as part of the agreement reached between the Committee and the debtor is that all Acis information will be designated as highly confidential determination, and certainly --

THE COURT: Okay. Acis litigation. If it's related to Acis litigation. If they misspoke, that's what I ordered earlier. You didn't misspeak, right?

MR. MORRIS: I don't believe so, Your Honor. I think that's --

THE COURT: Okay.

MR. MORRIS: That's what was --

THE COURT: Okay.

MR. MORRIS: I think it was relating to or concerning the Acis litigation matters.

THE COURT: Is that --

MS. PATEL: Understood, Your Honor. Yeah, and I just wanted to clarify because what I heard, and apologies if I caught a bit of it, but is that Acis litigation will be designated as highly confidential, and that it is not subject to further review. And I wrote that down because I wanted to

just, again, clarify what "not subject to further review" means.

My concerns, Your Honor, are kind of twofold:

Number one is that certain documentation, as Your Honor just referenced, and you'll recall Mr. Ellington and Mr. Leventon testify during the Acis bankruptcy case that during the involuntary and then during the case in chief, were generally testifying as fact witnesses. And my concern is is that there are other things, for example, in Acis's bankruptcy case, the original schedules were signed by Mr. Leventon.

THE COURT: Right.

MS. PATEL: Well, some of these are Acis's documents or Acis's information, and Acis is the holder of the privilege on those.

So to say that they're highly confidential and they're privileged, that they're -- it's our privilege, I should be allowed to assert my own privilege with respect to those documents, and waive my own privilege -- my client's privilege with respect to that even though --

THE COURT: Okay. Can I cut this off? I -- I -- what I believe is the deal, someone correct me if I'm wrong, is that with regard to documents produced, ESI produced to the Committee, if it pertains to Acis litigation matters, okay, litigation between Acis and any Highland -- Highland or Highland affiliate or Highland insiders, that is going to be

designated as highly confidential, meaning only professionals for the Committee get to see it, not Committee members/businesspeople. That's the whole agreement with regard to Acis, right?

MR. MORRIS: Yes.

MS. PATEL: And that was going to be my only point, Your Honor, was that we can -- Acis is obviously going to be able to go get it if necessary. In other words, we -- this isn't about prejudice to Acis's rights to even get it because it is our privileged information anyway; or, number two, we can get it in the ordinary discovery process.

Obviously we've got a claim objection that may go to trial, and we may need to seek these documents separately.

THE COURT: Right. That -- this doesn't mean -- this does not mean Acis never gets to see it.

MS. PATEL: Okay.

THE COURT: If Acis requests something in discovery with regard to the claim objection or other litigation, then that's subject to a whole different agreement or order, right, Mr. Morris?

MR. MORRIS: Yes. Yes, Your Honor.

THE COURT: Okay.

MS. PATEL: Thank you, Your Honor.

THE COURT: All right. Well, I -- I kind of lost my train of thought, but I guess I'm trying to signal, for

whatever it's worth, that if there are disputes down the road regarding files from these three individuals -- Ellington, Leventon, Surgent -- and the debtor is saying they're privileged, you know, and not related to estate causes of action, and the Committee is disagreeing, be prepared to make your best argument. Because I am expecting that some communications, even if they're unrelated to estate causes of action, may very well be in the nature of business type communications because I've seen with my two eyes that they fulfill different roles in that organization.

So I hope we don't get bogged down because of my ruling on this today.

The other thing I wanted you to kind of keep dangling in your mind is as I was reading the pleadings, preparing for this afternoon, I was very much fixated on -- we had this protocol and a compromise worked out with the Committee way back, at the end of last year, finalized in January and, you know, the agreement was that the Committee would have standing to pursue the estate causes of action, and would get privileged documents related -- you know, communications related to these estate causes of action. And that was to avoid a Chapter 11 trustee, which we all know under case law, Weintraub would inherit all privileges, all attorney-client privilege information.

So I guess what I'm getting at is I thought -- I

thought we had an agreement last January, and that we were going to be smoothly going down this road of document production. And here we are in mid-July, and we're having this fight. That doesn't make me very happy because I was happy not to appoint a Chapter 11 trustee last January because I thought, okay, we have this major compromise with the Committee, they're going to go forward, and evaluate estate causes of action, they're going to get documents that are subject to attorney-client privilege. And, you know, it just -- again, I said earlier I didn't want to get into the he said and she said, but the facts speak for themselves that were in July, and just now finalizing this protocol.

And I guess the one more thing I will say on that is I know I gave a 90-day deadline for the Committee to either bring causes of action against CLO Holdco -- and I forget the other entity -- or the money in the registry of the Court would be released.

I didn't know we still had so far to go with document production when I ruled that. So if someone asks for an extension after today, I think I'd probably be inclined to give an extension. Not a huge, huge, huge extension, but I was a little bit -- not appreciating where the Committee was with regard to getting documents when I said that that day.

All right. So I'll be looking for your form of order, hopefully in the next day or two on this.

Is there anything further on this topic? Or shall we go to the Acis status conference?

MR. MORRIS: Your Honor, just a couple of things.

THE COURT: Yes?

MR. MORRIS: Number one, I do want to give the Court some comfort of knowing that while Mr. Surgent is the Chief Compliance Officer, he's also the Deputy General Counsel at Highland, so he is -- he is (indiscernible).

Number two, as you may have seen from our papers, the board considered three outside vendors to do the document review, and ultimately selected one, and we had prepared a stipulation. The Court should expect to see, hopefully in the next day or two, a stipulation pursuant to which the debtor seeks its authority to retain a third party vendor named Robert Hass (phonetic) to assist with the document review. This has all been discussed with the Committee, the Committee has consented to the theory of the retention, but I would ask them to go back perhaps and look at the stipulation so we can get that signed up and get people to work as quickly as possible.

THE COURT: Okay, very good.

Now what about the third party neutral, do you have that person identified?

MR. MORRIS: No, we haven't talked about that. I'm sure we can get that resolved as we're discussing the form of order.

THE COURT: Okay, very good.

All right, well, if there's nothing further, again, let's roll to Acis.

And I guess actually -- maybe we should briefly talk about mediation, where things stand, in case there are people on the call who don't want to stick around for the Acis discussion. I don't know, maybe everyone wants to hear the whole hearing today.

So let me just tell you where things stand: We have -- my courtroom deputy reached out to you all late last week, and let you all know that both Sylvia Mayer from Houston, as well as retired Bankruptcy Judge Allan Gropper, are interested in being co-mediators on this, and that was subject to doing their conflicts review.

And then the next thing after that, they were going to reach out to the lawyer contacts, and give their, quote, "initial disclosures."

I emailed about 9:30 last night with Sylvia Mayer, and she was making sure she had all the right contact people. I gave her lawyers for the debtor, for the Committee, for Acis, for UBS, for Dondero, and the Redeemer Committee -- Crusader Redeemer Committee.

Right now, it's my view that that is the universe of parties to participate, although I can see the co-mediators rolling in more people. Like someone suggested Mark Okada, and

-- I think probably it would be premature in the beginning, but maybe he'll be rolled in. You know, if the UBS proof of claim is resolved in mediation, and the Acis -- and/or the Acis proof of claim are resolved in mediation, and then -- you know, I think those are kind of the highest priorities here of the mediation, then certainly he might be brought in, but right now, I'm not going to order that.

So about 9:30 last night, I sent Sylvia Mayer the lawyer people to email, the co-mediators' disclosures. And she was going to be in a mediation all day today, but I would suspect probably tonight, if y'all haven't gotten anything yet -- I haven't looked at my email during this hearing, but I would suspect maybe tonight or tomorrow you're probably going to get that communication from Sylvia Mayer with whatever their disclosures are for the parties to consider. And, you know, assuming everyone gets comfortable with that, then the administrative people at the triple A, the American Arbitration Association, we're going to get going with, you know, the administrative side of this, and you all would talk about scheduling.

So all this to say I hope here in the next few days there is an active effort to get things scheduled and get the dialogue going with those co-mediators.

The only other thing I would add is I don't necessarily anticipate that Sylvia Mayer would mediate the,

say, Acis proof of claim, and Judge Gropper would mediate, say, the UBS proof of claim. I think -- I don't think it necessarily breaks down that way. I think you would probably just have co-mediators doing the whole ball of wax here because, among other things, the plan treatment discussion is probably going to roll into proof of claim allowance discussions.

So that is, I think, what this would shape up to be. That you would have co-mediators working on all of this.

So any questions at this point?

(No audible response heard)

THE COURT: Again, I know -- if you haven't gotten an email by the end of today, it's surely going to be in the next day or two that you'll get their email reaching out about their disclosures. Okay?

UNIDENTIFIED ATTORNEY: Yes, Your Honor.

MR. CLUBOK: Your Honor --

MS. MASCHERIN: Your Honor, this is Terri Mascherin on behalf of the Redeemer Committee.

Just a quick question: Did I hear correctly that you have given the mediators our contact information? Because we have not been copied on the email -- the emails that have gone around.

In fact, we haven't been copied on any of the emails that have gone around about the mediation.

THE COURT: Okay; thank you, Ms. Mascherin.

Let me make sure you're completely in the loop. So I did have my courtroom deputy reach out to debtor, Committee, Dondero, UBS, and Acis last week, their counsel, regarding the interest of both Sylvia Mayer and former Judge Gropper.

And at the time she did that, I was thinking since the Redeemer Committee had an agreement with the debtor, you all have announced at the last hearing or two you had an agreement that perhaps you all would not be participating.

And I actually did have some lawyers respond to my courtroom deputy that, no, we think they very much need to be involved.

So that was just a missed step, I would say, on my part, not having that email go out to you originally. So I will make sure when we get out of this hearing that my courtroom deputy forwards to you the little bit of email traffic there was. There were not a lot of emails, but maybe her email and three or four responses of other lawyers.

So the co-mediators have been given your name. If others, besides you, want to be on her contact list, you know, certainly Mr. Hankin or Mr. Platt, you can let her know when you get the initial -- her, Sylvia Mayer, know when you get the initial email from her. But you're on the list now, and I -- again, it was just a mistaken belief on my part that maybe you wouldn't be part of the mediation since your claim had been

agreed to with the debtor, so --

MS. MASCHERIN: Okay. I appreciate it, and thank you for clarifying, Your Honor.

THE COURT: Okay; thank you.

MR. CLUBOK: Your Honor --

THE COURT: All right --

MR. CLUBOK: Your Honor, this is -- Your Honor, may I speak briefly?

THE COURT: Certainly.

MR. CLUBOK: Thank you, Your Honor. This is Andrew Clubok on behalf of UBS.

And I apologize if you did not see the email that we sent to Ms. Ellison this morning. But we -- our position is we very much are fine with Crusader, or frankly any other major creditor, involving the overall mediation.

But the issue of reaching an overall plan, the so call grand bargain that Mr. (indiscernible) talked about. What we don't -- and we just want to be sure that no one takes it that you're ordering this or thinks it's appropriate, because in the first instance to have a productive discussion on our specific claim with the debtor, it's not going to be helpful and productive -- in fact, it would be counterproductive -- to have other creditors in our class sitting in listening to that, weighing in. You know, obviously their position will all be make it as low as possible. It's not helpful to have a whole

nother set of lawyers doing that, and I just want to make sure people don't come away thinking that you've ordered -- I hope you have not ordered that, and if you have, I would like to speak to that.

But just like we wouldn't be sitting in -- we were not permitted to sit in when the debtor spoke with Crusader about setting their claim, we're not -- we have not been part of the discussion with Acis and if the debtors have discussions -- with Acis. The other parties, we were actually told before they would not be involved in (indiscernible) first instance.

There is a time -- an appropriate time for a creditor to object, but we don't even know what the settlement is with Redeemer. Once we hear it, we may have an objection; hopefully not. Hopefully it will be perfectly fine.

And we understand that once we reach an agreement with the debtor, that's subject to an objection process, and everyone is going to have a chance to weigh in. It's just not, we think, going to be effective, and I set this out in an email that I sent earlier but -- just today. And so I just want to make sure that, you know, people aren't taking from what you said that Crusader is just going to be able to sit in our (indiscernible), Acis does or does not (indiscernible) specifically their claim, etc.

THE COURT: All right. Well, let me tell you how I usually do this, and how I expect to do it here.

Once everything is nailed down with the mediators, and I say that because they're going to send you their disclosures, and hopefully everybody's going to be fine with everything. When I get the green light that, yes, we're going to go forward, I have a standard form of mediation order. And it pretty much gives discretion to the mediators to run this the way they want to. And, for example, if they want participants to submit a white paper, you know, no more than 25 pages in length, or whatever, you know, the mediators can instruct that.

And it has all of the usual bells and whistles about confidentiality that nobody can subpoena the mediators, or compel them to testify. And I'm not going to talk to them about the substance.

I just want a report, either things settled or not. People negotiated in good faith or not.

And so I don't think there will be any ambiguity about the rules of the road, it's just what I think is a fairly normal mediation order.

And, therefore, you know, I think the confidentiality that you're concerned about will be built into that order, and will be kind of the usual -- what I think is the usual protocol. That if you want the mediator to keep something confidential, and not share it with another party, then it's -- that's the way it's going to be.

MR. CLUBOK: Okay. I believe -- we certainly agree the mediators will different roles. We just -- I just -- and the mediator may have different sessions, different breakout sessions. But we just believe that if our claim, or any creditor's claim, with the debtor in the first instance, to have a productive mediation, settlement should be done the way the (indiscernible) claim is (indiscernible), which is directly with the debtor. And that we'd have a chance to see if that -- if that gets somewhere and results in something. We're -- we're -- that's our input about about meeting our specific claim to maximize the chance of avoiding litigation and resolving it.

THE COURT: Well, again, I fully suspect they're going to reach out to all of you all and get all of your ideas about the sequence of the mediation, you know, whether it's all together with people in separate rooms on day one, or hey, let's start with UBS, let's start with Acis. I mean it would be expected that the co-mediators will reach out to you all from day one with everybody's ideas about what would be the most productive format. So I hope that answers your question.

You know, to a large extent, this is to be determined. But, you know, the ground rules I'm giving them is let's try to get this UBS proof of claim resolved. Let's try to get the Acis proof of claim resolved. Let's try to get to a grand bargain on what a plan looks like, and the treatment of

all the unsecured creditors.

So I think these are extremely experienced people who will be pretty skilled at how to proceed.

MR. CLUBOK: That does answer our question; thank you, Your Honor.

THE COURT: Okay.

MR. CLUBOK: That's all I wanted to clarify. That you weren't directing them to do anything in terms of how they proceed, and we'll pick it up with them.

THE COURT: Okay; very good.

MR. CLUBOK: Thank you.

THE COURT: Anyone else want to say anything about this?

(No audible response heard)

THE COURT: All right. Well, let's turn then to the status conference that both the debtor and Acis wanted to have today. Back on the 14th, I guess it was, Mr. Pomerantz, I think, raised the issue that the Acis proof of claim, which at that point the debtor had objected to, and now Mr. Dondero has objected to, was set for hearing, I think, August 6th. But there had been a discussion about continuing that hearing to September 10th to hopefully focus primarily on mediation.

But then we wanted to have a status conference today to kind of talk about what the September 10th hearing would look like. We don't want it to just be a status conference.

And, Mr. Pomerantz, I don't know if you're on the line, but you said there were legal issues as well as factual issues. And so my brain was kind of going down the trail of are you suggesting motions for summary judgment might be a first step on September 10th? I have no idea what you had in mind.

So who -- is it going to be Mr. Morris taking the lead on this --

MR. KHARASCH: Your Honor --

THE COURT: -- or Mr. Pomerantz?

MR. KHARASCH: Your Honor, it's Mr. Kharasch.

THE COURT: Oh.

MR. KHARASCH: It's Ira Kharasch.

THE COURT: Oh, Mr. Kharasch.

MR. KHARASCH: Yeah.

THE COURT: Okay, there you are.

MR. KHARASCH: I --

THE COURT: You appeared earlier.

MR. KHARASCH: I did. I did. So two things, Your Honor:

First, Mr. Pomerantz wanted me to express to Your Honor that he would have loved to have been here today, as he's been here in the past, however, he is in the hospital with a medical condition, we think things will work out just fine, but --

THE COURT: I'm sorry to hear that.

MR. KHARASCH: Thank you, Your Honor.

THE COURT: Please express my best wishes.

MR. KHARASCH: Absolutely. But he just wanted to let you know why he's not here.

So, number two, I think, Your Honor, at the last week, I think we mentioned that the continued hearing on the claim objection would be September 17. There's a little confusion about that versus September 10. I don't know if Ms. Patel is in agreement about that. I think we're both in agreement that it was September 17th, but I'm not completely sure of the different dates.

THE COURT: Okay. I did not run that date by my courtroom deputy. I just -- I looked at the transcript from the hearing. Y'all said September 10th, but maybe someone misspoke.

What do you think, Ms. Patel?

MS. PATEL: Your Honor, I think the confusion might be -- I believe the original hearing was August the 10th, and that's what's getting moved off. And so September 17th is -- I've seen a September 19th date, as well, but I think that's a Sunday or --

MR. KHARASCH: It's a Saturday. I think it's a Saturday.

MS. PATEL: Saturday. So I think September 17th is

the day that Acis is amenable to -- to -- the process we're about to discuss with the date being the 17th of September.

THE COURT: Okay; very good.

MR. KHARASCH: Thank you, Your Honor.

THE COURT: Okay.

MR. KHARASCH: And --

THE COURT: So 17th, okay.

MR. KHARASCH: Yeah. And, Your Honor, I think the good news here is the debtor and Acis's counsels are in agreement subject to your blessing of that agreement as to how we want to approach things.

Again, we did continue the hearing to today and the purpose, Your Honor, is to give us a chance to discuss with the Acis team how we both thought -- how to proceed in a manageable way to make this September 17th hearing date a productive hearing, and manageable, and easily understandable, and easy for the Court to deal with, because we're dealing with a massive claim, and a very big claim objection.

So what we come up with is the following way that we think should be a productive way to handle it. We would like to have another status conference on or about August 14, which is, I think, just after Ms. Patel's vacation. If it has to be a few days later, that's fine.

And during that time, we'll also be seeing a draft response to our claim objection. But the purpose is before

that status conference on the 14th, Your Honor, we would propose the following:

That a few days before, we file a joint statement that would propose the following to the Court: We would come up come up with respect to the September 17 hearing date, that we would come up with a list of issues for summary adjudication that both parties would like to deal with by summary adjudication on the September 17 hearing date. We would set those forth in the joint statement for the Court to review.

We'd also set out a list of issues that are not subject -- we don't believe are not subject to summary adjudication. That would be dealt with later, if not through a trial or otherwise, if not dealt with by the summary adjudication proceeding, depending on how that goes.

We would also propose for that status conference, that joint statement, Your Honor, a proposed discovery and pretrial schedule that would occur after the September 17 summary adjudication, and a proposed trial date.

Just for the record, both parties do want to move as quickly as possible after the September 17th hearing date in terms of discovery, and get to a trial as quickly as possible, maybe even before plan confirmation. But this would be part of the greater discussion, then we'd starting pinning down proposed dates for Your Honor to talk about at the next status conference here, Your Honor, on or about August 14th.

We'd also address the Acis request that the debtor file an answer to the Acis second amended complaint in the Acis case. We had talked about that, that was a new topic of discussion.

And that's really the -- that's what we would propose to get before the Court. We'd file it -- it's August 14, we'd file it two days before the hearing because that's soon after Ms. Patel's vacation. If it's a few days later, we'd give the Court -- we would file it a few days earlier to give the Court more time to look at the joint statement.

To the extent we can't agree on all of these issues that I just enumerated in the joint statement, the joint statement would address those issues that we haven't agreed on, and the unilateral position of the parties to be discussed before the Court at the continued status conference.

So we think in that way, Your Honor, we can make everyone's life easier to go forward and get something done at the September 17 claim objection date.

THE COURT: All right. Well, Ms. Patel, do you agree with everything you just heard?

MS. PATEL: Yes, generally speaking, Your Honor. Just a couple of things.

THE COURT: All right. Mr. Bonds, I'm going to ask you to put your phone on mute. I think we're getting some disruption from your end.

MR. BONDS: It is on mute; I'm sorry.

THE COURT: Okay. Well, Mike, I don't know where that's coming from.

ECRO: I think it's Mr. Ira's phone. He's on mute now.

THE COURT: Okay.

ECRO: That's where it's coming from.

THE COURT: Ms. Patel, go ahead.

MS. PATEL: Thank you, Your Honor.

Just a couple of things, again, so the Court -- just so I can set the Court's expectations a little bit on where we're going to head, and these were discussions we had with Mr. Kharasch over the (indiscernible) yesterday. But I wanted to, again, reiterate the parties' expectation is that if we're going to go down this path -- a double (indiscernible) path while we're doing things by summary adjudication at the September 17th hearing which issues -- you know, we'll decide which buckets of issues are appropriate for September 17th, that nevertheless, that there would be an expeditious trial setting, and that's what I think the parties are anticipating coming back to the Court and asking for in August.

And that that trial setting would be at some juncture, preferably before plan confirmation. But if it has to go to trial, that's certainly no (inaudible), so make that simultaneous with the plan confirmation.

But just -- that's just a little bit of foreshadowing, I suppose, Your Honor, more than anything else.

We also requested that basically we would just go through one -- what we'll call summary adjudication process. And Your Honor hit on a great question of is this a motion for summary judgment? I'm not sure that we really necessarily defined it as a motion for summary judgment, as much as this is intended to be a "there's not going to be anymore motions to dismiss or motions for (indiscernible) pleading, etc." The September 17th hearing is intended to be the full shot of "let's go through all the issues that can be determined on September 17th by agreement, and then that's it, other than that, we're going to be talking about trial."

The other point that I would just raise again just to enlighten the Court, this isn't -- the summary adjudication would not just be issues that Highland has raised in its objection to Acis's claim, but it could also be summary adjudication with respect to Acis's affirmative claims as against the estate. So it's a two-way street with respect to that.

And then finally, Your Honor, Acis just requested that we at least have a discussion with respect to the Highland Capital Management filing an answer with respect to Acis's complaint. And as Your Honor recalls, the proof of claim that Acis filed is -- attaches the second amended complaint that's

pending in the adversary. That complaint has never had an answer filed with respect to it, so we need an answer really as kind of a responsive pleading. And the hope was that that would help streamline the issues so -- and, frankly, I think it would be helpful from my perspective to decide what are the appropriate issues for the summary adjudication basket to be heard on September 17th, and what are the appropriate -- what's the appropriate basket that is going to have to go trial.

And that was -- that was my thinking with respect to that. But we'll continue to have those discussions, and foster that.

But beyond that, that's just some things that I wanted to sort of foreshadow, I guess, for the Court, just to (indiscernible) the Court's expectations as to what's going to happen at the August hearing, and where things are headed.

THE COURT: All right. Well, just a couple of things I'll throw in.

Before we get off, I'll make sure September 17th is available.

(The Court engaged in off-the-record colloquy)

THE COURT: So we'll circle back and make sure that's good.

As far as this process, I like everything I heard.

As far as getting the summary adjudication on certain issues, I kind of like the idea of not cross-motions for

summary judgment, no, please. Maybe instead, you just come up with a set of stipulated facts, and then based on these stipulated facts, we think you can rule as a matter of law on A, B, and C, and then the other side disagrees that you can based on A, B, and C.

But on the other hand, you think we can -- you can rule in front of us because of D, E, F. And then the other side -- so I guess what I'm saying is -- hmmm, I'm trying to avoid the whole cumbersome summary judgment process, but -- can we --

MR. KHARASCH: Your Honor, can --

THE COURT: Mr. Kharasch, do you have an idea?

MR. KHARASCH: Yes. We've been thinking about that very point, Your Honor, and that's something I'm going to talk to Ms. Patel about, you know, prior to that status conference hearing.

We agree with you, we don't want to recreate the wheel on a bunch of paper that's already before the Court. We might come up with a proposal, Your Honor, where we just submit a short statement of why we think -- you know, before the September hearing date, here's what's going to be argued on summary adjudication, we'll cross-reference what's already in front of the Court in terms of our claim objection, point you to different parts of it, rather than me filing things. Hopefully stipulate to certain facts to make your life easier,

and to, you know, just make sure everything's easily directed.

But that's the kind of thing we'd like -- I think we're going to be talking about to make things easier and more streamlined.

THE COURT: Okay. Ms. Patel, you agree that's a goal to shoot for? Rather than cross motions for summary judgment, and responses, and replies, and giant appendixes, just have something like a set of stipulated facts, and here are the contested issues of law?

MS. PATEL: Yes, Your Honor. I think that would be sort of the general goal.

THE COURT: Okay, all right. Well, that -- that sounds like a good game plan.

So I like this overall idea, we'll kind of check in on August 14th. A few days before that, you'll file the joint statement of what you think the list of issues of law are that would be argued on the 17th.

And then as far as the answer to the Acis adversary proceeding, that adversary proceeding is technically subject to the automatic stay, and there are other parties in the litigation. So as I've mentioned before, we have drafted back in chambers a giant report and recommendation on a motion to withdraw the reference that was filed way long ago by -- I think it was jointly by Highland and HCLOF. But I may be wrong, it may have only been HCLOF, it's been so long since

I've looked at it.

But my point is it's stayed. So I mean as a technical matter, if you want to agree that Highland will file an answer, I mean I guess you'll have to do an agreed order lifting the stay, maybe just for the limited purpose of allowing Highland to do an answer with you all agreeing it's not going to go any further than that at this juncture. Or -- I mean I'm just asking, frankly, because we've got other parties involved who want to know the answer to that question maybe.

And then I've got a report and recommendation that I've got to dust off, and finalize, and send in to the District Court if we're lifting the stay for all purposes.

I assume you just want to do a limited lifting the stay to let them file an answer, but everything else is still on hold?

MS. PATEL: Your Honor, I think that would be the general concept. And to be fair, it's a concept that I was, you know, late in the day yesterday with Mr. Kharasch, and so we haven't really quite formulated exactly how we Proceed forward with it. So I don't -- I'm not trying to ambush him on the issue.

But I think we can either craft something that to the extent that it is an answer, a very traditional answer, you know, concept in the adversary proceeding, then, yes, I agree

that I think it would be appropriate to do a very limited agreed order lifting the stay for the limited purpose of filing the answer, and that's it. Again, just so we have the pleading.

Or if we -- that perhaps maybe Mr. Kharasch and I can come and put our creative brains together and see if we can come up with something that acts an awful lot like an answer, but is here and filed in the Highland bankruptcy case that kind of functions similarly.

THE COURT: Okay.

MR. KHARASCH: Yeah, just to be clear, Your Honor, we haven't agreed to anything; we heard about this concept yesterday. I have not really had a chance to think it through. I'm not -- I'm not saying absolutely no, we have to discuss it with our client. (Indiscernible) but we have an open mind, and will continue our discussions.

One thing, Your Honor, do we definitely have the August 14 date as a status conference? And if so, at what time?

THE COURT: It is available. Let's do it at 9:30, and I'm not going to give you a ton of time that day because I have a bear of a trial that next week that I'm going to need to be in mostly hibernation preparing for. So let's say 9:30 on Friday, August 14th.

MR. KHARASCH: That's fine, Your Honor; thank you

very much.

THE COURT: And then I -- on September 17th at 9:30, I also have available.

MR. KHARASCH: That's great.

THE COURT: The morning only, I've got a full afternoon.

All right, so I was going to ask you to do sort of like a mini scheduling order, reflective of what we discussed today. And it sounds like you'll have a few things to iron out after we get off the phone, but I think we've got enough here to kind of have a partial scheduling order, or something to that effect, dealing with objections to Acis's proof of claim.

Mr. Bonds, you're on there, I see now, for Mr. Dondero. I think you've joined in the -- I don't know if you call it a joint, or you filed your separate objection to the Acis proof of claim, correct?

MR. BONDS: (No verbal response).

THE COURT: Okay. You're on mute, if you could unmute yourself.

MR. BONDS: Your Honor --

THE COURT: We're getting some echo, but is there anything you want to add to this discussion?

MR. BONDS: Your Honor, there is. We believe that we are entitled to participate in the Acis claim of because it's so intertwined with the underlying lawsuit -- Your Honor, I'm

sorry.

THE COURT: All right. Well, I understand you filed an objection. Is there any -- is there any -- well, is there any objection to the Dondero -- I don't know if he's going to say anything separate from the debtor, but Dondero being involved as an objecting party.

MR. BONDS: (Indiscernible). I'm sorry.

THE COURT: Okay. We're having real terrible --

(The Court engaged in off-the-record colloquy)

THE COURT: Okay. We have two feeds that say D. Michael Lynn, and that's causing a feedback loop, according to the younger smarter people here behind me. Like maybe you have a phone and a computer? All right, well, I've actually turned to Mr. Kharasch and Ms. Patel, do you all have any problem with Dondero kind of joining in, and -- I haven't reviewed his objection to see how it differs from the debtor's.

MR. KHARASCH: Yeah, frankly, Your Honor -- Ira Kharasch. We have not spent time reviewing that objection, as well, so we haven't really thought about it.

I mean it's out there, I'm not sure I see the problem with it. But we would like some time to see how -- what it looks like, and how it plays into it. I'm not -- I'd be surprised if -- well, I'm not even going to say anything as to what's in it because I just haven't read it.

THE COURT: Okay, all right. Ms. Patel?

MS. PATEL: Your Honor, from Acis's perspective, same. I, frankly, have not given it enough consideration. And just out of the gate, I think one of the issues is going to be Mr. Dondero's standing to kind of join in on the claim objection, but it's something that, frankly, I just truly haven't spent enough time thinking that issue through, or whether there's going to be an issue. So I'm just not sure.

THE COURT: All right. Well, I'll try one more time. Mr. Bonds, do you have a good connection now?

MR. BONDS: (No audible response heard).

THE COURT: All right. I'm just going to direct you all to visit with Mr. Bonds or Mr. Lynn, and see if you can come up with any agreements. And if you can't, then maybe Mr. Dondero's counsel can request a status conference. I'm not inclined to want to do another one before August 14, but maybe we can just hear what they have to say on August 14th about the process.

MR. KHARASCH: I think that makes sense, Your Honor. And we'll -- and we'll talk to them.

THE COURT: Okay.

MR. KHARASCH: We'll talk to them beforehand.

THE COURT: Okay, all right.

MS. PRESTON: Your Honor, may I briefly be heard?

THE COURT: Who is this?

MS. PRESTON: This is Katherine Preston from Winston

& Strawn, I represent Mr. Ellington, Mr. Leventon, and some of the other Highland employees.

THE COURT: Okay.

MS. PRESTON: And I apologize, I tried to appear earlier and had some technical difficulties.

THE COURT: Okay.

MS. PRESTON: We just wanted to ask regarding mediation. We've discussed with some of the parties to that mediation dissipating, and so we just wanted to be included, as well, in any of those discussions and communications.

THE COURT: All right. And I guess the party in interest status would be that you've been sued by Acis, is that -- is there any --

MS. PRESTON: That's correct.

THE COURT: Okay. Well, I think what I'm going to do is think about that one a bit.

I almost put that one in the same category as Mark Okada. I'm just trying to be as productive as possible in the way this goes forward where the primary issues are the UBS proof of claim and the Acis proof of claim. And granted, there's a lot of satellite litigation out there, and -- and that might be a factor as far as -- let me think about that one, okay?

Your request is duly noted, and I'm going to think about that, and I'll let you all know through my courtroom

deputy what I decide on that. But I'm leaning towards that might be a second stage of mediation if we have wonderful breakthroughs on the Acis and UBS proof of claim sides, so that's my answer on that.

MS. PRESTON: Thank you.

THE COURT: Uh-huh. Anything else?

MS. PRESTON: Thank you, Your Honor.

THE COURT: All right. Well, it's a little bit late, it's 5:19 central time, and if there's nothing further, we're adjourned, and we'll look for all the orders to be electronically submitted.

Thank you.

MULTIPLE SPEAKERS: Thank you.

(Whereupon, at 5:20 p.m., the hearing was adjourned.)

CERTIFICATE OF TRANSCRIBER

I, KAREN HARTMANN, a certified Electronic Court Transcriber, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Karen Hartmann, AAERT CET**D0475 Date: July 24, 2020

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EXHIBIT 14

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

In Re:	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas July 14, 2020 1:30 p.m. Docket
Debtor.	APPLICATIONS TO EMPLOY JAMES P. SEERY AND DEVELOPMENT SPECIALISTS, INC. (774, 775)

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

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DALLAS, TEXAS - JULY 14, 2020 - 1:34 P.M.

THE COURT: ... to get lawyer appearances. First, for the Debtor, do we have some Pachulski lawyers on the phone? Please make your appearance.

MR. POMERANTZ: Good morning, Your Honor. It's Jeffrey Pomerantz; Pachulski Stang Ziehl & Jones. Also with me are John Morris, and then listening in are Greg Demo and Ira Kharasch.

THE COURT: All right. Thank you all. And do we have any Hayward lawyers on the phone?

MR. ANNABLE: Yes, Your Honor.

THE COURT: I presume that was Mr. Annable.

MR. ANNABLE: Yes, Your Honor. Sorry. My mic's not picking up. It's Zachery Annable and Melissa Hayward --

THE COURT: All right.

MR. ANNABLE: -- as local counsel for the Debtor.

THE COURT: Okay. Thank you. For the Unsecured Creditors' Committee, who do we have from Sidley Austin?

MR. CLEMENTE: Good afternoon, Your Honor. Matthew Clemente from Sidley Austin, and Paige Montgomery is also on the phone.

THE COURT: All right. Thank you. All right. I'll go to some of our usual appearances. Do we have lawyers for the Redeemer Committee this afternoon? (No response.) All right.

MS. MASCHERIN: Yes. Excuse me, Your Honor.

THE COURT: Yes?

MS. MASCHERIN: This is Terri Mascherin. I wasn't sure whether I had the microphone on mute or not.

THE COURT: Okay.

MS. MASCHERIN: I apologize. Terri Mascherin, Jenner & Block. My colleague, Marc Hankin, is on the phone. And I believe that Mark Platt is also on the line.

THE COURT: All right. Thank you. What about UBS? Anyone wanting to appear for UBS?

MR. CLUBOK: Yes. Good afternoon, Your Honor. This is Andrew Clubok from Latham & Watkins, LLP. And my partner, Kimberly Posin, is on as well.

THE COURT: Okay. Thank you. What about for Acis? Any lawyers appearing for Acis?

MS. PATEL: Yes. Good afternoon, Your Honor. Rakhee Patel of the Winstead firm and Brian Shaw of the Rogge Dunn Group appearing on behalf of Acis.

THE COURT: All right. Do we have Mr. Lynn or Mr. Bonds for James Dondero? (No response.) Maybe not. All right. Is there anyone else who wishes to appear for today's hearings?

MR. NEIER: Good afternoon, Your Honor. David Neier of Winston & Strawn making a reappearance, but this time for several employees of Highland: Mr. Leventon, Mr. Sevilla, Mr.

Ellington, several others.

THE COURT: Oh, okay. Thank you. Any other appearances today?

(No response.)

THE COURT: All right. I'll assume everyone else is just going to observe.

Well, we have two employment applications. Mr. Pomerantz, how did you want to proceed on those?

MR. POMERANTZ: So, Your Honor, we have the two motions to present, Your Honor. I'm happy to say that neither of them are opposed.

Before I present the motions to Your Honor, I wanted to ask if Your Honor would like to address the mediation issues at the conclusion of the hearing or prior to the presentation of the motions.

THE COURT: At the conclusion. Thank you.

MR. POMERANTZ: Thank you, Your Honor.

Your Honor, the first motion on the docket today is a Motion to Appoint James Seery as the Debtors' chief executive officer and chief restructuring officer, effective as of March 15th, which is about the time that Mr. Seery began performing the services as the chief executive officer.

While there's a good argument that the retention of a chief executive officer is in the ordinary course of business and does not require court approval, the Debtor, out of an

abundance of caution, filed the motion, and the motion seeks approval of the agreement which is attached to the motion.

The second motion, Your Honor, is a Motion to Approve the Retention of DSI as the Debtors' Financial Advisor. And as the Court is aware, Mr. Sharp, a managing director of DSI, was approved as the Debtors' Chief Restructuring Officer pursuant to this Court's January 10th order.

Although Mr. Seery is proposed to replace Mr. Sharp as the Debtors' Chief Restructuring Officer, Mr. Seery still requires the financial assistance and advisory support that DSI has been providing to him, the Board, and the Debtor for several months.

While each of these motions, as I mentioned, Your Honor, are unopposed, we plan to put on the testimony of James Seery, John Dubel, and Brad Sharp to provide the Court with the evidentiary basis to support the relief that is requested. And with the testimony, Your Honor, we intend to accomplish several things.

First, Your Honor, in light of our exchange at the hearing on July 8th, we thought it'd be appropriate for Mr. Seery to provide a more fulsome response to Your Honor regarding the nature and extent of the Debtors' operations and assets and the variety of significant activities that the Board in general and Mr. Seery as the chief executive officer has been performing over the last several months.

We think this is very important, Your Honor, given that the Debtor has substantial and multiple complex business operations that it oversees that are in -- that are in subsidiaries outside of Chapter 11 or are in entities managed by the Debtor and also not in Chapter 11. And the Court, we appreciate, especially in light of Your Honor's comments, does not have the benefit of seeing what is really going on. So we're hoping, by Mr. Seery's testimony, it will provide Your Honor with a much clear picture, and, quite frankly, a better job doing it than I was able to do last week.

Mr. Seery's testimony will support the need for the retention of the chief executive officer and why his particular background and qualifications made him the appropriate choice for the role.

Second, Mr. Dubel, as the chairman of the compensation committee of the Board, will testify regarding the process undertaken by the compensation committee that led to the conclusion to ask Mr. Seery to become the chief executive officer and the agreement -- under the terms and conditions set forth in the agreement.

Lastly, Mr. Sharp will testify regarding the activities he and DSI have been performing since the commencement of the case, the assistance they have been providing to Mr. Seery over the last few months, and how the nature and extent of the services they are providing will essentially remain the same

if Your Honor approves the motion to employ Mr. Seery.

Before I turn the virtual podium over to my partner, John Morris, to present the testimony, Your Honor, I thought I would provide the Court with a brief summary of the events leading to the Debtors' filing of the motion.

THE COURT: Okay.

MR. POMERANTZ: As Your Honor will recall, the Court entered an order on January 9th approving a settlement between the Debtor and the Committee, and a significant part of that settlement involved modifications to the Debtors' corporate governance that resulted in the installation of the Independent Board.

The term sheet that was attached in the settlement motion specifically contemplated that the Independent Board, in consultation with the Committee, would determine whether it was appropriate to retain a chief executive officer, and further went on to say that the chief executive officer could be a member of the Board.

And the retention of a chief executive officer was on everyone's minds from the beginning, because since Mr. Dondero's authority as the CEO of the Debtor was being terminated in connection with the settlement, the Debtor and the Committee contemplated that, in order to manage a dynamic and widespread asset management platform like Highland's, that the retention of a chief executive officer may very well be

necessary.

I will leave it to Mr. Seery and Mr. Dubel to explain to the Court what transpired during the early stages of the case and the decision-making process that led to Mr. Seery starting to act as the Debtors' chief executive officer. And I would also leave it to Mr. Dubel to discuss the sequence of events which led from the appointment of him as the chief executive officer through the filing of the motion that brings us here today, which events will include the establishment of a compensation committee; the commissioning of a report from the Debtors' compensation expert, Mercer; the procurement of the Debtors' [sic] and officers insurance coverage to cover Mr. Seery and Mr. Dubel; the negotiations over the (inaudible) of Mr. Seery; and lastly, the negotiations with the Committee which has resulted in the motion being fully consensual.

I'll also leave it to Mr. Seery to explain his personal -- professional background and why he was qualified to fill that role.

The agreement, Your Honor, between Mr. Seery and the Debtor includes the following material provisions.

First, there would be base compensation at the rate of $150,000 a month, retroactive to March 15th. And while Mr. Seery will remain on the Board as part of his role as the chief executive officer, the $150,000 per month would cover his services not only as a CEO but also a member of the Board.

In other words, the Board fees that were agreed to back in January of $60,000 a month, $50,000 a month, and $30,000 a month would be replaced by the $150,000 a month commencing on March 15th.

While the compensation committee and Mr. Seery reached agreement on the structure of potential bonus compensation, the Committee has not agreed to that proposed structure. As a result, the compensation committee and Mr. Seery decided that approval sought in this motion would only be the monthly compensation and the other non-economic terms, but would not include the bonus compensation. Any bonus compensation sought to be paid to Mr. Seery would be pursuant to a separate motion filed, if at all, a lot later in the case.

The Committee was also uncomfortable with the open-ended nature of the agreement and wanted some control in being able to seek to terminate it. To accommodate the Committee, Mr. Seery and the Debtor agreed to the following: After 90 days from the date the Court enters an order approving this agreement, if the Court is inclined to do so, the Committee may provide the Debtor with notice that it does not want the agreement to continue. The Debtor would then have two weeks to file a motion on normal notice seeking to extend the date of the agreement, and Mr. Seery would be entitled to his base compensation until the Court ruled on the motion.

Also, the Committee asked us that be made clear in the

order, which we've done, that Mr. Seery's retention would terminate on the effective date on the plan, subject, of course, of his right to seek bonus compensation pursuant to a separate motion. The agreement also contains standard reimbursement and indemnification provisions.

Your Honor, those conclude my initial remarks. I'm happy to take questions. And then, at the appropriate time, I return it over to Mr. Morris, who will put on the testimony of Mr. Seery, Mr. Dubel, and Mr. Sharp.

THE COURT: All right. I'd like to pretty quickly get to the evidence. So, I'll ask: Does anyone have a burning desire to make an opening statement? If so, please let's keep it brief.

(No response.)

THE COURT: All right. I assume everyone is content to wait until the end and speak up in any way they want to speak up.

Mr. Morris, are you ready to call your witness?

MR. MORRIS: I am, Your Honor. Can you hear me right now?

THE COURT: I can. Thank you.

MR. MORRIS: Okay. Your Honor, this is John Morris from Pachulski Stang Ziehl & Jones for the Debtor. As the Debtors' first witness, we call James Seery.

THE COURT: All right. Mr. Seery, I need to swear

you in by video. So could you take your phone off mute and please raise your right hand. Can you say Testing 1, 2, so I know you're there?

MR. SEERY: Testing 1, 2.

THE COURT: All right.

JAMES P. SEERY, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Thank you. Mr. Morris?

MR. MORRIS: Thank you, Your Honor. Before I begin my questioning of Mr. Seery, the Debtor had filed its witness list and its exhibit list. We provided copies of the exhibits to the Court and to the Committee, and I would like to just move into evidence Debtors' Exhibits 1 through 7 at this time.

THE COURT: All right. So I have in front of me Docket Entry No. 822 with Exhibits 1 through 7. Any objection? (No response.) All right. 1 through 7 are admitted.

(Debtors' Exhibits 1 through 7 are received into evidence.)

MR. MORRIS: Thank you, Your Honor. And just as an overview, so you have a sense of where we're going with Mr. Seery's testimony, I am going to begin with some very brief background questionings and then have Mr. Seery answer some questions concerning the overview of the company and the corporate structure of the company. You may have heard some of this before, but I think in the context of a motion such as

the appointment of a CEO, I think it would be helpful to hear it all.

When I finish with that, we're going to move into the area of the Board and the work that the Board has done and Mr. Seery's work as a member of the Board.

And then we'll transition into really the meat of the discussion here, and that is what has he done in his capacity as CEO. And to be clear, he's not the CEO, he doesn't call himself the CEO, but he's functioned as the CEO, and I think that's the point that we want to present to the Court. And we want to present to the Court the fact that he functioned as a CEO really from day one of the process. And we're not going to get into, you know, every single thing he's done, because we'd be here for an awfully long time, but we do intend to highlight a couple of the transactions that he worked on and give you a sense of his role in trying to develop a plan and resolving claims.

And I think, with that, you'll have a better understanding of Mr. Seery, his role, and why we believe it's a proper exercise of the Debtors' business judgment to appoint him as CEO.

THE COURT: All right. Sounds good.

MR. MORRIS: All right.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Seery, can you hear me?
A I can. Can you hear me?
Q Yes, I can.
MR. MORRIS: Your Honor, just one other point. I have a legal assistant on the phone here. She's participating in the WebEx. Her name is La Asia Canty. La Asia is going to handle the exhibits when and if we need to put them up on the screen. So we've tried to practice that, and hopefully it will go smoothly, but I may turn to Ms. Canty from time to time with some help with the exhibits.
THE COURT: All right. Fine.
BY MR. MORRIS:
Q Okay. Mr. -- what is your current relationship to the Debtor?
A I'm an Independent Director of Strand, which is the general partner of the Debtor.
Q All right. And when did you become the Independent Director of Strand?
A On January 9th, along with John Dubel and Russ Nelms.
Q The Court has previously heard about your background, but from a high level, can you just hit the highlights for the Court as to your experience, et cetera?
A To go swiftly -- and if Your Honor wants me to go further, I certainly can -- I was a restructuring and finance lawyer for 10 years, handling virtually every type of restructuring

matter as well as financing in distressed matters during that time.

In 1999, I went to the business side and I began to manage distressed assets at Lehman Brothers as well as a leverage finance business. That grew into my running the risky finance business as well as the loan business at Lehman globally, which included high-grade loans, high-yield loans, trading and sales of those products, a big part of distressed, all of restructuring, all of asset management, and all of the hedging of the portfolio that we had.

From there, I left Lehman with a small group and sold it to Barclay's. I moved on and ran a hedge fund with two former partners of mine who are the founding partners called River Birch Capital. It was a long-short credit fund; mostly credit, though we did structured finance as well, and we also handled some equities.

Q Okay. Let's spend a few minutes, as a preview, talking about the Debtor and its business. And let's start with the basics. Is there a way you can summarize the business of the Debtor?

A I think, from a high level, the best way to think about the Debtor is that it's a registered investment advisor. As a registered investment advisor, which is really any advisor of third-party money over $25 million, it has to register with the SEC, and it manages funds in many different ways.

The Debtor manages approximately $200 million current values -- it was more than that at the start of the case -- of its own assets. It doesn't have to be a registered investment advisor for those assets, but it does manage its own assets, which include directly-owned securities; loans from mostly related entities, but not all; and investments in certain funds which it also manages.

In addition, the Debtor manages about roughly $2 billion in -- $2 billion in total managed assets, around $2 billion in CLO assets, and then other entities, which are hedge funds or PE style.

In addition, the Debtor provides shared services for approximately $6 billion of assets. Those are assets that are owned by related entities but not owned by Debtor-owned or managed entities. And those are a combination of back office services, which include timely reporting, asset management, legal and compliance support, trading and research support, but not the actual management of the assets.

The Debtors run -- and I think the way to think about it is on a functional basis; at least, that's the way I think about it -- and there's really six areas. There's corporate management; finance, accounting and tax; trading and research; private equity and fund investing; compliance and legal; and then structured equity, which really includes all of the CLO businesses.

The goals of the Debtor generally are what you'd expect out of an asset manager. A little bit different than most because the Debtor does own assets, which is a little different than when money asset managers typically hold assets away from the asset manager. But number one, discharge Highland's, which I'll call Highland (inaudible), LP, duties to investors in the funds. Those are fiduciary duties under the Investment Advisors Act. Each day, you've got to make sure that you do that first and foremost.

Number two, create positive MPD in each of the funds that we manage, either through sales, purchases, or hedging.

Next, make sure that we report timely finances of our own assets, including in the funds, but also, to the third-party investors. Maximize the value of HCMLP's owned assets. And then operate as efficiently as possible for the lowest cost.

That's essentially how the Debtor -- how we think about the Debtor from a functional perspective. It's got about 70 employees laid out in those areas that I mentioned, and each of those employees every day usually think about those goals and try to discharge their duties by focusing on those goals.

Q Thank you, Mr. Seery. And can you describe for the Court how those 70 or so employees are organized? Is there an internal corporate structure that you're working with?

A Yeah. The way -- the way -- I apologize. The way we think about it is, as I said, corporate management, which is

really HR and overseeing the function that it's filling every day, that's been really -- because Mr. Dondero was removed from management. It used to all roll up to him. That's been effectively rolling up to me since February.

Finance, accounting, and tax. Each of these businesses every day require certain amounts of liquidity. Each of them have requirements that they have to pay out to investors. Each of them have expenses. And all of them have different kinds of tax either obligations or reporting. Those are managed by Frank Waterhouse as the CFO. (inaudible), sorry.

Trading and research. With respect to the assets, they're not -- they're not static assets. Many of them do get traded on a regular basis. A gentleman, Joe Sowin, heads up the trading of the liquid assets. John Povish (phonetic) heads up the research and the trading of the more illiquid assets, but not PE. In addition, we have PE assets that require some management every day, including Board seats. That's a gentleman by the name of Cameron Baynard, and also he will fund investments in that area. J.P. Sevilla is responsible for working with Cameron on those investments and leading that team.

Importantly, because of the nature of what the Debtor does, the fiduciary obligations, as well as the responsibilities to each investor and the legal overlay, we have a robust compliance and legal department. That's headed

by Thomas Surgent and Scott Ellington. Scott: more focused on transactional issues with respect to legal. He is actually general counsel. Everything that has do with compliance, the interrelatedness of the funds, trading between funds or positions that are shared across funds, which are many, runs through Thomas Surgent and his team.

And finally, structured equity. Sitting on top of the structured finance business that we have, understanding those assets, particularly of two billion-ish assets in CLOs, that's headed by Hunter Covitz.

Q Can you describe for the Court your interaction with each of the department heads that you just identified?

A Well, depending on the nature of the issue each day, I have at least -- I'd say generally at least weekly contact with most, often daily contact with most. So, for example, when there are trading issues, particularly as the market was extremely volatile with respect to unliquid securities, Joe Sowin and I were on the phone several times a day.

Relating to the COVID issues, Brian Collins, who heads the HR group, and I were on the phone several times a day.

Relating to structured equity, depending on what's happening with a particular fund or what's happening in loan prices, I speak to Hunter Covitz. And it goes down the line.

So it really depends on each of the areas and what's going on in the business, but I try to touch base with each of those

department heads on a regular basis.

Frank Waterhouse, of course, is at least weekly. We have a standing call every week to make sure that we're focused on liquidity, which is always a concern in a Chapter 11, and Frank and his team are on that call and prepare weekly materials for us.

Q Okay.

MR. MORRIS: Your Honor, before I move to the next area of questions, the work of the Board, I just wanted to see if the Court had any questions on the corporate organizational structure, the internal structure of the business, or any of the matters that Mr. Seery touched on?

THE COURT: I do not. And I do have in front of me a demonstrative aid that Mr. Annable sent over ahead of time, so I appreciate that as well.

MR. MORRIS: Okay. Your Honor, I think Mr. Seery covered much of what's on that document, but if you'd like him to go through that, we're happy to do it.

THE COURT: No, that's fine.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Then let's shift gears a little bit and start talking about the work of the Independent Board itself. The Independent Board was appointed in mid-January; is that right?

A Yeah. It was the first -- January 9th, the first week of

January, and we started working that afternoon.

Q Okay. Can you describe for the Court what the -- the Board's initial focus? What were you focused on?

A Well, if you think about the areas that I just mentioned previously, the Board initially, for lack of a better term, gang-tackled everything. So we tried to make sure that we had a broad base of understanding among the three of us with respect to the business.

I, because of my background, had a lot more familiarity with asset management, these type of asset security businesses. But we wanted to make sure that each of us was at least facile with the main areas that we had to understand. First was operations. How does the company run each day? Particularly, how was it going to run without Mr. Dondero? And I went through some of those functional areas and how we thought about those and who head each of those.

Next in the -- I don't mean to say it's second, because it's always first, but liquidity. What did the Debtors' liquidity look like? How are we going to manage that liquidity, not just for the near-term, but also for the medium-term, and then even into the slightly longer-term? We had to think about what assets are there, what money those assets might need that we would have to invest in them, and whether there was liquidity in those assets that we can create liquidity in order to fund the Debtors' business.

Personnel, we needed a good opportunity to understand who did what, not just in the senior managers that I mentioned, but deeper into the staff, because we're going to rely on those folks. Particularly worked through with DSI.

As I mentioned, the Debtor, unlike a lot of other asset managers, owns a lot of assets. It's a disparate group of assets, but getting a feel and understanding for what those assets were, what the critical issues surrounding those assets are, who managed them day-to-day: We wanted to make sure that each of the directors had a good (inaudible) and understanding of those issues that might arise with respect to those assets, and a good sense of how quickly those issues could, you know, further arise.

We also had to get a very good understanding of each of the funds that we manage. As I said, the Investment Advisors Act puts a fiduciary duty on Highland Capital to discharge its duty to the investors. So while we have duties to the estate, we also have duties, as I mentioned in my last testimony, to each of the investors in the funds.

Now, some of them are related parties, and those are a little bit easier. Some of them are owned by Highland. But there are third-party investors in these funds who have no relation whatsoever to Highland, and we owe them a fiduciary duty both to manage their assets prudently but also to seek to maximize value. And we wanted to make sure we had a good

understanding of that.

Finally, with respect to the shared service arrangements, we needed to get an understanding of that $6 billion in assets and how our business, HCMLP, worked with those -- those shared service counterparties and exactly who did what for whom. It's very complicated because it had been run much more on a functional basis than on a line basis from each contract. So it's not as if your employees are allocated to NexBank. It's the whole panoply of businesses that we enter into, and providing those services to NexBank, not through a central point but through whatever requests come in from the counter-parties. So we needed a good understanding of what those contracts looked and what those obligations were.

A VOICE: John, you're on mute.

MR. MORRIS: Thank you.

BY MR. MORRIS:

Q All of that work was going on in the first weeks of the appointment of the Board?

A Yeah, it would not be fair to say we could do that in a couple weeks. So it took far longer than that. But that didn't mean that issues didn't start to arise immediately in February. And so, while we were learning, we were also starting to get a feel for different things that could happen in the company.

As in many companies, immediately, one of the first things

you have to deal with is, particularly at the beginning of the year, what does compensation look like; who are the -- what do promotions look like; are you going to be able to hold this team together to service these assets? And yeah, we had that, with an additional wrinkle that Highland's payment structure defers a significant amount of compensation to its employees, and it vests over time, and it has the very typical provision that if you are not there when it vests -- when it is going to be paid, actually, not when it vests. Even if you're vested, if you're not there when it gets paid, you're not entitled to it. And so understanding who was owed what; how the vesting worked; what the compensation structure looked like compared to third parties, was one of the first things we had to do. And Highland has an extremely robust review process. Brian Collins manages it. It's first-rate. It goes through both 360 in terms of what other employees think of each other as well as bottoms up, in terms of performance. And then it has a top-down component, which ultimately ran through Mr. Dondero. Since he was effectively removed from that role, the Board had to jump in and get a full understanding with Brian about what the process looked like; how it was going to work; how it compared to other firms; and whether we could go forward with it. And that was one of the motions that was brought early to the Court.

A Let's talk a minute about the transactional work that the

Board was called to focus on initially. Are you familiar with the transactional protocols that the Debtor agreed to with the Committee?

Q I am.

A Can you describe for the Court the impact those protocols had on the Board's work?

Q Well, they make it extremely difficult. And I understand the purposes behind the protocols. Was not involved in negotiating them. However, because of the limitations they put on the Debtor, they make it very difficult to manage certain of the assets. So, if an asset needs money to invest in it, depending on the size, it may need Committee approval. If the -- if there are expenses that need to be paid from -- in related entities, and the related entity does not have the capital to make the expense payment, the Debtor needs to put the money in. Can the Debtor put that money in without the Committee's approval, and if the Committee doesn't approve, would we have to go to Court?

So, the functioning on a day-to-day basis for how to deal with those assets became very difficult. And that came up really early, as the market started to get a lot more volatility by mid-February. We saw with respect to the internal accounts trades that we would have liked to put on, for example, short position, where we just weren't able to put the trades on.

Now, we could go to the Committee, and we did, but understanding why we wanted to put it on; explaining it; presenting that opportunity to the Committee; and then having them go to the full Committee with it: It's very cumbersome. And the trading markets don't wait for a week to determine whether that offering that you want to -- that you want to access is available.

So, early on, we got a sense of how difficult it would be to manage the business with the protocols.

One of the areas I think that was significant and that we talked about significantly with the Committee was an entity called Multi-Strat. Multi-Strat is a fund that is owned by the Debtor. It's, in essence, a PUNY-style (phonetic) fund. It's an older fund. And it's about 60 percent owned by the Debtor and roughly 30 percent owned by Dondero-related entities.

However, there are 90 million, roughly 89 million, approximately, third-party redeemers who had redeemed in that fund but have yet to be paid, so they're treated like equity claims but they're a fixed dollar amount because they are set at the date that they redeemed based on the NAV at that time, the net asset claim.

So, we were -- we were stuck with looking at that fund and trying to determine how do we best manage the fund to get up-side for the Debtor as well as the related entities that owned

the equity, making sure that we treated the redeemed entities as fiduciaries, so which we acted as their fiduciaries, but then also assuring that we managed the assets that that fund owns in a prudent way.

One of the large assets in that fund were 13 life policies. And these are, in essence, life insurance policies that the Debtor bought from third parties. And there's a market that trades life policies, and they owned these policies on (inaudible). The value at the time was marked around $32 million when -- when we took control.

The problem with the policies and some of the other expenses at Multi-Strat is that they didn't -- Multi-Strat didn't have the funds to continue to pay premiums. So, if the premiums weren't paid, that $32 million was at risk of going to zero. Why? Because if the premiums aren't paid, the policies lapse. And once they lapse, the insurance company will pay you zero for them. They don't them buy them back anywhere. That's the market. But we looked at those assets and began to consider how we would fund, from a liquidity perspective, monies going into Multi-Strat.

The amounts required would require CC's approval under the protocols, and the Debtor prepetition had advanced monies to Multi-Strat to make premium payments and other expenses at Multi-Strat. We went to the Committee and were able to get approval to put a couple million dollars in early on to keep

the policies alive while we analyzed the best opportunity for maximizing value with respect to those policies.

But thereafter, we needed additional money to try to consider how to continue to maximize value, and the Committee balked. So we went to Dondero-related entities, and they actually put equity into the Multi-Strats. So we -- the Debtor had made a postpetition, in essence -- it wasn't a postpetition advance because it was going outside of the Debtor, but postpetition, the Debtor made a loan to Multi-Strat to service the policies, and then Dondero-related entities made an equity investment into Multi-Strat to continue to service the policies.

Well, we understood as a Board but that wasn't going to work and that the protocols were going to continue to hinder us, so we entered into a sale process with respect to those policies.

Q And the work that you're describing with respect to Multi-Strat, is that -- just to transition to your work as functionary CEO, would it fall into that bucket as opposed to the Board work that we were talking about earlier?

A Yeah, absolutely. I think the -- the initial assessment, as I said, we made as a group. And we looked at what the opportunity set was, and determined that, because of the costs, we weren't going to be able to continue to fund money into Multi-Strat to make those payments.

So the Board asked me to take on trying to work out a process to sell those policies. So, working with Fred Caruso of DSI, we hired a broker, after interviewing a couple different brokers. We considered the views of the internal Highland team with respect to value and how to maximize that value. We entered into a sale process for those policies, and we ended up with a number of bidders and broke it down to two bidders for the 13 policies, breaking up the policies to maximize the value. They're only on eight lives, so it's not fair to call it a portfolio. And so there's significant amounts of premiums that have to be paid on a monthly basis and going forward, and realizations on those policies are very uncertain because it's hard to take them over an actuarial methodology because there's only eight lives.

We tried to consider other ways to finance those policies, but seven turned out to be, in our view, far and away the best net present value for the investors in the fund.

The challenge that we had, as I mentioned, is the complexity of Multi-Strat was also layered with a loan from NexBank that was secured by four of the policies. That $32 million loan was also secured by the MGM stock owned by Multi-Strat.

And then, as we got towards closing, we learned that one of the buyers wanted a more detailed title rep, and as we peeled through, we found a long-dormant UBS fraudulent

conveyance suit that had been brought against Multi-Strat. There was no lien on the policies, but it made it impossible for us to give the clean rep that the buyer wanted.

And at this point, I was running that with Fred Caruso, at the request of the Board, and it became almost a full-time job except for the five other things that we have to do during April. And we negotiated a variety of different -- well, considered a variety of different opportunities to try to complete the sale.

First, I negotiated directly with UBS to see if they would agree to a release, and then when the funds, other than certain escrows which had to be paid out to NexBank as well as repayment of the Debtors' fund, (inaudible), that didn't -- it was very unfruitful in terms of those negotiations.

I then moved towards a potential bankruptcy of Multi-Strat, where we would file Multi-Strat, have to do a 363 sale, have a DIP loan to service the NexBank monthly payments. That seemed very expensive.

We also thought about doing it as not selling them, so perhaps we would a 360 -- a filing without a sale and try to maximize the value by holding onto the policies but have to get financing.

Ultimately, we came up with a structure which was we escrowed funds for UBS, $10 million of funds, but they're not actually for UBS. We preserved all of our rights to defend

the claims and we had paid down NexBank. We allocated funds to make sure that we can pay NexBank for the next year before their loan comes due. We allocated for all the expenses in Multi-Strat. And then when we went back to the sellers, lo and behold, one of the two sellers balked. Didn't -- or buyers, I'm sorry. Balked. Didn't want to complete the sale. And fortunately, our broker (inaudible) and Fred Caruso had had another buyer in the wings, kept them warm, and were able to complete the sale for $37 million.

So that goes to: How does this business function, what's the complexity of it, and what have I and the rest of the Board been doing? That was virtually a month's worth of work.

Q And when did the Board ask you, if you recall, to undertake this project? When did it begin and when did it end?

A Well, the initial project, around -- around Multi-Strat, we started analyzing it as a group in January, the first week we were there. I started probably taking control of it sometime in mid-February, with Fred Caruso. So, DSI was already on it. We were looking to work with the Debtors' team as well as hire a broker. We, as a group, as a Board, made the decision to sell the policies. Ultimately, we sold them for about $37 million, which was -- which was more, a few million dollars more than the mark on the policies when we took them.

Q Can you give the Judge a sense of your role, as distinct from the Board's role, how you went about completing or attempting to complete all of the tasks that you've described and the interaction with the Board and what the Board's role was in assessing all of that?
A With respect to the Multi-Strat policies?
Q Uh-huh.
A I think, you know, initially, it was a understand, for the three of us, understand the policies; understand the premium obligations; understand what the benefits, the potential up-sides to those policies were; and understand what the risks were if we were to fail to make a premium payment; what did the lapse period look like. And we did that collectively. From there, all of the individual work around -- we came up with a strategy to sell the policies, and then the tactical work with Fred Caruso about how to execute sale of the policies and completing that sale through the issues NexBank, through the issues with UBS, resolving those issues, that became really my job.
Q Now, I do want to take a step back, because we kind of transitioned from the Board to the work that you were doing, and I wanted to ask: You're seeking -- the Debtor is seeking to have you appointed as the CEO, right?
A Yes.
Q Can you just describe for Judge Jernigan your

understanding of the duties and responsibilities of the CEO position that we're seeking your appointment for?

A Sure. From a high level, it's -- I apologize. From a high level, it's what I said earlier, which is the Board sets the strategy, the CEO implements the strategy. And so I work with the Highland team and the managers that I described earlier, whose function that is, to try to execute on that strategy. So that's, that's the basic overlay of what we do. But that includes everything from, as I mentioned, personnel issues to COVID-19 protocol to determining whether we're going to sell certain assets and then how we're going to sell them, determining how we'll resolve issues like Multi-Strat.

Another good example was the trading accounts that the Debtor had. So, on the second or third week of January, or perhaps the third or fourth week, we determined as we were going through the asset review that the Debtor had two primary liquid or semi-liquid securities accounts, and those were in the Select account, which was a separate fund that had previously third-party investors but was effectively a hundred percent, 99 and change percent, owned by Highland at this point. And an internal account, which was basically just HCMLP-owned and denominated securities. These were generally at Jefferies. Both of them employed significant margin.

THE WITNESS: If this is too pedantic, Your Honor, please tell me if I'm going too deep.

But margin is, in essence, a way for a security purchaser to borrow money to facilitate the purchase and holding of the securities. In essence, the lender, which in this case was Jefferies, a large, well-known, reputable financier and New York investment bank, was the Debtors' account holder. The Debtor would select securities. Jefferies would establish a haircut. The haircut is really the -- how the lender determines how much they want to lend against the assets. So if there's a -- if there's a haircut of a hundred percent in use there, there would be no margin against that asset. A haircut of 50 percent means the debtor will give you -- or, the lender will give you 50 percent of the funds you need to own and hold that asset and you put up 50 percent of the funds.

And in a margin loan, the way that the lender protects itself is, each day, it assesses the value of the asset; it looks at the volatility of the asset; and then it asks for more margin if the asset value went down in the trading markets; and then you have a day or two or three, depending on the structure, to post the new margin.

If you don't post the new margin, and this the way every margin loan works, the lender has the ability to seize the asset, sell it, and pay off its loan. It will then give you the proceeds above the loan, if any.

The debtor -- the lender does that by looking at both the

daily prices, to make sure that it can manage its exposure, but also it considers the volatility. And what it does when it's looking at the volatility, and volatility is really a measure, the way -- the way that securities analysts look at it, is a forward year of the movement, potential movement of a security. And that's how you set your haircut. Because if the -- if the asset is very, very stable -- for example, your home -- if your home was a margin loan and your mortgage, say, is a margin loan, there wouldn't be much calling of margin every day, because if the lender loaned 80 percent of the value of your home, there may be house sales that go higher or lower, but they don't necessary move that much really quickly, particularly if these loans set what's called a threshold amount that allow a little bit of movement each way.

The margin loans, though, are on securities that can move tremendously. And what happened in February and then in early March, volatility spiked up, prices moved significantly, prices moved against the Highland positions. So Jefferies did two things. One is it called margin, because it was -- its equity cushion, in essence, was getting trimmed, and it wanted more protection. Number two, it increased the haircuts, which it was entitled to do because it looked forward and said, The volatility in this market is worse than we thought. It will be a higher volatility and there's more risk to us that the asset could be worth less than the loan.

I started working with Joe Sowin, who's a head trader, a very accomplished trader at Highland. He actually reports into the -- not on the Debtors' payroll but another payroll that we don't manage. But he spends a ton of time working on Highland assets and trading those assets. And Joe and I started working together to try to manage the Jefferies exposure.

At one point, Jefferies actually seized the Select account. Again, Select wasn't in bankruptcy, but Jefferies had safe harbor provisions or protections anyway and they could have done it. We felt they were about to seize the internal account, and so we sent them a note that said that perhaps their safe harbors weren't as good as they thought. But, more importantly, here's our sale program. Jim Seery's going to take over the account, working with Joe, and we're going to manage it down.

In the Select account, Jefferies took it over -- and this is not really a blame to Jefferies; it's part of the market -- they sold out of that account pretty quickly. They did work with us, but they were the selling position and covering their loan, and we lost virtually all of the value in that account.

In the internal account, we effectively kept Jefferies from seizing it, gave them a sale program, and then day-to-day managed the sale of the more significant assets, as well as the hedges, which mean we traded pretty aggressively

throughout the day. This was a full-day job, trading that account, with Joe as the trader and then me acting as the PM, effectively.

We took that account, which if Jefferies had taken it over and done -- it had virtually the same securities, it had just a small number of securities, as well as some hedges which had significant basis risk related to the securities -- we took that account over. If we'd gotten the same program as Jefferies, we would have lost $11 million. We made about $23 million. So that swing, that swing was pretty significant. I'm sorry, we made about $11-1/2 million, about a $23 million swing than if Jefferies had taken it over.

So that was another example of what I've been doing that the Board designated me to do to help run this business. Working with Joe, as well as research, as well as discussing these positions on a regular basis with Jefferies, weekly calls and daily e-mails, we were able to preserve that value in that account.

Q And so, just for context, this is happening in late February or early March, as COVID is hitting and the markets are volatile; is that fair?

A That's when we started taking it over. The real -- the real -- the lay in the markets was about March 22nd or 23rd.

Q Uh-huh.

A And that's when it became a daily grind on those positions

for a solid month to make sure that we got it in a decent place.

And remind you that we were trading those accounts within the strictures of the protocols. So we didn't have the ability to -- the securities were -- rather less liquid. We didn't have the ability to just dump them, because we would have destroyed the market and taken significant losses.

In addition, because of the protocols, we didn't have the ability to go out and buy hedges, even though we had a negative bias as to where the market was, particularly in those less-traded securities.

And it's -- it was public that Highland (inaudible) and Highland (inaudible) was in bankruptcy, so you can be certain that the traders were leaning on those -- those securities from short decisions. So it was a very difficult, time-consuming effort, and a great job by Joe.

Q When you talk about a time-consuming effort, how would you -- how would you characterize the amount of time you spent on this project in the month of March? Was it a full-time job?

A Yeah. Yeah. I mean, full-time is relative, right, but it was -- it was a lot of time. So we would start out, you know, like everybody else who is in those markets and do it the same way, it's pretty tried and true: By 6:30 in the morning, you're starting to look at what the EOP, what Asia did, where

European markets were opened up, what the futures were looking like, looking at your own securities, checking all of the mail, talking to your research folks. To the extent that you know that there's other investors in those investments, we reached out to those -- I have a number of contacts in the market who are in these kinds of assets -- to see what they're thinking and how they're looking at value. And then set up a trading strategy with Joe, and then execute on it every day. And that trading strategy, again, was not static. So during the day, a dynamic trading strategy has to be adjusted depending on what the market is doing, and Joe was excellent at it.

Q I think you mentioned the protocols earlier. Can you just talk a little bit more about how you and the Debtor communicated with the Committee through this process of addressing the Jefferies mortgage -- mortgage defaults?

A Well, every day, we sent a report to -- to the Debtor -- I mean, to the Committee, I apologize -- with our positions in each of the accounts and tell them exactly what we're doing, what the plan is, what we're set up to do, where we think it's going, and what assistance we might need through the protocols.

I think it became really difficult for the Debtors' professionals -- the Committee's professionals to deal with these issues, because it's just not what they were used to

doing every day. So we would report to them. The Committee met weekly. We can -- provided direct information to Committee members when they -- you know, there's members on the Committee who are very versed in these types of assets. We would talk to them directly, I would talk to them directly, and tell them exactly what we're doing and why and get their input, because there was no magic special sauce as to exactly what to do.

Q And would you characterize the process as transparent and open between you and the Committee and its members?

A Oh, oh, absolutely. You know, we were -- they were constructive. I wouldn't say that the Committee wasn't constructive. I think the difficulty the Committee had, which is what, you know, any third party would have, is that: Why are we going to put more money into these accounts when the value is going down, and what's -- what's your -- what are your price targets? How do you think about those assets; who's the analyst who's working on it; how do they compare to other assets? So it wasn't an easy process for the Committee to get their arms around, either.

Q Okay.

MR. MORRIS: Your Honor, we have other transactions that we could talk about if you think that would be useful, or we could continue to push this forward.

THE COURT: You can continue to push it forward.

Thank you.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Then let's transition for a moment just about your recollection as to kind of when and how, you know, the discussions with the Board and the Committee evolved with respect to your taking over as CEO. Did there come a point in time that you can recall when the Board asked you to consider that?

A Yeah. The Board asked me to consider it I would say probably late January or early February. And the initial discussions, even before, you know, before we were selected. So, as John Dubel and I had been selected by the Debtor and the Committee, we talked about the need for one central point of management for this company. That it's 70 employees and diverse assets, diverse business practices. How are we going to mold that as a Committee? It really needed somebody to execute the strategic plan that the Board put in place.

And so John had asked me about that even before we were selected. Committee counsel asked me about it. So there was -- there was some, at least away from me, there was some view that perhaps I was going to be the person that was most likely, if it was needed.

My view in early February was that, you know, we were effectively, as the phrase goes, drinking from a fire hose,

and I wanted to get a better sense of who the folks were at Highland; what their responsibilities are; how they performed; what I thought of them as performers; how -- I had -- or, having some idea what the claims are and how that process would work; and could we make this a success?

So, early on, in January and in February, as we started having these discussions, I was in the Highland offices at least three, usually four days a week. And I was there from 7:30 in the morning until 6:00 or 7:00 at night every day. And that gave me just a different feel for exactly how the organization was running and the issues that were coming up every day.

That evolved into March where, after I took over the securities accounts in early March and then took over the Multi-Strat issues, that John and Russ Nelms pushed me to really consider stepping up fully to the CEO role. So, by early April, I think it's the first week of April, we actually -- we put it forth and go to the Committee. So we started negotiating what potential terms were, how it would work.

You know, one of the concerns that I had, you know, we had no idea, and I suppose we still don't, how the COVID-19 issues will play out and how that would both -- because at the time they were really affecting New York, where I'm based and I live, and less so in Dallas. But by mid-March, it was pretty clear that the whole country was being affected. And now,

obviously, it's hitting all over.

And hopefully that will settle, but what we did learn, and I think a lot of businesses learned, is that particularly these types of service businesses that function electronically in lot of respects, even when they are in an office, because you're in front of your screen, that we are very lucky to have these types of roles where we can really perform the job, if not equally well, pretty darn close to how you perform it when you're at the office. And so that issue subsided a little bit in terms of how I would interrelate -- not the issue going away, obviously -- but how I could interrelate and work with the team to drive the business, even if I was doing it from New York.

Q And have you continued to play a leadership role from the time you spoke with your fellow Board members in early March until the present?

A I have. And I think one of the things that the Committee, you know, recognized was that John and Russ, experienced professionals, were willing to step back and let me take the day-to-day working with the Committee or presenting to the Committee. So we do have weekly Board meetings and we do have almost daily Board calls, and then, without an official meeting, we meet on the phone virtually every Saturday or Sunday, sometimes both, with the three of us, to go through what's happened every -- each week, how the plan has evolved

and where we're pushing it.

But in terms of the presentations to the Committee, I took the lead on those in both designing and working with the Board then and then implementing them and laying them out for the Committee, as well as the individual negotiations.

So, early on, we determined that we had to try to figure out a way to push this case forward, notwithstanding that we weren't getting -- we didn't see a lot of movement from any of the parties, frankly, on trying to figure out a way to coalesce around a direction. So we designed a program that we laid out for the Committee in which we considered three main areas to consider for a plan. And I took the lead on doing that.

Q So, let's talk a little bit about the claims resolution process and the formulation of a plan. Have you played any role in the claims resolution process?

A Well, we haven't actually resolved any claims completely yet, but we're very close on one, and I've taken the lead on doing that.

On the other two, I've been involved heavily with the -- both counsel and with DSI in analyzing the claims. As well as with the rest of the Board, frankly. The -- you know, we've got a significant amount of expertise between John Dubel and Russ Nelms with respect to how to think about these issues in the context both of a bankruptcy, obviously, with Russ, and in

the context of both a restructuring and in the business with respect to John.

So we've gang-tackled those, again, effectively, all analyzing the various issues with respect to these claims. But in terms of having the direct negotiations, particularly on two of them, I've taken -- I've taken more of the lead about where we could go. And if you -- particularly with my background in restructuring, and having wrestled with substantive consolidation, alter ego, piercing the veil since 1988 or '89, you know, some of the issues that have arisen in this case are very, very familiar to me. I've spent a significant part of my career dealing with those. So I've taken the lead on those types of issues.

I think that where I was going was in terms of structuring potential outcomes for plans. And we are -- you know, we've been slowed down, as I think Jeff Pomerantz mentioned last week, to a fair degree by COVID, in that the business impacts, we can go into, and Jeff touched on some of those, but the social impacts with respect to negotiating are hard to -- are hard to understate. The -- you can run a business like this through your screen. It's very difficult to simply negotiate by phone or by video. The face-to-face, at least in my experience, makes a big difference in moving parties, and we haven't had as much of that.

What we've tried to do recently, starting in May, is we've

put together a program for the Committee, and we'll walk them through what I think are the -- what we determine as a Board and then we laid out the specifics -- I didn't; DSI -- of what the options are in this case.

And I think number one was the status quo. Do we maintain this case status quo, continue to run the business, and then try to negotiate, resolve, mediate, or litigate, first through dispositive motions, then through something more significant if we can't do it through dispositive motions, these claims?

The Debtor right now on an operating basis does burn cash. I can go into the specifics, but the Committee knows them, and I'd prefer to do those *in camera* if we -- if the Judge would like that. We do burn cash on an operating basis, but not that much. The Debtor has about $30 million (inaudible) and the business does run, and generally each year the operating burn, if you will, which is, in compensation, is filled by selling some assets that have appreciated in value. And the Debtor runs real -- with those accretions, run roughly breakeven.

The problem in this case is that we are burning a significant amount of bankruptcy professional fees. And it's the lament of creditors and business operators and the bankruptcy bar. I think, certainly, the judges that I see for a long time. And the percentage -- the cost of the cases keeps going up and the percentage of the assets keeps going,

but particularly if the asset values are going down.

So the status quo didn't make a lot of sense unless we were going to get very swift movement from the parties, and I mean all sides, to try to resolve the case.

The other type of outcome we thought about in terms of a plan was a downsiding model. Downsizing model, excuse me. In that model, we would try to significantly cut headcount, try to significantly cut expenses. Run the business as leanly as possible. And then try to go through those steps with respect to resolving the claims.

Again, the problem, the problem with that is resolution of those claims was uncertain and could take a long time, unless we had significant movement from either side. But, moreover, in terms of operating the business, we determined that with respect to both the managed accounts and shared service agreements, we really couldn't effectively do the job that the Debtor does with a smaller staff. Truth is, even at 70 people, the HCMLP staff is pretty lean. It's a really good team and they are very efficient and they've really proved it through working offsite, you know, through the pandemic.

But we really thought that if we -- and analyzed it. If we were to try to cut that team and provide the services, we would fall down. So we would breach the duties or potentially incur liabilities under those various contracts.

The third area that we took a look at, which was what we

called the subservicing model. In this model, we would try to separate the business of the Debtor, which has a small operating loss, but it's still material money, from the asset management. That way, you could hold onto the assets for the benefit of the creditors or the Debtor, depending on where the claims comes out, still provide the services to those third parties under the subservicing agreements or the management agreements. You wouldn't make money on that, but you'd get rid of the operating burn.

And that model had a number of issues, but we've sort of evolved that model to what I think has been referred to in court as the debtor-creditor monetization vehicle. So a little bit of a cumbersome name, but the idea would be to try to separate the assets, which potentially are the ways to pay the creditors, depending on where claims come out, and then -- and the operations, and make sure you can continue the operations without a heavy burn.

That model also permits us to cut, we believe, bankruptcy operating expenses significantly. So, right now, because of the nature of the case, we have two professionals doing every job: Committee professionals and Debtor professionals. We would be able to reduce that cost by putting those into one entity that'll be a trust-like structure to service the business, resolve the claims, monetize the assets.

And, finally, something I started working on -- I'd say on

my own, but that wouldn't be true -- with the DSI team, particularly the two -- we have two excellent analysts on the case. A very detailed model of what I think has been referred to maybe even in court as a potential grand bargain plan. And that plan looks at monetizing the assets over what period we believe that we could get that done. (inaudible) we're looking at the values that we could achieve as well as setting out what we think are reasonable numbers for the claim distributions and then how they would be made.

Now, on the asset side of the ledger, we have a pretty good understanding. We obviously know where the assets are bought, and we have a pretty good sense of what the current market looks like for those assets. We're not a forced seller, but we have -- we have been involved in processes around a number of the assets and have a good sense of where values are and how long it would take to achieve those values.

You don't have to sell an asset as well to get money from it. There might be ways to finance those assets. Although, to be sure, in this environment, financing particularly these types of assets has become very, very difficult.

The other side of the equation of the claims, and we're using our best estimate of where we think those claims come out in terms of payment, the creditors often have a different view as to what they would like those claims to come out with. So we're trying to figure out, through negotiation and

discussion, how we get those two sides closer together. And that, that would be the grand bargain plan.

And I think where we're really focused now is that status quo doesn't make sense. We've gone that way too long. Downsizing doesn't work because of the complexity of these operations and the contractual obligations that the Debtor has. And it's really a grand bargain plan or a Debtor monetization, a debtor-creditor monetization vehicle, which would be structured like a trust and still be able to service the business while resolving the claims.

Q Taking into account the uncertainty because there are still some options being considered, in your leadership role, have you -- do you have a sense of timing? Is there a timeline by which certain milestones are at least aspirational, if not achievable?

A Well, I don't think I'm telling anyone what they don't know, that deadlines get people to act and make decisions. Sometimes they're good decisions, sometimes they're not, but we're going to push forward on both of these plan opportunities now. So we intend to file a debtor-creditor monetization vehicle plan, and we'll keep pushing the parties towards settlements.

You know, as we say on the Multi-Strat negotiations, until it was clear that we were either going to default, because we didn't have the money to pay those premiums, or we're going to

file Multi-Strat as a bankruptcy, it was hard to get folks to really come to the table and think about how to settle that issue.

These issues in regard to the total case are much more complicated. We're going to file a plan. We believe that will set a bit of a crucible to folks to think about how to move forward with their claims. We are, as Jeff Pomerantz mentioned last time, agreed in principle, but we have some issues to work through with Redeemer that we hope to be able to resolve by this week. And so that's my internal goal, but I expect to be able to do it.

The reason that's complex is not that it's simply a -- the arbitration award is not simply a money award; it actually requires certain offsets, it requires certain assets be sold and paid for. And we're trying to carve our way around some of those, because they (inaudible) agreement, because they're -- they're more difficult than simply exchanging cash for assets, because we don't have the ability to do that right now. We don't have the cash, and we're in bankruptcy.

So I do believe that we can get these done. And then if mediation is something that would work, great. We're going to try to do it without mediation as well. Going to try to do it before we get to mediation and resolve claims. And if we're unable to do that, hopefully mediation will push it forward or we have to have a fallback, which will be dispositive motions

with respect to certain of the claims.

But we expect to have and I think we have a number of claims objections that have (inaudible). We've resolved those. We're really down to three claims. And one of them is almost done.

Q All right. At the last hearing, --

MR. MORRIS: Your Honor, that really does finish the substance of the testimony with respect to this motion, but at the last hearing Your Honor raised some questions about PPP loans.

THE COURT: Yes.

MR. MORRIS: Would you like me to just take a moment with Mr. Seery to address that?

THE COURT: Yes, please.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Mr. Seery, you're aware that the Judge raised some questions about whether and to what extent the Debtor may have been involved in any of the PPP loans?

A Yes.

Q And have you done any work to try to figure out the answers to the questions the Judge posed?

A Well, work in response to the question, but also work previously. So, just a -- quickly, as I think we all know, the PPP program was put forth to try to give companies cash

that they had to use for employee payments, to continue to keep payroll supported and to continue to have folks hold their jobs.

We have -- and I think the *Business Insider* article, which I'm not familiar, I know the publication is not something I seen much, but I'm not familiar with the specifics of that article, and -- but any PPP, away from the assets that HCMLP actually owns or controls. And we've got -- we've got three -- and I think there's some substance to the article. But we've got three businesses. And these are -- this is public, but I'll go into the -- sort of the obvious reasons without going into the specifics of the business around the ones that I know of well.

Carey Limousine is a business that transports folks in high-quality cars from airports or from events or between businesses. It was hit severely by the COVID-19 pandemic., particularly with respect to the air transportation, which was really one of its biggest areas. The business, notwithstanding Uber and the other type of shared ride services, had actually done quite well, and Highland was an owner of a significant portion of that business related to some loans that it held in various funds.

That business's management, with its own outside counsel, sought a PPP loan. Then our director came to us and discussed with the Board the propriety of that loan. We engaged outside

counsel, not bankruptcy counsel but counsel that had particularized expertise in PPP, and spent a ton of time really understanding both the law as well as the specific regs. Carey did get a PPP loan. It is potentially forgivable, depending on how it's used.

The second entity that was similar but didn't come to the Board, we have a business called SSP, which is an excellent highway business that provides equip -- materials for a lot of different road construction, but primarily highway road construction. Very well run business. That entity got a PPP loan as well, primarily worried about whether the construction on the highways would shut down.

So it's been -- I don't believe that's really happened in Texas, which is where most of their business is, but they qualified for that loan. They did not come to the Board. A very specific carve-out, because one of the interest holders that we share that position with is a Small Business Administration fund and, so it was very clear that it was entitled to that loan.

Then there's a third entity called Roma that got a very small PPP loan. We don't control the entity and we were not involved in its acquisition of that loan. Again, it would have to be used as required.

One of the things I want to make sure that is in the record and for Your Honor with respect to Carey, we spent a

lot of time as a Board focused on, one, whether it was legal to get that loan, first. We're doing everything right, by the book. We're not going to play in the gray. There is no gray. There's black and white in these areas.

Number two, was it ethical, was it appropriate that we went and got this loan or that Carey went and got this loan? Management, with the outside counsel, was sure that we could do it, but we didn't want to take their word for it, so we went out and got our own counsel, third-party counsel for the Board to make sure that this was appropriate.

Three, the requirements around these loans are significant and the penalties for violating them are severe. So if you get a loan by mistake, are you really required to pay it back? And if you're mistaken, that will be expensive, but it won't be a real penalty. But if you get a loan that's really inappropriate, that you shouldn't have gotten, that was a material misstatement of any of the facts around it, the penalties are significant. And not only in terms of the opprobrium that you'd suffer in the press, because that's coming, but in terms of how you use the funds.

So they can only be used in very specific ways, and we were exceptionally careful around this program.

The basis of the program is to keep people employed. And with a business like Carey Limousine in particular, where there's a significant amount of debt, where the business is

shut down by COVID, where we didn't have the funds to put into Carey, nor even if we wanted to, we might not have been able to do it without the Committee's approval because of the protocol, a PPP loan was not only legal but it was appropriate. And it's being used in that fashion, meaning to keep employees employed.

Q Thank you very much, Mr. Seery.

MR. MORRIS: Your Honor, I have no further questions of Mr. Seery. Does the Court have any questions?

THE COURT: I actually have a follow-up question regarding the PPP, just to kind of put a bow on this.

EXAMINATION BY THE COURT

THE COURT: I'm looking at the demonstrative aide. I don't know if you, Mr. Seery, have it there handy.

THE WITNESS: I do, Your Honor.

THE COURT: Okay. So I'm turning to Page 6, the chart, the subchart, Investments and Subsidiaries. The third column, Privately-Held Equity, Various Companies. I mean, that would be the type of investment entity we're talking about here that got the PPP loan: Carey Limousine, SSP, Roma? Nothing that was -- well, I'm going to say Highland affiliate. Affiliate, that's a dicey term, but that's the type of entity in the organizational structure we're talking about, correct?

THE WITNESS: Those are the ones -- I want to be very careful, because I know what I know and I know I won't

represent anything that I don't know.

So, with respect to the entities that HCMLP, the Debtor, controls, that's absolutely the case. I don't know, and I can try to find out, but they are not HCMLP-controlled entities. Whether other entities in the related-party complex received loans -- so, obviously, HCMLP did not receive a loan. And the only entities that we were involved with is the ones I mentioned to you.

And I should mention, there are other entities in the privately-held equity that got other government money, in the medical space, that they didn't even ask for. HHS pushed forward payments to folks in the business, medical healthcare-providing businesses, to assure that they had liquidity to provide. And so -- and this has been described to me exactly this way, that they woke up in the morning and found money in their account. And with one of the companies, they actually returned a bunch of the money because it was from a dormant provider number and they didn't believe it was appropriate to keep that money. So that was one of the entities that we control with other investors.

But with respect to our HCMLP entities, these are the only ones I know. With respect to other related entities that might be in the family of businesses, for lack of a better term, that were alluded to in the *Business Insider* article, I don't know that answer. So, I -- if I -- I can try to find

out. I just don't know the answer, Your Honor.

THE COURT: All right. Thank you. Well, this has been extremely helpful.

I should ask does anyone have any questions of Mr. Seery? The Committee counsel, perhaps? Anyone else?

MR. CLUBOK: Your Honor, this is Andrew Clubok. In light of the testimony, I do have some questions on behalf of UBS.

THE COURT: All right. Briefly. Go ahead.

MR. CLUBOK: Okay.

MR. MORRIS: Your Honor? Your Honor, I'm sorry to interrupt, but there's no objection lodged here. If Your Honor wants to permit it, that's obviously the Court's prerogative. But as just a point of order, having not lodged an objection, I don't know what right anybody has to cross-examine the witness.

THE COURT: All right. Well, that's why I said briefly. I think that Mr. Morris makes a good point, Mr. Clubok. You could have filed a written objection, response, comment, or something. So, you're a party in interest. I'll give you a little bit of leeway here. But please keep it brief.

MR. CLUBOK: Yeah. Thank you, Your Honor. It's just some of the things that Mr. Seery said which we didn't expect to hear that has raised a few questions that I just very

briefly will try to address.

CROSS-EXAMINATION

BY MR. CLUBOK:

Q Mr. Seery, good afternoon. I'm Andrew Clubok, Latham & Watkins, on behalf of UBS.

Mr. Seery, you talked about the fiduciary duties you've understood yourself to have with respect to certain parties, and my question to you is: Have you understood, since the beginning of your service as an Independent Director of Strand, that you had fiduciary duties to the unsecured creditors of the Debtor?

A It's a -- it's a -- the answer is I understand the fiduciary duties very well. I think we have fiduciary duties to the estate. So Highland -- what I tried to explain is that Highland, as an asset manager, has very specific fiduciary duties that are set forth in (inaudible) in the cases and the rules that have interpreted it. We, as directors of Strand, have a duty to the estate.

I don't think it's -- I don't think it's fair, and I'd have to subject myself to some education from counsel, I don't think it's fair to say we had a specific fiduciary duty to a particular creditor.

So, for example, if I had a fiduciary duty to UBS, it would be very difficult for me to object to UBS's claim. It would be -- I don't know how I could do that as a fiduciary.

When the claim is crystalized in the estate, I believe that we have fiduciary duties to each and every interest holder in the estate.

Q My question is a little simpler, and I just -- well, I'm actually not asking legally whether you do or not. I'm asking what your understanding has been since your role. Have you conducted yourself in a way in which you have treated your obligations as though you have a fiduciary obligation to the unsecured creditors?

MR. MORRIS: Objection to the form of the question.

THE COURT: Sustained.

MR. CLUBOK: Okay.

BY MR. CLUBOK:

Q You said that you believe that you have, with respect to Multi-Strat, which is an entity that you manage, you said that you understood yourself to have fiduciary duties to the redeemers of Multi-Strat. Do you recall that?

A Yes.

Q Yeah. And Multi-Strat is outside of the estate, but HCM, the Debtor manages Multi-Strat. And you said because of, you know, your role, you personally feel as if you have a fiduciary duty to the redeemers in Multi-Strat, correct?

A I --

MR. MORRIS: Objection to the form of the question. Mischaracterizes the testimony.

THE COURT: Sustained.

MR. CLUBOK: Your Honor, I believe that the transcript -- I believe Mr. Seery said in direct that he considered himself to have fiduciary duties with respect to the redeemers of Multi-Strat. The transcript will show it. I don't know what the objection is. Maybe I misstated when I asked my question, but I'm just starting --

THE COURT: Okay.

MR. CLUBOK: I'm just trying to understand --

THE COURT: All right. I'll let you rephrase the question, but this -- I've probably -- I may have made a mistake in letting you ask questions, because this is about the propriety of him being CEO and the reasonableness of compensation. This isn't a discovery opportunity. So I'm a little confused the relevance of what you're asking. Could you address that for me?

MR. CLUBOK: Sure. Your Honor, Mr. Seery on direct described what he understood his fiduciary duties to be. I think we -- it made me wonder, he didn't mention the unsecured creditors or what he believes his fiduciary relationship is, if any, with the creditors, unsecured creditors. I would -- I think it's a fair question to ask what his understanding is, because now he's going to take on a new role as CEO, and I think it's appropriate for everyone to understand, so we know when we're dealing with Mr. Seery --

THE COURT: Okay.

MR. CLUBOK: -- what his --

THE COURT: I think -- I think he --

MR. CLUBOK: -- he understands -- what he understands his fiduciary duties to be.

THE COURT: I think he answered the question, and frankly, I think he answered it correctly. His fiduciary duties go to the estate, right? And the creditors are the beneficiaries of his actions in that regard, right? So I think he correctly answered the question already. All right? Next question.

MR. CLUBOK: Okay. He says that there's three aspects of the business he's been managing: $300 million, roughly, of Highland's own assets; the fact that they manage $3 billion in other assets, I think in managed assets; and then they have shared services for $6 billion in assets owned by related entities, mostly.

BY MR. CLUBOK:

Q For those three separate businesses, I just want to briefly understand: With respect to the first one, for example, there's $300 million, you said, roughly, of (inaudible) assets. Roughly what were the value of the assets when you started your role in January of 2020?

A It's hard to compare apples to apples on this because there are certain assets that we've taken out that didn't

change in value. So I would say they were carried on the balance sheet at different levels. I think a good rough number would be in the $500 to $600 million area.

Q Okay.

A And the biggest -- the biggest movants in asset values have been on securities, both ones that we continue to own and the accounts that Jefferies -- that were levered, and those were shown as unlevered marks on the balance sheet and the losses that were incurred there. And then with respect to certain of the PE assets and then a major movement on a related-party loan, where the Board, through analysis that we did with DSI and others, believes that loan is likely to be worthless. Likewise, the claim of that entity we believe is likely to be worthless.

Q And then to the extent the assets, you say, have a rough value of $300 million, you alluded to significant professional fees, bankruptcy costs, administrative fees, the Debtor is burning cash. My question is, If it's $300 million today roughly of total value of assets, what's your current best estimate of the total amount that will be available to be distributed to the creditors net of those -- that burning of cash and the admin fees and the other issue that you mentioned? What is your current expectation of the total amount that will be able to be distributed to the creditors?

MR. MORRIS: Your Honor, just -- I just object to

this line of inquiry. It's like free discovery, as Your Honor suggested earlier. I don't know what it has to do with Mr. Seery's work, his qualifications, the compensation arrangements. And I think it's inappropriate.

THE COURT: Okay. I'll overrule and allow this one remaining question, but that's going to be it, unless your next questions pertain to the employment or compensation structure.

THE WITNESS: Yeah, I don't have a crystal ball as to what the assets are going to be worth. I think that they are fairly marked right now, and we have significant discovery that we've had with respect to a number of the assets and marked at views as to their value. So I think that we're at a pretty good base value, assuming that we don't rush into forced sales of assets.

So, as I know the Court is aware and I hope you're aware, when you look at asset values, and you look at them on a liquidation basis, the numbers are normally much lower than when you look at them as selling them on a more controlled basis. If you have liquid securities, that's not the case. So if I have $500 million of Apple at $363 today, it's probably a good chance that it'll be worth something different in a month, something different in two months. But if I need to move my position, I can do that.

These assets are much more difficult to move. And the act

of selling them often changes the value, which is why we engage professional bankers to help move, first, those assets.

So I just don't have a good crystal ball. I think the valuations that we have now are pretty good. I think they've been scrubbed well. But that doesn't mean that certain of these assets will maintain the exact value they have. So, I gave a good example of Carey Limousine, which is a very small asset but it's an easy one to understand because everybody can relate to a car service company that does, you know, a little bit more high-end and is focused on the airport travel and how that's been impacted.

That asset value has gone down precipitously, even though it was small, because of that. So I don't -- I don't really have a great crystal ball as to what's going to happen. If we're very successful in the fourth quarter and the economy stabilizes and the COVID vaccines are out in record time and move forward, then I think we've got potential for upside. But right now, in the current environment, I think we're marked fairly.

BY MR. CLUBOK:

Q Yeah. But my question really wasn't about the value of the assets. I realize those could go up or down. And you think they're fairly marked. My question was, What's the total amount of setoff from those assets to the extent the bankruptcy fees you alluded to, the burning of cash on the

other businesses, you know, how much, you know, net -- what's the amount that will come off of those assets or that should be -- that we should assume will be deducted from those assets because of the professional fees that have been incurred or you predict will be incurred through the end of the year and the burn of cash that you mentioned, et cetera?

I'm trying to understand how you supervised -- because you've managed those expenses as well as the assets, right? And so I just think it's important for us to understand, at the end of six months, and then how things are set for the rest of the year, what's the total amount of, you know, call it liabilities or costs associated with running the business, running the business and at a cash burn rate, bankruptcy fees, et cetera, that we --

THE COURT: Okay. I'm going to cut it off. I'm going to cut it off. That, in my view, is going a little too far afield. That's a discussion outside the courtroom. So, thank you, and we're going to see: Does the Committee have anything they want to ask?

MR. CLEMENTE: Your Honor, Matt Clemente on behalf of the Committee.

I certainly do not have any questions to ask. I do have a couple of statements that I want to make, but I don't know if now is the appropriate time or if there's going to be further testimony.

THE COURT: Okay. I think there might be another witness or two, but we'll let you make your comments at the appropriate time.

EXAMINATION BY THE COURT

THE COURT: Mr. Seery, I meant to ask, I forgot to ask: You've mentioned a couple of times the Debtor, Highland, has 70-ish employees. Has the number gone down since the case was filed, is Highland losing employees, or is it staying stable?

THE WITNESS: We lost -- we lost seven employees. There were some that were severed for performance reasons. That happens every year. There were some that just moved on because they decided to move on. And that some -- and then we had some that, because of the bankruptcy, we lost. We added, I think, one or two employees that we're pretty excited about in the fund valuation area, which is a pretty critical area for the shared services. Unfortunately, they haven't been able to go to the office, but fortunately, they've been able to work.

So we're down, Your Honor, probably eight total, and so we're more of the low to mid-60 area right now.

THE COURT: Okay. And --

MR. SEERY: And we were a little bit north of 70 when we took the case.

THE COURT: Okay. And the COVID situation, I mean,

if you walked into the office, would there be people around in masks, or are people still working at home?

MR. SEERY: People -- so, in -- yeah. So, in March, very early on, as things started to shut down, Brian Collins, who's the director of human resources and an accomplished professional, came to the Board and basically said, you know, yeah, Texas is better, but it's not immune. We need to come up with a program.

And with Russ Nelms and John Dubel and I, we developed a program, with Brian -- with Brian driving it, to figure out exactly how to approach going into the office; how we would maintain the office; and then, if something were to happen, what we would do.

We had an employee who, with her family, got COVID in -- we believe in New York, came back. And as soon as we found out that person wasn't feeling good in the office, it was the first day they were back, a protocol with thermometers and -- at that time, thermometers were thought to be valuable -- we immediately sent that employee home. We then brought in a cleaning crew to clean up the office with EPA and FDA-approved materials, and then had several days off and brought folks back the following week.

We found that to be, frankly, unwieldy as COVID started to continue to creep a bit through March and into April. At that point, we did have other employees, not who came into the

office, but who had contracted COVID, so we shut down HCMLP. When we cleaned the office, we shut it down completely. Nobody could go in.

When -- since then, we have set the office up where we had initial (inaudible) when things were pretty good, so we divided the move into -- into basically 20 percent could be in the office at any one time. And then, since that time, as things have gotten worse, we found that we were, one, working extremely well offsite; and two, that it was just a better environment for the employees. So we've been working continually offsite.

If folks need to go in, because either they need more advanced systems that they can't go to plug-and-play at home, or because there's just materials that they want to get, they're able to do in. We have tons of disinfectant everywhere. We have masks available. We put in dividers, Plexiglas dividers between the work stations to assure that if someone was at a station for a long time, it didn't -- it was less likely that you could have transmission.

I will tell Your Honor that HCMLP is not reporting to the office. Some of the affiliated businesses, and I don't know the percentage, have been. So those businesses, which we don't control, are going in.

From my perspective, as long as the numbers are where they are in Texas, from both a business perspective in terms of

making sure that the employee base doesn't contract COVID in material amounts -- first, any amount -- but in material amounts that would impact our ability to run the business. And then with respect to the civic part of it, which is we don't want to be a part of forcing the spread or causing the spread of this disease, we know we can work from home. We're going to continue to do that until we believe it's very safe to go back.

Notwithstanding that we have the ability and have been doing it with extensive cleaning, extensive disinfectant, and with dividers, until we are very comfortable that we can go back and protect our employees and that it's the right civic thing to do, we're not going to go back, particularly since it doesn't impact our ability to perform.

THE COURT: Okay. I really want to, you know, get to the rest of our hearing soon, but I heard something that made me have a question. You said there are other entities we don't control whose employees are going in. Could you tell me exactly what you meant by that?

THE WITNESS: There's -- away from HCMLP, there's approximately another 75 to 80 -- it may be slightly more -- employees at the other entities that are NexPoint, NexBank, NexPoint Advisors. They are under different protocols that neither I nor Russ nor John control. The office --

THE COURT: Let me just stop you.

THE WITNESS: Please.

THE COURT: So it's just Nex -- well, NexPoint-related companies?

THE WITNESS: Uh-huh.

THE COURT: NexPoint and --

THE WITNESS: Yes.

THE COURT: -- affiliates of NexPoint?

THE WITNESS: Correct, Your Honor. The office, the HCMLP offices are huge. And when we were there pre-COVID, with the full complement of folks, it felt like they were relatively empty. I shouldn't say -- they felt like there was plenty of space.

What we found, with both sets, our employees and then the NexPoint-related employees, when 140 or 150 people were in that office, which pre-COVID felt comfortable, post-COVID didn't feel so comfortable. So our employees, we started, as I mentioned, with the shift-working. And then we decided to go completely mobile unless somebody feels they have to be in the office, and we want to make sure that they follow the protocols when they do.

With respect to the non-HCMLP related entities, those entities, some percent of those employees are still going into the office.

Now, when they're there, to be frank, what I said was a pretty comfortable place with 140 people is a pretty empty

place if there's only 50. But our employees, we felt it was important, since we were able to execute from home, we didn't need, on most parts, the extra systems to be able to execute in the office, that we could largely perform from home to make sure that we weren't taking any risks with the business but also taking -- one, taking risks for the employees; two, taking any risks for the business; and three, as I mentioned, the civil perspective.

THE COURT: Okay. We're going to have to take a five-minute break here in just a second, but let me kind of elaborate on why I was drilling down on that question about NexPoint. I mean, isn't it Highland employees who service NexPoint? Or am I wrong about that?

THE WITNESS: Highland employees service a lot of NexPoint. But NexPoint, NexBank, the various funds, NXRT, there's a number of businesses: They have their own employees as well.

THE COURT: Okay.

THE WITNESS: So the whole complex is about 150 employees.

THE COURT: Okay.

THE WITNESS: Highland Management is about 70.

THE COURT: Okay. All right. Well, are we finished with Mr. Seery's testimony, Mr. Morris?

MR. MORRIS: Yes, Your Honor. Our next witness after

the break will be John Dubel.

THE COURT: Okay. Very good.

MR. MORRIS: And we --

THE COURT: Mr. Seery, again, this has been extremely helpful for me, and I hope for others. I hope you'll stick around, because when we circle back to the mediation discussion at the end of today, I really would like you to be involved in that discussion. I may want your input on one or two things. So can you stick around?

THE WITNESS: Absolutely, Your Honor. Other than getting some water and maybe turning the air conditioning back on in this room, I'll stay.

THE COURT: You must not be in Texas if you don't have your air conditioning on. I assume you're in New York. All right. Five-minute break. We'll be back.

THE WITNESS: It's hot, but not Texas hot.

THE COURT: Okay. Thank you.

THE WITNESS: Thank you, Your Honor.

THE CLERK: All rise.

(A recess ensued from 3:16 p.m. until 3:22 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're back on the record in Highland.

Mr. Morris, you were going to call Mr. Dubel next?

MR. MORRIS: Yes, the Debtor calls John Dubel.

THE COURT: Dubel?

MR. DUBEL: Your Honor, may I have just one minute to -- my air conditioner.

THE COURT: All right. Mr. Dubel, I said your name wrong. Could you say Testing 1, 2?

MR. DUBEL: I can do that, Your Honor. Testing 1, 2.

THE COURT: Okay. Very good. Please raise your right hand.

JOHN DUBEL, DEBTORS' WITNESS, SWORN

THE COURT: All right. Thank you. Mr. Morris, you may proceed.

MR. MORRIS: Thank you, Your Honor. As Mr. Pomerantz previewed, Mr. Dubel's testimony is going to largely cover the corporate governance-type issues concerning the evolution of the motion, the discussions or the, you know, beginning of the discussions, and how the proposal itself evolved.

If I may, Your Honor, just to perhaps move this along, I might lead the witness a little bit. If it's a problem, you'll let me know, okay?

THE COURT: Okay. I will let you know if it's a problem.

MR. MORRIS: Okay.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good afternoon, Mr. Dubel. You're a member of the Board

of Strand today; is that right?
A I am.
Q And you've held that position since mid-January; is that right?
A Since January 9th, yes.
Q Okay. And you understand that we're here today on the Debtors' motion to appoint Mr. Seery as the Debtors' CEO, CRO, and the Foreign Representative?
A I do understand that, yes, sir.
Q Does the Board unanimously support the motion?
A I think the Board does, and specifically the compensation committee, because of obviously the conflict that Mr. Seery might have, you know, but the Board fully supports it, and the compensation committee is comprised of Mr. -- Judge -- Judge Nelms and myself.
Q Okay. And do you believe that -- withdrawn. Does the Board believe that it's in the Debtors' best interests to retain Mr. Seery on the terms proposed?
A We do.
Q And why does the Board believe that?
A Well, as the Court has heard from the testimony of Mr. Seery today, he has a tremendous amount of skills and experience in the area of asset management. He's effectively been serving as the CEO since -- well, in a lot of ways, since January 9th, when we asked him to step up and take on some

additional responsibilities, but very clearly since the middle of February, and specifically, the middle of March.

And as the Court noted, he is -- knows these assets very well. He knows the operations. He's done an exemplary job of handling all of the issues. He has spent a tremendous amount of time working with the Committee members, trying to develop good lines of communications.

And, you know, Russ -- having, you know, served in a C Suite position for 25 years of my 30-plus years of restructuring experience, and 15 years as a CEO, we need a good leader, an operational leader to run the organization. So we can support him because you need to have someone in there who can make decisions; work quickly; obviously, communicate well with the Board, which he has been doing for quite some time. So, all the -- all of the reasons why we are very pleased to have him take on this role.

Q Okay. Let's talk a little bit about what led to this particular motion. Do you recall when the idea of appointing a CEO first arose?

A I would say it was back in December, before the Independent Board was put together, when we first started intervening with the creditors and with the Debtor. It was raised to me in my interview, would I be, you know, willing to step in as a CEO if asked to? And I'm assuming it was also asked of Mr. Seery. I didn't ask him that. And it was all

obviously coming, you know, out of the protocols that were being developed where Mr. Dondero would step down as the CEO and the Independent Board would basically be responsible for the operations of the company. But we had the opportunity to go out and seek either one of the three Independent Board Members as the CEO or go outside to the marketplace and try and find an independent or a third-party CEO.

Q And to the best of your recollection, was that flexibility built into the term sheet that was part of the corporate governance settlement?

A It was.

Q All right.

MR. MORRIS: Your Honor, this is where we're going to test our technological capabilities. I'm going to ask Ms. Canty to put up and to share Exhibit 1, and let's see if we're able to do that.

THE COURT: Okay. But if anything goes wrong, I actually do have the docket up on my screen. I can pull them up. But, oh, even better. Even better. Okay.

MR. MORRIS: All right. It looks like it worked. Ms. Canty, if you could turn to Page 2, please. I think that's Page 1.

(Pause.)

MR. MORRIS: I think it's stuck.

THE COURT: Hmm.

THE WITNESS: If need be, I have a teenager who could probably figure this out, because I sure can't.

MR. MORRIS: I'm impressed that La Asia got to this point already. Okay. Good. Just the one on the right. Is there a way to focus in on the top paragraph on the right?

THE WITNESS: I'll put my glasses on and I'll be able to read it.

MR. MORRIS: Okay. Right there. Perfect.

BY MR. MORRIS:

Q Is -- are you familiar with the provisions generally in the term sheet relating to the opening of CEO?

A I am.

Q And is this the provision that you were referring to earlier?

A It is.

Q And does this provision, to the best of your understanding, provide the Board with the flexibility, in consultation with the UCC, to exercise its business judgment and appoint a CEO if it determined that to be in the Debtors' best interest?

A It does. It's consistent with the discussions had -- that were had prior to our appointment, and it obviously was incorporated in the term sheet that was approved by the Court on January 9th.

Q And this also reflects the understanding that you

described earlier, where one of the Independent Directors could, in fact, be selected as the CEO; is that right?

A That is correct.

MR. MORRIS: All right. Let's just take that down, please, Ms. Canty.

BY MR. MORRIS:

Q Mr. Dubel, has Mr. Seery, in fact, taken on day-to-day operational responsibilities for the Debtor?

A Yeah. Yes, he has. And I think early on the Board realized that, between the three Board members, we would try and divvy up the responsibilities, as Mr. Seery referred to earlier, and it was definitely like drinking from a fire hose in the early stages of the case, where the new Board was put in place. And we tried to divvy up our responsibilities, taking into consideration each of the Board Members' expertise.

But it was pretty clear that the main business operations required somebody with the skill set that Mr. Seery had, and it would be much more efficient, as we progressed forward, to coalesce around one individual as a CEO.

MR. MORRIS: Ms. Canty, can you pull up Exhibit 2?

BY MR. MORRIS:

Q And while we're doing that, Mr. Dubel, do you recall early on that the Board asked Mr. Seery to become involved in the trading of the prime accounts?

A I do, yes.
Q Okay.
MR. MORRIS: La Asia, I don't know if you can scroll down just to --
Your Honor, these are minutes from the Board's very first meeting. And if we go to the next page, right here, you'll see there's a discussion in the second paragraph.
BY MR. MORRIS:
Q Mr. Dubel, does that reflect the Board's deliberation and decision, really, on the first day, to give Mr. Seery, you know, the responsibility for dealing and overseeing the prime accounts?
A It does. And what I was saying is, prior to the appointment, in doing all of our diligence prior to joining the Board, we realized there were all these issues that needed to be dealt with. And so we came in on the very first day, ready to recognize that there were certain things that needed sort of expertise. And they were presented to us by DSI and the management of HCMLP as areas that needed some additional handling and oversight. And so we asked Mr. Seery to step into that role on the very first day, which he -- which he agreed to and the Board approved it.
Q Okay. Let's get to the meat and potatoes here. Did there come a time when the Board and Mr. Seery actually began discussing the possibility of his serving as the CEO?

A Yes, there did.
Q And can you share with the Court your recollection of how that began?
A So, there were informal discussions, I would say, through the month of February, as we started to realize that there were -- the decision-making was going to be cumbersome, having, you know, three parties involved. As I said earlier, having spent 15 years or so my career as a chief executive officer, I understand where you really want to have one person be responsible for these issues.

And so we were conversing with Mr. Seery to see if he would take on that role. And, obviously, we had felt very comfortable, Mr. Nelms and I felt very comfortable with the communications that he was having with us on things that we had asked him to do. There was a very free and open discussion with the Board members. So we continued, you know, to look at opportunities where it might make sense.

And then, you know, towards the beginning of March, it was pretty obvious that we were going to want to coalesce around the motion. We thought about whether or not that would be some third party. But having, again, experience of having to go out in the marketplace to find CEOs when I'd been either, you know, a director or involved in companies, we realized that can be very time-consuming, would take us months to find somebody.

And so we continued to discuss it with Mr. Seery. And around the middle of March or so, right around the time that we had a Creditors' Committee meeting in New York, we asked Mr. Seery if he would take that role on, and he agreed to, to take that role.

Q And that's -- and is that why the Debtor is seeking authority to retain Mr. Seery nunc pro tunc back to March 15th?

A We are. I mean, effectively, he really started the role in the February time frame. But we officially asked him about this in -- right after that meeting on March -- I think it was March 11th or so.

Q So, is it fair to say that's when the Board had a meeting of the minds with respect to not necessarily the terms but at least the engagement of Mr. Seery as CEO?

A Yes, that is fair to say.

Q Okay.

A And that's when he really did step up and take on all of those responsibilities, you know, with the acknowledgement and understanding that we would work out the appropriate terms for his engagement.

Q Okay. And a couple of weeks later, do you recall that Mr. Seery made a written proposal to you and Mr. Nelms?

A He did make a written proposal after, you know, having discussions with us orally about various issues and roles and

responsibilities. I think it was around April 4th or so that he presented us with a written proposal.

MR. MORRIS: All right. Ms. Canty, can you call up Exhibit 3, please? (Pause.) Okay. If you'll scroll down.

BY MR. MORRIS:

Q Mr. Dubel, is this the April, the early April e-mail that you were referring to in which Mr. Seery made a proposal for the terms of his engagement as CEO?

A Yes. This document refreshes my recollection. It wasn't April 4th. It was April (audio gap). But yes, that's the document I was referring to.

Q Okay. What happened next, after -- after the -- after this was presented to you and Mr. Nelms? What did you guys do?

A So, what we wanted to do is understand what was our responsibility as a board. So we reached out to counsel to figure out how the process should work. We set up a compensation committee. It's called a comp committee; it's more I would call it a nomination committee or a governance committee also, because it was all about retaining Mr. Seery in that role.

We got advice from counsel on what the process should be. We reached out to our compensation consultant at Mercer, who had been providing us assistance in other areas of the company's compensation program, to talk to them about what the

various market comps, you know, compensation programs were and what would be an appropriate market comp for Mr. Seery's compensation, and, you know, moved forward that way.

MR. MORRIS: Ms. Canty, can you pull up Exhibit 4, please?

BY MR. MORRIS:

Q Do you know what this document is, Mr. Dubel?

A Yes. This looks like the minutes from the meeting of our first compensation committee on April 8th, compensation committee of Strand Advisors.

Q And this was a meeting between you and Mr. Nelms, with counsel; is that right?

A That is correct.

Q And this was precipitated by Mr. Seery's written proposal that was made a few days before that; is that fair?

A Well, I would say it was precipitated by the advice we had gotten through counsel that we should set up a compensation committee and consider what would be the appropriate way of retaining Mr. Seery, you know, as a chief executive officer. His proposal came in a couple of days earlier than that, and so this was our first official time to get together as a committee and review it and discuss the issue.

Q And was this a contemporaneous record of the steps that the compensation committee took to do its due diligence with respect to the proposal?

A It is.
Q Okay. Did the compensation committee --
MR. MORRIS: You can take that down, Ms. Canty.
BY MR. MORRIS:
Q Did the compensation committee communicate with the Creditors' Committee with respect to these matters?
A We did.
Q Can you --
A As a part of the protocols, one of the things I -- and I'd go back and re-read the protocol language, but one of the things it said was work with the UCC to determine who would be an appropriate CEO. And so we realized we would do that, and we started to reach out to the various members of the Creditors' Committee to discuss that.
Q Okay. And do you recall whether the compensation committee or the Debtor generally shared Mr. Seery's proposal with the Committee?
A We did. I don't recall the exact date, but we did share it with the UCC through the UCC counsel.
Q Do you recall if the report that was commissioned by the Debtor with respect to Mercer, the Mercer Report, was that shared with the Committee?
A It was.
Q Can you describe for Judge Jernigan your recollection as to, you know, the Committee's reaction and, you know, position

with respect to the proposed retention of Mr. Seery as CEO?
A We shared the report from Mercer with the Committee in -- I think it was early May. And we spent time with them in the April time frame talking about the fact that we were going to be seeking Mr. Seery's appointment as CEO and telling them that we were going to be commissioning a report to make sure we had what we thought was market compensation.

The Committee was generally very supportive. They had been obviously experiencing Mr. Seery taking on that role of effectively the CEO for a period of time, so they understood where, you know, where he was coming from and what -- how he was going to operate the business.

They understood, to my knowledge and in my discussions, they understood the benefits of having a single person as the CEO rather than trying to manage the business by committee. We discussed with them why it made sense.

And so, you know, they were supportive of it. Obviously, we had to negotiate the terms of the compensation.
Q And did that take some time, to negotiate the compensation terms?
A It did. Initially, it was being done through myself and Mr. Nelms, working directly with the Committee. But, again, having been in that position of having to negotiate with the, you know, the committee on terms of my own personal compensation -- not this committee, but in other cases -- we

recognized that it was probably more efficient for Mr. Seery to speak directly with the Committee, Committee members. And so we asked him to pick up that, you know, responsibility also. And he did. He kept us informed every step of the way. And I, as the de facto chairman of the compensation committee, also spoke directly with the various members of the Committee during this time frame, where there was (echoing) communication about compensation.

Q Mr. Pomerantz mentioned it in his opening remarks, but do you recall kind of what the bigger issues were with respect to the proposed compensation terms with the Committee?

A Sure. The Committee -- well, there was always negotiation going on, obviously. The Committee, at the end of it, they had no problems with the monthly compensation, recognizing that whatever his board compensation would be would effectively be wrapped into the monthly compensation.

What the issues really came down to for them revolved around the restructuring fee that was being proposed, success fee, you know, what have you. And there was a lot of different views, as you can imagine, between the four members of the Committee as to how that should be set up.

Mr. Nelms and I were very cognizant that we did not want to have Mr. Seery (echoing) -- I'm sorry. I'm getting a lot of background noise here.

THE COURT: Yes. I'm not sure who needs to mute

their phone, but someone needs to mute their phone. Okay.

THE WITNESS: Thank you.

THE COURT: Uh-huh.

(Echoing subsides.)

THE WITNESS: So we were very concerned that structures not be put in place that could cause the potential, the appearance of a conflict between the role that Mr. Seery was playing and his compensation.

It's always a, you know, a challenging issue here, to make sure that, you know, a CEO of any company is looking out for the best interests of the estate and not looking out specifically for any particular creditor, equity, or group of creditors, just because that's the way the compensation was designed. And so that was a challenge.

At the end of the day, we wanted to have what we felt was fair compensation for the success fee and restructuring fee for Mr. Seery, because we wanted him incented to get the job done, as he has alluded to in his prior testimony as to what he's trying to do here. And so there did come a point where we could not get to a meeting of the minds and so we chose to move forward on the compensation with just the monthly agreed to. Mr. Seery was good enough to agree to that for just the monthly, and that we would put forward the restructuring fee at a later date.

BY MR. MORRIS:

Q Okay. Thank you. In addition to the CEO title, the Debtor is asking for the Court to appoint Mr. Seery as the CRO and the Foreign Representative; is that right?
A That is correct.
Q And why is the Debtor seeking that relief?
A Well, initially, the CRO was brought in, I believe it was the middle of October, when the case was filed and before the Independent Board was put in place. And there were reasons why, you know, the Committee had asked for the CRO to have certain responsibilities. Those carried through in the protocols.

And obviously, you know, we had no issues with those, but what we also felt, Mr. Nelms and I, and in consultation with Mr. Seery, was that it would be more appropriate to have one person be responsible for all of the issues within the company. And since there was an Independent Board, and since one of those Independent Board Members was becoming the CEO, the need for another individual to be the CRO might send conflicting signals inside the organization. And so we decided that it would be appropriate to put those responsibilities into Mr. Seery's lap. And we spoke with Mr. Sharp from DSI, and he agreed. And so that's the reason why we moved it forward that way.
Q Okay. I understood you to say that the meeting of the minds, at least conceptually, was somewhere around March 12th

in New York, or March 11th. I think the Judge may have asked the question or at least implied that she wanted to know kind of why it took so long to get the motion on file. I think you've discussed some of the issues, but just kind of in a bullet-point way, can you give the Judge an explanation as to, you know, why it took several months to get this motion in front of the Court if a meeting of the minds occurred back in March?

A Sure. I believe the motion was filed on the -- I think it was the 22nd or so of June.

Q Okay.

A And so we -- we asked Mr. Seery. He accepted the responsibility in the middle of March. Right at that point in time was when the whole pandemic issue was, you know, really coming hot and heavy at the company. As Mr. Seery testified earlier, he had -- he was spending a tremendous amount of time just focusing on the operations of the business, focusing on the assets, dealing with the prime accounts, the select accounts, working with Jeff Reeves, working with the other individual investments that we had, to make sure that those were under control.

I would say I applaud him for putting the business first in front of him, and then I think probably at 1:00 o'clock in the morning he was able to finally sit down and put together his own compensation request.

We did need time to go through with the Mercer folks and get, you know, the market information, and that took a lot of, you know, a lot of time.

And then, more importantly, we wanted to make sure we could get something in front of the Court that was agreed to by the Committee. So we did share the information with the Committee. We spent a lot of time in negotiations with the Committee, trying to get to a resolution. As I said earlier, we asked Mr. Seery to step in and there be, you know, one-on-one discussions to maybe shortcut some of that.

And finally, at the point in time where we realized we could not get a full, you know, fully-agreed compensation program, we asked him to just break it down into the monthly, and then come back for a restructuring bonus at the end of the case.

And so all of that, while trying to manage the business in the COVID era, is what took such a long period of time.

Q Did it also take some time to obtain appropriate D&O insurance for Mr. Seery as the CEO?

A It did. We had to, as the Board of Strand, we had to set up a D&O program for the Board members when we first got involved back in January. That took a tremendous amount of time. It was very difficult to obtain in the marketplace, for any number of reasons, but mainly because the insurance market understood what Highland was all about and the various

players, and they were very reticent to insure Highland.

So, because we were Strand, because there were other protections that were afforded to the Independent Directors, we were able to obtain it.

When we asked the various carriers to add Mr. Seery on as the CEO for HCMLP, it was very challenging to put folks on. We were eventually able to get our first layer to sign on, the first-layer insurer. The second layer would not do it, and we had to go find a third carrier who would do it. And we actually got that done at some time in the latter part of June, right after we had filed the motion.

Q Okay.

MR. MORRIS: Your Honor, I've got just a few more questions, but they're going to be devoted to the DSI motion. I don't know if you wanted to ask -- if you had any questions on the motion with respect to Mr. Seery or I should just continue on.

THE COURT: I do not have questions. You can continue.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Okay. So, let's just finish up, Mr. Dubel. There is a second motion in front of the Court, and this one is for the appointment of DSI as financial advisor. Are you familiar with that motion?

A I am.
Q Does the Board unanimously support that motion?
A We do.
Q Has the Board concluded, in an exercise of its independent business judgment, that the engagement of DSI as financial advisor is in the Debtors' best interests?
A We have. Yes.
Q Can you explain to the Court why the Board reached that conclusion?
A Well, we do need the services of a financial advisor. It's very important in this case to have an independent, you know, restructuring, you know, financial advisor to assist us. As Mr. Seery testified earlier, they have been very instrumental in helping him prepare the financial analysis that has been part of what he's been using to start negotiating and working forward on the -- putting together a plan of reorganization.

They've also spent a tremendous amount of time acting as a bridge to FTI, the Committee's financial advisors, which is very common in these types of cases. And so that's been extremely helpful. And that role needs to continue.

They also are handling all of -- all the administrative bankruptcy issues, the SOFAs, the MORs. They're doing a lot of work for us, not necessarily specifically on the large claims, but on helping us analyze and review all of the other

myriad of -- I think it's two hundred something claims that have been filed in the case.

So they've been here since -- I guess they came in pre-filing. They have a lot of history and knowledge, and we want to continue to utilize that knowledge as we continue to move forward. So that's why. And the Board is very comfortable with the job they've been doing, and so we felt it was appropriate to continue to use them as the financial advisor, just in a slightly different role.

MR. MORRIS: Your Honor, I have no more questions of Mr. Dubel.

THE COURT: All right. Well, I'm going to just jump in and ask my own questions, and then I will -- I'll, you know, offer him up for cross if people will promise to restrict it to employment terms.

EXAMINATION BY THE COURT

THE COURT: So, what -- my question is about Mr. Sharp. As I recall, the compensation is not going to change at all, even though the role is changing. He won't be CRO anymore, Mr. Sharp. He won't be the Foreign Representative anymore. But obviously, he and his firm will remain very engaged as financial advisor.

What I'm getting at is there was a $100,000 per month flat fee for Mr. Sharp, and then other professionals at DSI will bill by the hour. Tell me why the Board thinks that's still

the appropriate compensation package with the modified role of Mr. Sharp. I'm getting at, $100,000 a month, is that still the right thing, or hourly compensation, did you discuss that, and why is --

THE WITNESS: We did, Your Honor. And I'll be (inaudible) with you. I don't know who negotiated that originally for -- with, you know, with DSI, but I find it to be a very fair-to-the-Debtor compensation package of $100,000 for Mr. Sharp, but it also includes Mr. Caruso, who Mr. Seery has referenced earlier. I think it was a very good negotiation that was had by the Debtor.

So when we looked at it, we said, if we switch to a straight hourly, based upon the amount of time and effort that's being put in by the two of those individuals, it might cost us a little bit more. So we chose to continue it at that level.

And I know Mr. Seery will continue to lean on those two folks and get his money's worth. I'm confident of that.

THE COURT: Okay. You just reminded me of something that I did not remember, I guess. Mr. -- we're getting two for the price of one, is basically the -- Mr. Caruso does not bill by the hour?

THE WITNESS: They -- they work together. It's their compensation. I would imagine they keep hours internally, just to keep track of it, but what they bill us for the two

individuals, Mr. Caruso and Mr. Sharp, is a flat fee of $100,000 for the two of them.

THE COURT: Okay. All right. And do you remember, by comparison, the financial advisor to the Committee -- is it FDI? Whoever it is.

THE WITNESS: It -- it --

THE COURT: How are they getting compensated? Is it strictly on an hourly basis, or is there also a combo flat fee and hourly?

THE WITNESS: (echoing) on an hourly basis, and I have one of their most recent charts. It was the May fee application that they just filed, and they -- they bill in a range from $1,245 an hour for, you know, senior managing directors, to $875 an hour for managing directors, down to, you know, $690 an hour for directors. Yeah. A very fair and appropriate marketplace compensation, but I think what we are incurring under the structure that we have for DSI is below that.

THE COURT: If those two guys were billing normal market hourly fees, you think it would be busting $100,000 a month, perhaps?

THE WITNESS: I think it -- I think it would be well in excess of $100,000, --

THE COURT: Okay.

THE WITNESS: -- based upon the hours that we have

seen to date from them, Your Honor.

THE COURT: Okay. Now, does anyone else have questions for Mr. Dubel related to these employment arrangements proposed?

(No response.)

THE COURT: I guess not. I actually have one more question. I think it will be for my benefit, but maybe for benefit of parties in interest, I hope. You made a comment about getting insurance for Mr. Seery, and you said it was a bit of a challenge because insurers in the marketplace kind of knew what Highland was about. I think those were your words.

THE WITNESS: Yes, Your Honor.

THE COURT: Here is my question. As far as knowing what Highland is about, other persons, not me, have used the words that people were Mr. Dondero's puppet master, or he was the puppet master, had his hands all over this, here and there. And we obviously endeavored to change that with the new Board in place. What would you say if people out there think Dondero still might be a puppet master? What -- I mean, is there any concern there that you could address?

THE WITNESS: Sure. And let me, let me take it in two parts, because I think it's important for you to understand from a third-party insurer's point of view. The D&O marketplace has seen a lot of litigation surrounding the Highland Capital name. And because of that, that obviously

causes them concern. Their business is to write insurance and never pay a dime. I ran an insurance company for six years, and you never want to pay a dime out, you just want to collect premiums.

THE COURT: Yes. And I probably prefaced this in a confusing way. I'm really not going back to the insurance. I just said that comment, when you were talking about insurance, made me want to ask, for my benefit and for other parties' benefit: How much control, if any, does Dondero have? In theory, he was not supposed to have any control over the Debtor anymore, but can you say something to make us all feel comfortable that, if he ever was a puppet master, he's not a puppet master anymore?

THE WITNESS: Well, I won't use that terminology. What I will say is, since January 9th --

THE COURT: Yes. It was someone else's term, not mine. I'm just repeating it.

THE WITNESS: That's okay. Since January 9th, when the Independent Board was put in place, the Independent Board has had the responsibility, is responsible for the operations of this business. Mr. Dondero, as Mr. Seery alluded to earlier in talking about the number of people in the organization, has other businesses that he's involved with that operate out of the offices through shared services. But it's very clear to all the employees that the Independent

Board is responsible for HCMLP and that since, really, you know, the early March time frame, that Mr. Seery is the CEO.

So there is no concern on my part that Mr. Dondero is having undue influence. He is still our portfolio manager, but Mr. Seery is working with him as appropriate, and I have no concern that Mr. Seery is not getting the job done and getting any undue influence from Mr. Dondero.

THE COURT: All right. Thank you.

Mr. Morris, do you have any redirect?

MR. MORRIS: I do not, Your Honor. I appreciate the question, and I think Mr. Dubel answered it appropriately.

THE COURT: All right. Thank you, Mr. Dubel. I do appreciate your testimony today. It was helpful.

All right. Mr. Morris, --

THE WITNESS: Thank you, ma'am.

THE COURT: -- what else do you have? You have Mr. Sharp on your witness list. Did you want to --

MR. SHARP: I'm here, Your Honor.

THE COURT: -- put him on?

MR. MORRIS: I'm intending to do that. If Your Honor thinks it's not necessary, I don't need to ask more questions. It's a relatively brief examination that will just focus on the slight change in his role.

THE COURT: All right. Well, if you feel the need to make a record, you may. I just have one question I want to

ask him, to shore up the record.

MR. MORRIS: So perhaps, Your Honor, could we swear him in, you ask your question, and then I'll see if there's (echoing)?

THE COURT: All right. Mr. Sharp, I see you there. Please raise your right hand.

(Echoing.)

BRADLEY SHARP, DEBTORS' WITNESS, SWORN

THE COURT: Thank you. We were getting some distortion there. So, again, if you're not Mr. Sharp, please put your phone on mute.

EXAMINATION BY THE COURT

THE COURT: All right. Mr. Sharp, I just wanted to hear from you how many hours a month do you think that you and Mr. Caruso are working on the Highland matter?

THE WITNESS: I don't have the hours in front of me, Your Honor, but I think Mr. Dubel unfortunately alluded to poor negotiating on DSI's part. That'd be my responsibility, because I'm the one that did that.

From October through May, if you look at the time for Mr. Caruso and myself, DSI has provided about a $730,000 discount. So if we were actually being paid on our hourly rate, our fees would be $730,000 more than the $100,000 a month. We typically run -- my rate is $720 an hour. I think Mr. Caruso's is about the same. The time for the two of us each

month runs about $200,000, which we then write down to $100,000.

THE COURT: All right.

THE WITNESS: (echoing) a month.

THE COURT: Okay. That answers my question. Mr. Morris, is there anything you wanted to put on the record?

DIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Sharp, are you the person who was (echoing) with the (echoing) CRO (echoing) Seery (echoing)?

A Yes, I am. I think it's much more efficient, frankly. We've worked very well with Mr. Seery since the beginning, since January 9th. That's going to continue. I think it takes away some confusion, both internally and externally, in that, you know, Mr. Seery is the CEO, the CRO, and everyone knows that we are providing the analytical and support for him with whatever he needs.

Q And I want to focus just for a second on DSI's (echoing). Is DSI's responsibilities in the case changing at all?

A No. No. We have been working for the Board and responding directly to Mr. Seery. You know, as Mr. Seery testified, he works directly with myself and directly with my team, and that's not going to change.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: All right. Anyone have any questions

regarding the employment terms?

(No response.)

THE COURT: All right. Well, I thank you, Mr. Sharp. We appreciate it.

All right. Mr. --

MR. MORRIS: The Debtor rests, Your Honor.

THE COURT: Okay. Well, I presume no one else had a witness to call. Again, we didn't have any responsive pleadings on this.

So, with that, I am going to turn to the Committee counsel at this point. Mr. Clemente, I know you said early on that you wanted to make some comments, so this is your opportunity.

MR. CLEMENTE: Well, thank you, Your Honor. Matt Clemente from Sidley on behalf of the Committee.

And just very briefly, Your Honor, as you know, we did not file an objection. It sounds from what we heard today that Mr. Seery and the Board are working hard, which is, frankly, what I think you expect and what we expect of them.

We don't have an objection to the retention of Mr. Seery as CEO at $150,000 a month, which is inclusive of director fees. And as Mr. Pomerantz said, the Committee does not agree -- in fact, that was the source of quite a bit of the negotiation of the last couple of months -- with the bonus proposal. But, again, we understand that that will be addressed by a separate motion.

Your Honor, we appreciate Mr. Seery's testimony to advise you and to create the record for purposes of today's uncontested matter. And obviously, the Committee -- there's no live objection. And while the Committee may have different views of what Mr. Seery said -- for example, the working of the protocols, the sophistication of the advisors to the Committee -- again, for purposes of the matter before the Court today, we're not going to take any issue with any of those statements, Your Honor, but reserve the right to do so again in future if it becomes necessary.

So, with that, Your Honor, I have no further comments, but I did want to make those couple comments for the record, to make sure Your Honor understood where the Committee is coming from.

THE COURT: Okay. Thank you. Does anyone else wish to make comments about the applications before the Court?

(No response.)

THE COURT: All right. Mr. Morris, I'll turn it back to you.

I found in my notes one question that I had. Looking at your Exhibit 3 is what made me decide I have this question. The Exhibit 3 was the e-mail exchange of Sunday, April 5th amongst the Board members. Let me ask you this. There was something in there regarding Mr. Seery, this would be a full-time position, but he would be permitted to serve on outside

boards of directors. Is that a term that survived, or no? And if it did, I want to ask how many outside board memberships does he have? Again, I expect, like I think everyone, that it's going to be very full-time, so I don't want to hear that he's on 12 other boards. How did that --

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz. Since I was the one who actually was involved in negotiations more than Mr. Morris, --

THE COURT: Okay.

MR. POMERANTZ: -- maybe I can answer. I believe it was something that survived. I am not aware of any other boards that Mr. Seery is on. And if he has actually been able to do anything meaningful while performing what is I think probably 200 hours a month and being available 24/7, I take my hat off to him. But I would ask him to confirm if he has any other material role, but I have not seen anything.

THE COURT: All right. What about that, Mr. Seery?

MR. SEERY: I -- currently, I'm not on any other outside boards except two charities.

THE COURT: Okay.

MR. SEERY: One is a foundation called the (inaudible) Foundation, which is a charity for (inaudible) individuals, disabled folks, and -- most of whom are abused. And I'm also involved with a charity, I'm not on the board but on a funding committee for Team Rubicon, which is a reference

-- reference service, assistance in disasters. So they don't take time like this, and so I'm not going to be involved in any --

THE COURT: Okay. Thank you. That's what I would hope to hear. I didn't want to hear that you were on, you know, 12 other for-profit boards.

So, all right. So, Mr. Morris, Mr. Pomerantz, do you have anything to say before we wrap up this topic?

MR. POMERANTZ: Your Honor, I'm happy to give Your Honor a closing statement if you think it's necessary. I think you know what I would say, to summarize. But I think we've been at this a while, so (inaudible).

So unless Your Honor has any questions for me, I would just say that the evidentiary record, I believe, supports the entry of an order approving both the Motion to Employ Mr. Seery as the Chief Executive Officer, CRO, and Foreign Representative, and the Motion to Appoint DSI as the Financial Advisor.

THE COURT: All right. Well, I am going to grant both of these motions. Again, as for Mr. Seery, it's as modified per the agreements with the Committee, that modification being that, as for any bonuses, we're just deferring to another day whether Mr. Seery is going to get any bonuses related to a plan, what kind of plan it might be, a case resolution plan or a monetization vehicle plan.

You know, I really hope, frankly, Mr. Seery is before me seeking a bonus in the very near future and we're all happy about the prospect of paying him a bonus because a plan has been achieved, hopefully a case resolution plan. I will just tell you right now, I will have a big smile on my face and will warmly consider that if we get a great result here.

But it's deferred to another day. So I do find it's -- the evidence amply shows a sound business justification and reasonable business judgment on the part of the Debtor in proposing that Mr. Seery be CEO and CRO, essentially, and a foreign representative, where necessary, at the base pay of $150,000 per month, again, with bonuses to be considered at appropriate times down the road if we feel that that is a good thing for Mr. Seery to be paid.

And I likewise find that, under 327, 328, 363, the amended application with regard to DSI Specialists and Mr. Sharp and Mr. Caruso should be granted, it appearing to be reasonable business judgment and in the best interests of the estate and appropriate in all ways under those Code sections.

All right. So we are going to look for orders on those two matters.

Now, unless you have other housekeeping matters you want to talk about, I want to circle back to the mediation topic. Mr. Pomerantz, Mr. Morris, anything you wanted to raise?

MR. POMERANTZ: There is actually one other

housekeeping matter that Ms. Patel and I have been speaking about and we said we would raise before Your Honor.

As Your Honor heard at the last hearing, we had filed an objection to the Acis claim. We initially set the objection for August 6th. Ms. Patel reached out to us, I understand, I remember at the last hearing indicated that August 6th was difficult for her. And especially since we were having the mediation, we had talked to her about a rescheduling. So we are intending put the matter on the September 10th calendar. We have also granted Acis an extension to file a response to July 31st.

What I think we would like the Court's input on, and not now, but we would suggest having it done at the next hearing, which is July 21st, as I'm sure Your Honor has not yet read our objection, but it's a quite lengthy objection, I think 55, 60 pages. There's a lot of issues there. There are some factual issues, some -- there are some legal issues. There are some combination of factual and legal issues.

We think it would be helpful to the process to set up a status conference with Your Honor -- again, to be held perhaps on July 21st, because discovery motions are pending -- where we could walk through with Your Honor what exactly everyone would intend to accomplish on September 10th. We don't believe it should just be a status conference. We searched other dates. On the other hand, I think both parties will

have different views on what exactly will be at issue. But I think it would be helpful, from both sides, to hear Your Honor's expectations and to get some ground rules so we can make a hearing, if necessary, on September 10th as productive as possible.

THE COURT: All right. So, in writing down dates, did you tell me what -- a deadline you have given Acis, or what is the deadline that would apply under the Rules versus what you have agreed to? Is there something different you've agreed to?

MR. POMERANTZ: Sure. I believe, for a hearing on August 6th, based upon when we filed it, I believe their objection would have been due July 23rd or thereabouts. They have asked us for July 31st, and I don't want to be as presumptuous, Your Honor, to say that I have given them the extension. I know that's up to you, Your Honor, to do so. The Debtor does not have any opposition to an extension in that respect, especially given the fact that we're not going to have a hearing until September, although it's obviously going to be important to be able to move forward with negotiations to understand what their specific position is, and, of course, for a mediator to look at both as well.

So, again, it's July 31st, September 10th, and then setting up something with Your Honor, whether it be July 21st or some other date, to walk through Your Honor what that

hearing will look like so it could be most efficient.

THE COURT: All right. Well, I am agreeable to that set of dates and deadlines. Ms. Patel, did you want to say anything about it?

MS. PATEL: No, Your Honor. Mr. Pomerantz hit the salient terms. Yes, July 31st is the agreed response date. And that allows, frankly, parties to -- an opportunity -- allows Acis the opportunity to meaningfully brief the issues, as Mr. Pomerantz indicated.

It's a 60-page objection. It's very weighty. There's a lot of issues that require due consideration. So we have agreed on that extended date. It's in sufficient time to allow the parties time to read a response and analyze it ahead of a mediation in August.

And as Mr. Pomerantz indicated, yes, the parties would like -- effectively, I think he -- he might have referred to it as a status conference. Apologies, my WebEx is cutting in and out a little bit this afternoon. But I think it's probably a status conference/scheduling conference so we can talk about what the trial of the claim objection is going to look like and how it should be structured. And I think, as Mr. Pomerantz alluded to, parties may have very different contexts with respect to that, but we want to just run it by Your Honor, and ultimately it is going to be up to Your Honor with respect to how the trial goes forward.

THE COURT: All right. Well, I hope that you all are going to have lots of specific thoughts to share on what the hearing on September 10th would look like, because, holy cow, a $70 million proof of claim that -- I haven't looked at your proof of claim, but it is presumably based on the 34 counts in the adversary proceeding filed in the Acis case, and maybe then some.

So, you know, I don't know how in the world, if we had to have a contested hearing on September 10th, we could get that all done in one day.

MR. POMERANTZ: Your Honor, Jeff Pomerantz again. Without getting ahead of ourselves, at least the Debtors' view is there are some threshold legal issues --

THE COURT: Okay.

MR. POMERANTZ: -- that are raised in the objection. And then there are, of course, a series of issues that are factual-intensive.

So what we intend to present is how we think we can efficiently deal with it. Again, it's not our expectation to have a lengthy trial on the entire claim objection. But, again, Ms. Patel and I agreed that what we weren't going to do is turn this into a status conference.

THE COURT: Okay.

MR. POMERANTZ: To the effect that neither party was ready. I would just leave it at that --

THE COURT: Okay.

MR. POMERANTZ: -- and say we'd be prepared to talk with you on the 21st.

THE COURT: Okay. Well, we -- we'll use that setting partly as a status conference to talk about the September 10th hearing. And, again, I hope you both will have some specific ideas to give me.

So, July 21st, we have -- remind me what we have. We are so busy, I haven't looked one week ahead to --

MR. POMERANTZ: I believe, and Mr. Morris could correct me if I get ahead of ourselves. I know there's been discussions between us and the Committee on two very -- two, in some sense, the opposite sides of the coin -- discovery motions that are pending before Your Honor. I thought July 21st may have been pre-obtained. Again, I could be ahead of my partner there.

THE COURT: Okay. That sounds like something that I've set on an expedited basis in the past few days. Mr. Morris, Mr. Clemente -- Mr. Clemente filed a motion, or someone from their shop filed a motion --

MR. CLEMENTE: Your Honor? Your Honor?

THE COURT: -- during the middle of our last hearing, as I recall. And I was kind of surprised to get out of court and learn about it. But you're saying you haven't gotten information you've been asking for for months, and we also

have a motion for a protective order.

So, just give me a short -- I'm trying to figure out how much time we're going to be in court next week on the 21st. It's a discovery dispute.

MR. POMERANTZ: And I'll --

THE COURT: So, Mr. Pomerantz? Go ahead.

MR. POMERANTZ: Your Honor, if my colleague, Paige Montgomery, is on, she's in a better position to address that. I don't know if Ms. Montgomery is on.

MS. MONTGOMERY: I'm here. I don't -- my WebEx has been cutting in and out, but I think (inaudible) hear me.

THE COURT: We can hear you, but we can't --

MR. POMERANTZ: Yes, we can.

THE COURT: Oh, there you are. We can now see you as well. So, --

MS. MONTGOMERY: Yes, Your Honor. I think the amount of time that might be required for the discovery motions is going to be dependent on the number of third-party objections that may or may not be filed tomorrow. We've been in communication with a number of different parties over the last couple of days, trying to resolve those.

But I think, if it were just the two motions and the two parties that filed those, John, I don't know if you disagree, but I'd say that's probably an hour. I just don't know how many other people -- I don't know how many other people will

want to participate, Your Honor.

THE COURT: Okay. Well, it's going to be whatever it's going to be, but we're going to have -- the main event on the 21st is going to be this document discovery contest, and I guess there's a related motion for protective order. But I don't know how much it's going to be about resisting producing documents versus we'll produce documents if we have a protective order.

Mr. Morris, can you, in, you know, a few seconds, answer that?

MR. MORRIS: Sure. As the Debtor, we're trying to -- we've got certain interests to protect. We thought we were in a different place in the middle of June, and, you know, this proposal that the Committee made for the first time on July -- on June 26th is really what, from my perspective, prompted us to be here.

But we've made a proposal to the Committee. We haven't received a response to that. We're trying to address these issues. But it's not, you know, it's not contentious. I think our interests are legitimate. I think the motion that we made is either for a protective order or for an order directing us to produce the documents. Because as the motion itself sets forth, Your Honor, the Debtor has certain contractual and other obligations to some third parties. We have given notice to those third parties of our -- of our

intent to make this motion, because we are kind of between a rock and a hard place. We can't produce the documents without, you know, potentially violating obligations to third parties.

And so we'd just ask the Court to be the referee here, to make the decision as to how it gets resolved. And we've given notice to these third parties so that they fairly have an opportunity to be heard, too. And I've been in communication with some of them as well, and I've encouraged them to speak with the Debtor, because ultimately, you know, if the Debtor and the third parties can come to an agreement on the production of the documents, you know, that will resolve, you know, a substantial piece of the issue.

MR. POMERANTZ: You mentioned the -- you meant the Committee, John, not the Debtor.

MR. MORRIS: I apologize. Yes. Thank you.

MR. POMERANTZ: Thank you, John.

THE COURT: Okay. Well, I hope you have this largely worked out. Obviously, I hope that. You know, I just remember doing a very quick pass through the Committee's motion, but I do remember them saying they've been trying to get these documents for a very long time, and I think I recall there's pressure building now because I gave you a 90-day deadline to either file a lawsuit regarding the CLO Holdco issues that we had a hearing on a few weeks ago, a couple of

weeks ago, or I'm probably going to release the money in the registry of the Court. And so that's part of why you're trying to get these documents as soon as possible, right, Ms. Montgomery?

MS. MONTGOMERY: Yes, Your Honor.

THE COURT: Okay. All right. You all try to work this out. Okay?

MR. CLEMENTE: Thank you.

THE COURT: Well, I was partly pressing the issue of what's July 21st going to look like because I think we may carry over the discussion about mediation. We're going to start it right now, but I think we may have to carry it over to the 21st, and I hope finally kind of get a game plan together on that day.

So, I wanted Mr. Seery to be available. Mr. Seery is -- if you're still there somewhere. You're very important, in my view, to mediation potentially being successful here -- and the whole Board is, for that matter -- because -- well, let me digress a minute.

Mediation is going to be very tough here. We all know that mediation tends to be more likely to succeed if we've got face-to-face, in-person participation. And as I said last week, I just don't know how I can order people to be in face-to-face mediation right now. I just -- we've got people spread out, and I think it would be very, very bad to order

face-to-face mediation right now.

But on the topic of mediation, you know, I've heard some things that, you know, we all know, but I've heard some things from Mr. Seery that are important to stress today. This isn't the type of case that needs to be in bankruptcy for months and months and months and months. Okay? We have the issue of the professional fees accruing, of course, like every case. But we have a company where -- it's a strange fit for bankruptcy, right, this kind of company. And it's so dependent on people to provide value. And people can bolt. You know, people can get weary of the bankruptcy and want to be somewhere else where that taint is not there in the marketplace.

The issue of the UCC protocols was brought up by Mr. Seery, and I know that is something that is going to be cumbersome, you know, for this company to be in bankruptcy long-term.

So, I want to go to Mr. Seery, and it may be unusual for me to reach out to you and ask this, but I want to hear from you: Do you think mediation is a waste-of-time pipe dream, for lack of a better term? I really want mediation to happen, because I don't know how we quickly get a confirmed plan if we have, well, the voting issue, for one, right? We have to, at a minimum, figure out what is UBS's voting claim. What's its claim for voting purposes? What is Acis's claim for voting purposes? A looming, huge issue in my mind. So I feel like

we've got to have mediation. We've got to get a strong shot at getting these two claims liquidated, at least for voting purposes, if not overall.

So, is this a pipe dream, Mr. Seery, in your view, that mediation might get to resolution on these two claims? What do you think about it?

MR. SEERY: The quick answer, Your Honor, is I don't think it's a pipe dream. I think there's a legitimate shot to move parties together.

Let me just say one thing that -- reflecting on what Mr. Clemente said. I want to make clear for the record that, to the extent I misspoke, and it would have been misspeaking, I have no negative implication regarding the sophistication, professionalism, or focus of Sidley --

THE COURT: Uh-huh.

MR. SEERY: -- or FTI or any of the professionals. I know these folks. They're really good. They're very sophisticated. I have the highest professional and personal respect for them. So, to the extent that I misspoke, I apologize.

THE COURT: I don't think you did, and that's not how I heard it --

MR. SEERY: Okay.

THE COURT: -- and that's certainly not how I meant it. It's just a fact of bankruptcy that it's expensive.

Okay? So, --

MR. SEERY: Yeah.

THE COURT: Right.

MR. SEERY: I just wanted that to be clear.

I think, particularly with respect, Your Honor, to the Acis and UBS claims, our professionals have done a lot of work on them. Obviously, the professionals for Acis and UBS have done a lot of work on them. There may be things that we know, the perspectives that we have, and perspectives that the other side has, that may not be as well-founded as each side thinks. It could be very valuable to have a third-party objective observer, cajoler, somebody who's strong, to help move the parties off of certain positions.

We would like to think, as a Board, Independent Board, and I'd like to think as an Independent Director and now as a CEO, I didn't really have a -- the proverbial dog in that fight for either of those claims. I wasn't -- I'm not a Highland employee. I don't have any animus towards any of the sides. I don't have any history with any of the sides.

But I'm realistic that I take a perspective around certain claims and how they're brought, the factual and legal basis for them. And I get a lot of that information from Highland employees, and we use that information to then perform the analysis with our professionals.

Likewise, these parties have been involved in, on the

other side, very entrenched disputes with Highland and Highland employees. And they've dug in on their positions.

Having a third party hear each side and start to move could give us the chance to break it open. I think there's -- and there's two really important aspects. One is the claim amount, and then, obviously, the distributions on the claims: How to make those, how much are they, when are they made? We can work on both of those, and I think we need some help moving us both on the claim amounts and on how to make the distributions.

We've made progress with Redeemer because even though they had -- they had an arbitration award, so we knew what the outside would be. Now, Redeemer and their attorneys are very good and very creative. They could stretch the outside in those discussions. I won't get into what they are. But we were able to more easily fashion around the particulars of that claim because there was that judgment from the arbitrators that, while it hasn't been entered, gave us much more guidelines as to where we could look. The other claims are much more amorphous, at least at this stage, and having a third party help us develop perhaps closer goal lines would be useful, in my opinion.

But, again, I think it's very important that we do it quickly. I think we -- you know, somebody who is focused, strong. I'm sure they'll be highly intelligent and versed in

the field, but somebody who's got the opportunity and time to do it. And then, if it's unsuccessful, then, as Mr. Pomerantz and Ms. Patel alluded to, then perhaps we may need some judicial help to move those goal lines a little bit.

But I do think that mediation -- and I apologize for the length of my answer -- could be a very helpful way to do it, provided we get there quickly.

THE COURT: All right. I guess my other question I wanted your view on is structure. You know, when someone -- Mr. Pomerantz, I think -- told me that he or others had reached out to our judges in Houston, Judge Jones and Judge Isgur, my initial reaction -- and, frankly, my continued thought on that -- is they just don't have meaningful time, because I don't think one day of cajoling is going to be enough to get -- you know, you're a billion dollars apart on UBS, right? The Debtor, I guess, thinks zero is the amount of their claim, and UBS thinks it's a billion, and it's been litigated for 11 years. And then I personally know, you know, how Acis feels about its positions.

So, anyway, what I'm getting at is structure. I in some ways think what we need here is sort of a master statesman-type person who would spend meaningful time, not just a day or two, but days or even weeks trying to reach a grand compromise.

On the other hand, in my experience -- I've never done

that in a case as judge. But as a lawyer, I felt like that kind of person can hijack a case, and we don't need that here. We have wonderful professionals, a wonderful Board, a wonderful CEO. We don't need that kind of help, I worry.

So, I guess where I'm evolving, you know, we've got the two-sitting-judge option that would be free mediators that could give you a day or two. Maybe. And then we have kind of the master statesman who might be in there for weeks, trying to help you reach a grand compromise.

Another option, I think, is one or two mediators who just zero in, you know, on the UBS claim versus -- and the Acis claim. And I have a couple of private mediators in mind that have very good video capabilities to have a sophisticated video mediation.

So, all of this rambling to say, Do you think we need to just zero in on Acis and UBS and maybe have one or two people to do formal video mediation with those two parties, or do we need sort of more of a grand pooh-bah, grand compromise-type person?

MR. SEERY: My view, Your Honor, is that we should focus on the claims, but they're not just going to be two-party, because we do have other active constituents. I think Redeemer, with their party in interest status, is going to want to be part of it.

I think if we can focus on those, we have the

professionals to help drive the grander bargain that I've alluded to in some of those discussions we've been having. So they haven't progressed as far as I would like, but they have progressed. We do need the bottom line number for where claims are going to come out. But also that will help frame a little bit as to what parties expect in terms of distributions on their claims.

And I think the reason that we had some impetus behind a sitting judge -- frankly, I didn't know that sitting judges couldn't be paid. I think that's -- there should be a standard rate, because we shouldn't take people's time for free in these cases, and I know judges work extremely hard and if they're going to put in extra time, then they should maybe be compensated, but that's a whole different issue.

I don't think we should get too hung up on the cost. We are -- the costs of this case are extremely high, and we are, with best intents, sometimes getting ourselves wrapped up in things that should be, I think, more swiftly and economically dealt with and dispatched.

So, if we can get a good mediator, and I think the reason folks think about a judge is -- a sitting judge, it's not just the vast experience that folks -- judges like yourself have, Your Honor, and in particular with these issues, but also the requirement that all the participants, notwithstanding the professionals and -- that you see here, the requirement that

all the participants know that they're dealing with a sitting judge, there's a certain decorum that's required. But that, I think we get anyway. But there's also a -- there's less willingness to go to the furthest reaches of your argument when you have someone who's on the bench who sees those types of positions taken frequently and can dispatch with them more readily.

So, I think there are a number of individuals that I've dealt with in the past who would have the ability, the gravitas, for lack of a better term, to be able to help push the parties in the right direction. And I think it's a matter of finding somebody, as you said, with both the capabilities, which we'll find, but also the capacity in terms of the time to do it. And then, in the video age, maybe some facility in being able to make that happen both rapidly and effectively on screen.

THE COURT: Okay.

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz. And I'd just make a couple of comments.

THE COURT: Okay.

MR. POMERANTZ: You know, as Mr. Seery said, we were predisposed towards a sitting judge. And while we did share the same concerns about the timing of Judge Jones and Isgur, we understand you've probably been in communication with them, and if that's not going to work, we appreciate it. We want

this mediation to be effective and we want someone to spend the time with it. And if you didn't feel that they, you know, could commit to that, we totally appreciate that.

We thought long and hard about the people that you identified at the last hearing, former Judge Peck and Sylvia Mayer. We've done our diligence. The Debtor would be willing to mediate before Sylvia Mayer. We think that, based upon our diligence, the people we've spoken to, that she, if she otherwise had the time and the abil... the time to devote to it, that being a former big-firm lawyer in permanent practice now as a mediator, that the Debtor would find her acceptable.

THE COURT: All right. Does anyone else wish to comment? Because I have a very positive view of Sylvia Mayer, and certainly her video capabilities, I think, are far and away better than a few other people I've chatted with.

MS. PATEL: Your Honor?

MR. CLEMENTS: Your Honor? Oh, I'm sorry.

MS. PATEL: Go ahead.

MR. CLEMENTE: Your Honor, --

THE COURT: Not that I would ever, you know, put that ahead of, you know, overall abilities, but it just is an added plus, a huge plus right now during COVID.

Go ahead.

MR. CLEMENTE: Your Honor, Matt Clemente on behalf of the Committee. Just a couple observations, building a little

bit on what Mr. Seery said.

We had consensus among the Committee around Judge Isgur and Judge Jones. I think the view, the consensus view -- and, again, I use the word consensus and not unanimity because I want Your Honor to understand that -- is that having a sitting judge, ideally, given the personalities as you've expressed and I think as Mr. Seery has expressed, provides the best possibility for a successful mediation. It may not be that overlord that spends three weeks, but, you know, it is a strong personality that -- not that any of the names that have been raised aren't tremendously to be respected, but that would be respected by all of the parties simply by the fact that they're a sitting judge.

With that said, Your Honor, and, again, the speed. Again, I don't have unanimity from the Committee, but there is consensus to see if Sitting Judge Green from the Southern District of New York would have the time and the capability to spend. And I know Your Honor has concerns about the time. I think Judge Isgur and Judge Jones occupy a special place in terms of how busy they are, but at least among the Committee members, there's been discussion that that may be a suitable approach in terms of identifying a mediator and accomplishing the objectives of having a very strong mediation, mediator, on a timely basis, that has the best possibility of success.

That being said, Your Honor, based on what Mr. Pomerantz

said, if Mr. Green is not acceptable or if Your Honor doesn't wish for us to go in that direction, I do have consensus among the Committee members to move forward with Ms. Mayer as mediator.

So, a little -- maybe a little convoluted in my comments there, Your Honor, but the main thrust is I think there is consensus among the Committee to consider a sitting judge, and Judge Green would be someone who would be satisfactory. And if he's not acceptable, or I should say acceptable but not able to do it, Ms. Mayer would be acceptable to the Committee.

THE COURT: All right. Well, let me put this out there. I talked on a no-names basis with Ms. Mayer last Friday. And it was actually more in the nature of making inquiries about how an organization she's connected with, the AAA -- you've heard of the American Arbitration Association; they, of course, do mediation -- what their experience and capabilities were with many, many parties and video mediation. And as you might guess, they have a lot of experience already -- you know, a number well in excess of a hundred; I can't remember -- of doing video mediations with many parties and having the different constituencies in this caucus room and that caucus room. And, very importantly, having lots of IT staff to give instructions, to give help, to, you know, tackle technology problems.

But in that discussion, I learned that there is a panel

that AAA has put together of 12 mediators that have bankruptcy expertise. And, of course, Sylvia Mayer is one of those people. But Retired Bankruptcy Judge Gropper -- is it Groper or Gropper from the Southern District of New York? I always forget which way he pronounces his name. Anyway, he is on that. He is on that panel of 12.

Mr. Seery, you're grinning like you want to say something about this.

MR. SEERY: No. Only on the Gropper/Groper, because there's a professional that I know that is similarly named, and I believe -- and I believe Judge Groper -- I may have it wrong, but I think it's -- it's Judge Groper and Dan Gropper. But that's the best I --

MR. NEIER: It's Dan Groper and Judge Gropper. I actually had a mediation with the two of them when they argued about the pronunciation of their name.

THE COURT: Okay. Well, Gropper. So we -- it's Gropper. Okay.

A VOICE: Yes.

THE COURT: My point was, without -- I've not talked to him at all. And by the way, I haven't personally reached out to Jim Peck, but we'll stop that discussion about him. But after getting off the call with Sylvia Mayer and a couple of other people at the AAA Friday, I put together in my brain, maybe we could have a Sylvia Mayer/Allan Gropper tag team, two

mediators. Okay? I don't know how that would affect the cost, but that might be the way to go in such a complex case. You know, maybe they could divvy up among themselves. One would be the primary mediator on Acis, one would be the primary mediator on UBS, but they would both work together.

If you all want to think on that, digest that a little, and we, you know, decide definitely next week on the 21st, we could do that. Or we could just all say, yeah, that's a good game plan, and I can get on the phone after this. Or it actually may be tomorrow, because I have a terrible hearing that I've got to prepare for at 9:30 in the morning tomorrow. It may be tomorrow.

But do people want to let that soak in a little bit, or shall -- I mean, --

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz.

THE COURT: -- frankly, I can order it either way. I can order it. But I just really want to be conciliatory to the parties who are owed the money and have to pay the money, if you want to think on it some.

MR. POMERANTZ: Your Honor, it's Jeff Pomerantz. Having my newly-minted CEO on the phone, Mr. Seery, I would ask him, and if he says that it would be okay, then it would be okay with me.

MR. SEERY: Be fine with me.

THE COURT: Okay.

MR. SEERY: Yeah, I think the key is moving forward. I know it's much harder with a Committee, and I respect, you know, Matt Clemente's job there of having to get consensus. But from our perspective, if we were to push it off, you know, on the 21st, Your Honor, we -- we would request you to order something, because I don't want this to delay.

THE COURT: Okay.

MR. CLUBOK: Your Honor, if I may, speaking for UBS, it's Andrew Clubok. You'll be happy to know I think that we're in agreement with Mr. Seery, and I guess, derivatively, Mr. Pomerantz. We think the most important thing is to move it along quickly, and we trust -- you know, we're familiar with Judge -- or, with Mayer, and whether it's Groper or Gropper, I lost track, but I'm sure he is also going to be equally capable. We do kind of think that two is probably necessary, given, you know, the sort of multi-layer (inaudible).

But, really, our position has simply been we'll happily mediate with any, you know, effective mediator as quickly as possible, because we do think the sooner we do that, the sooner we might have a chance to get to yes. So, I'm -- we're prepared to just say yes to the idea.

THE COURT: All right. Does anyone else want to comment?

MS. PATEL: Your Honor? And can you hear me? I'm

sorry. It's --

THE COURT: Yes.

MS. PATEL: Again, I'm still having WebEx problems.

THE COURT: Yes.

MS. PATEL: Your Honor, again, for the record, Rakhee Patel.

Acis is fine with the proposal, Your Honor. We've been amenable to virtually every proposal, and have been trying to hopefully be helpful with respect to getting this moved to mediation as quickly as possible. We equally think that we should get to mediation as quickly as we can.

And, you know, the only -- the only -- and I appreciate Your Honor's contemplativeness on this. As you know, at least in connection with the Acis case, you know, we've been through two unsuccessful mediations so far. So we're really hoping that the third time will go much better than the prior two.

So, anyway, this is my very long way of saying we're fine with the proposal and are happy to kind of sign off on it. We don't need until July 21st to respond on that.

THE COURT: Okay. Anyone else?

(No response.)

THE COURT: All right. Well, very good. I'm going to move ahead on this and will confirm to you, hopefully before the 21st, through my courtroom deputy. And, again, given the late hour, I think it's going to be tomorrow before

I pick up the phone and reach out to Sylvia Mayer and former Judge Gropper.

But, again, I did, in speaking generically with Sylvia Mayer, asking her, Have you ever done like a two-mediator mega-mediation, and she said, Oh, sure. You know, that's -- she acted like it was quite common. It's not something that I have seen very often, but I think we'll be in business with this game plan.

Because, you know, I know everyone on this call knows this, but maybe not everyone's client knows this: If we don't -- if we don't have a successful mediation of both of these claims, or at least one of these claims, it's going to be years and years and years. I mean, I know it's already been years for UBS, but it will -- it will be many, many more years. And that's not what we're supposed to do in bankruptcy. We're supposed to stop burdensome litigation and solve problems. And I can't imagine your clients want to go on with three or four more years of litigation. But that's exactly what it will be, it's exactly what it will be, many more years of litigation, if we don't have mediated settlements.

So, all right.

MS. PATEL: Your Honor, if I may very quickly. I just wanted to make sure the Court was aware of something. In the context of mediation and as it relates to Acis's claim,

yesterday counsel for Mr. Dondero filed a joinder in the Debtors' objection to Acis's claim. So, again, just thinking about this in the context of mediation, I think, with that joinder, they will be a necessary party. So, going back to Mr. Seery's point, this is not just --

THE COURT: Oh, absolutely. Mr. Dondero is --

MS. PATEL: -- a two-party --

THE COURT: -- going to be a required party in mediation. Absolutely. So, --

MS. PATEL: Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing further, we'll see you on the 21st. And, again, my courtroom deputy may be reaching out before then if we've got things nailed down on mediation.

(Proceedings concluded at 4:54 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **07/16/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBIT 15

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

IN RE:	.	Case No. 19-34054-11(SGJ)
	.	
HIGHLAND CAPITAL	.	Earle Cabell Federal Building
MANAGEMENT, L.P.,	.	1100 Commerce Street
	.	Dallas, TX 75242-1496
	.	
Debtor.	.	March 4, 2020
. . . . .	.	1:31 p.m.

TRANSCRIPT OF HEARING ON MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER AUTHORIZING, BUT NOT DIRECTING, THE DEBTOR TO CAUSE DISTRIBUTIONS TO CERTAIN "RELATED ENTITIES"
BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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THE COURT: -- set a motion of the debtor for entry of an order authorizing but not directing the debtor to cause distributions to certain related entities.

Let's get lawyer appearances in the courtroom.

MR. POMERANTZ: Good afternoon, Your Honor. Jeff Pomerantz and Greg Demo, Pachulski Stang Ziehl & Jones, on behalf of the debtors.

THE COURT: Thank you.

MS. HAYWARD: Good afternoon, Your Honor. Melissa Hayward and Zachary Annable of Hayward & Associates on behalf of the debtor.

THE COURT: Thank you.

MR. CLEMENTE: Good afternoon, Your Honor. Matthew Clemente, Dennis Twomey, and Penny Reid from Sidley Austin on behalf of the Official Committee of Unsecured Creditors.

THE COURT: Thank you.

MS. SHRIRO: Good afternoon, Your Honor. Michelle Shriro on behalf of CalPERS. And I also have my co-counsel Louis Cisz from Nixon Peabody, and he is -- he should be on the line.

THE COURT: Okay. Thank you.

MR. LYNN: Good afternoon, Your Honor. Michel Lynn and John Bonds for James Dundero.

THE COURT: Okay. Thank you.

MS. PATEL: Good afternoon, Your Honor. Rakhee

Patel, Winstead PC, on behalf of Acis Capital Management, LP, and Acis Capital Management, GP, LLC. Also, I have my co-counsel Mr. Brian Shaw of the Rogge Dunn Firm on behalf of the same clients.

THE COURT: Thank you.

MR. PLATT: Good afternoon, Your Honor. Mark Platt firm Frost Brown Todd on behalf of the Redeemer Committee of the Highland Crusader Fund. And I believe Terry Mascherin is on the phone, as well --

THE COURT: All right.

MR. PLATT: -- from Jenner & Block.

THE COURT: Thank you.

MS. ANDERSON: Good afternoon, Your Honor. Amy Anderson with Jones Walker on behalf of the Issuers. I believe Mr. James Bentley with Schulte Roth is also on the phone on behalf of the same parties.

THE COURT: Okay. Thank you.

All right. We do have a large number of people on the phone. I'm just going to go through the live lines and take roll. Asif Attarwalla for UBS, are you there?

MR. ATTARWALLA: Here. Yes, Your Honor.

THE COURT: All right. James Bentley?

MR. BENTLEY: Yes, Your Honor. I'm here.

THE COURT: Okay. Also Jeff Bjork from Latham? Yes/no?

(No response)

THE COURT: All right. Earnestiena Cheng for FTI?

MS. CHENG: Yes, Your Honor.

THE COURT: Okay, thank you. And Louis Cisz, I think we heard he was CalPERS co-counsel. Are you there?

MR. CISZ: Yes, I am, Your Honor.

THE COURT: All right. Thank you. Kimberly Gianis for Contrarian? Yes/no?

(No response)

THE COURT: All right. Terry Mascherin, I think we heard he was there for the Redeemer Committee.

MR. MASCHERIN: Yes, Your Honor.

THE COURT: Okay. I'll just ask anyone else on the phone who wishes to appear, go ahead at this time.

(No response)

THE COURT: All right. That may be it.

All right. Mr. Pomerantz, I see a 20-minute time estimate on our calendar. I'm not sure where that came from, but that --

MR. POMERANTZ: I think that's quite aggressive.

THE COURT: Okay.

MR. POMERANTZ: Good afternoon again, Your Honor. Jeff Pomerantz, Pachulski Stang Ziehl & Jones. First, I want to thank Your Honor for scheduling the hearing on shortened time. I would also like to introduce once again the three

members of the independent board who have been appointed pursuant to the settlement, Your Honor, that Your Honor approved on January 9th. That's James Seery, John Dubel, and Russell Nelms.

THE COURT: Okay. Hello.

MR. POMERANTZ: I thought it might be helpful, Your Honor, to provide Your Honor with a brief background of each board member, how they have been approaching their duties as independent directors, and what the focus has been the first two months of the case. And then I will go into the background of this present motion.

THE COURT: Okay.

MR. POMERANTZ: James Seery will be the debtor's witness at today's hearing, and he's a 30-year restructuring lawyer with extensive experience with high-yield and distressed investing both as a principal and manager which is precisely the business in which the debtors operate. He is an attorney licensed to practice in New York who has passed and held the Series 7, 63, 79, SIE and Series 24 FINRA principal designations.

From April 2012 to 2017, he was the president and senior investing manager of RiverBirch Capital. And RiverBirch is an SEC-registered investment advisor managing a $1.3 billion global long short fund that focused on high yield loans, bonds, CLOs, and distressed investments. Prior to that, Mr. Seery

spent ten years as a senior high yield manager at Lehman Brothers, and he was the global head of Lehman Brothers fixed-income loan business.

Accordingly, Mr. Seery brings to his role as an independent director a unique combination of a legal background, restructuring experience, and a deep knowledge of the highly regulated business in which the debtor operates.

Mr. Dubel brings 35 years' practice in the restructuring area. His experience includes turnaround management, crisis management, operational restructurings, and corporate acquisitions and divestitures. He's worked at both sides of the table, both on the company side and other side. And he brings a unique perspective to each situation, and he spent the last ten years being an independent director for a wide range of distressed companies including Purdue Pharma which obviously is the newest in current Chapter 11, WMC Mortgage, Wartaco (phonetic), FXI, and ResCap.

And as an independent board member, he's plated a principle role in overseeing management, negotiating with creditors, supervising and investigating resolution, either consensually or through litigation of insider and affiliate claims, and also spearheading reorganization efforts.

I'm sure Your Honor is familiar with Russell Nelms but briefly he was a distinguished bankruptcy litigator with Carrington Coleman for 20 years which followed a stint of six

years as a United States Army judge advocate, and also he sat with the bankruptcy court here in Fort Worth from 2004 to 2018.

Your Honor, these individuals bring a complementary skill set to the independent board that have made them uniquely qualified to manage the debtor's restructuring efforts in this case, that bring a combination of sophisticated asset management experience, financial restructuring, a legal insolvency background, and judicial experience. They've been involved in many cases on all sides of the aisle, whether it's been alleged wrongdoing or questionable conduct with people they've ever had to supervise as a board member, advise as a restructuring lawyer, work with as a financial advisor, or administer their cases as a judge.

Mr. Seery and Dubel were selected by the Committee not only because of their relevant expertise but because of their commitment to independence and ability to stand up to strong personalities that exist on all sides of this case. Mr. Nelms, while originally identified by the debtor, was scheduled by the Committee, and was ultimately chosen to be the third board member by Mr. Seery and Dubel from a group of highly-qualified candidates.

Your Honor, I provide this background to stress that the independent board consists of individuals whose background and experience speak to their independence, experience, and strength, and who take their job seriously to do what they

believe is right for this debtor, and they're not bring influenced by any party in this case, be that the debtor, Jim Dondero, members of the management committee, members of the debtor's management, or the creditors' committee. The reputations of each of these gentlemen at are stake in a case like this, and they take their attendance very seriously.

Upon taking over on January 9th, 2020, the board quickly made a few observations about the current circumstances that have guided their actions today. First, the board understood that the debtor was where it was in part due to many years of intense litigation arising out of sometimes aggressive management decisions or failure to settle certain employee disputes and that the litigation led to cost and diversion of time and energy for what the debtor did best which was manage assets.

The board concluded that for case to succeed, the board would have to chance the culture from one of litigation to reconciliation and consensus building. It doesn't mean that the debtor will back down from defending itself from claims that it doesn't believe are legitimate but rather the litigation that the company under their watch would be involved in would need to be carefully vetted by the independent board, outside advisors, and the results of which would guide the board's conduct.

The board's focus has and continues to be operating

the debtor's business in accordance with its obligations of their debtor in possession in conformance with its statutory, contractual, and fiduciary obligations as an investment advisor. By scrupulously meeting its obligations as an investment advisor, the debtor will continue to enhance the asset management business and avoid the litigation that contributed to this case.

Second, the board understood the relationship between the debtor's largest creditors and senior management had materially deteriorated and that there was severe lack of trust that creditors had with respect to management. The board initially determined, has determined to continue retaining the services of senior management because it believes that their historical background and deep knowledge of the debtor's assets provide material value to the estate. However, the board's decisions thus far have and will continue to be based upon their independent review of the facts and circumstances and based upon consultation with outside advisors as appropriate.

Third, the board believe that a lengthy stay in Chapter 11 only would serve to erode asset value while at the same time leading to extensive restructuring costs. The Court and the board developed a timeline that will hopefully lead to a confirmed plan at the end of the year.

Against this backdrop, the board is focused on the following things the first two months of the case. Initially,

the board met with all department heads and other members of senior management including Mr. Dondero and let them know that the board was now in charge and that all business decisions needed to be run by the board subject to the board delegating authority as it deemed appropriate.

The board has had several calls with the committee and its professionals to discuss among other things the board's initial determination as to staffing levels and employee compensation, time-sensitive transactions that needed the committee's input under the Court's approved operating protocols, and the proposed timeline for achieving restructuring. There is an in-person meeting scheduled next week in New York City between all the committee members and their professionals and the debtor and their professionals.

Members of the board have also reached out to individual committee members and have had or will have meetings with them to understand their specific concerns with the debtor and to importantly have a dialogue about the claims they have against the debtor, as resolving the claims against the debtor is a key part of achieving a consensual restructuring in this case.

The debtor's asset basis is also extremely complex, and the board has worked hard to get a grasp on how best to maximize their value. The board has analyzed the debtor's liquidity needs and worked with the debtor's chief

restructuring officer to develop a 13-week cash flow and otherwise address how to enhance liquidity. The board has also conducted a thorough review of the debtor's employee basis, including performance reviews and address ongoing staffing and compensation in a manner that the board believes will sustain the debtor's business operations and maximize value.

Related to the motion before the Court, the board has evaluated the status of certain funds which were in the process of being wound down at the commencement of the case and has supervised their wind-down in a manner consistent with the debtors' fiduciary, statutory, contractual liabilities. The board has also commissioned outside counsel to provide an independent analysis of the significant litigation claims that are facing the debtor. And as I mentioned, the board anticipates engaging with these creditors to seek a resolution.

The board is acutely aware that resolving consensually claims of creditors and claims the estate has against third parties is the only way to restructure this debtor efficiently and economically. I'll now turn Your Honor to the background with respect to the motion, explain the relief requested, and address the two objections that are before the Court.

Your Honor will hear testimony from Mr. Seery that the debtor is the asset manager of two hedge funds, Dynamic and ARF, that are in liquidation because of redemption requests

from large non-affiliated investors that render the funds economically not viable. The term of the third fund, which is a private equity fund, Restoration Capital expired, and the governing board comprised of large institutional pension funds has refused to grant further extensions.

Mr. Seery will testify that while these wind-downs were already in process and fully disclosed to the Court prior to the installation of the independent board, the board evaluated the decision to wind down the funds independently of the debtor's decision and decided that the prudent exercise of the debtor's business judgment was to continue with the wind-down. Neither the committee nor Acis challenge the board's selection to continue with the wind-down.

You will hear testimony from Mr. Seery that a priority of the independent board was to make sure that the debtor operated in accordance with applicable law to ensure that the debtor fills its obligations to investors and doesn't act or fail to act in a manner which could expose the debtor to liability. After all, as I mentioned, Your Honor, a material reason why the debtor is before the Court is because of litigation claims that have plagued it over the last several years.

Mr. Seery will testify that in evaluating the debtor's duties and obligations as an asset manager of these three funds, the board consulted with bankruptcy counsel with

respect to the applicability of the operated protocols and domestic and Cayman counsel specializing in advising funds with respect to their obligations under the transactional documents, the Advisors Act, and general fiduciary duty obligations.

Tim Silva, a partner of WilmerHale, the debtor's outside firm that provides fund advice, is present in the courtroom and will be available to answer any questions the Court or the parties have. Dennis Olarou, a partner with Carey Olsen, is on the phone. He is the debtor's Cayman counsel and also available.

Importantly, Mr. Seery will testify that the independent board made the decisions that led to the filing of this motion based upon their own expertise and the advise of outside counsel and did not rely on the advice of the debtor's employees or any of the related parties.

He will further testify that based upon the input of outside counsel, the independent board concluded, one, that the operating documents governing the funds did not permit the debtor to unilaterally withhold distributions from some investors and not others; that, two, the debtor risked breaching its fiduciary duty to investors under principles of common law if it withheld distributions on its own; and that, three, the debtor risked liability under the Advisors Act if it essentially attempted to use its position as an investment manager to gain leverage against investors in connection with

an unrelated matter, to wit, potential claims that the estate may have.

The motion describes in detail the nature and extent of the debtor's obligations, and I think the substance of that is not challenged by either the Committee or Acis. I didn't read their objections to challenge that the debtor has these obligations and seeks to fulfill them.

Based upon the foregoing and to make sure that the debtor didn't expose itself to liability, Mr. Seery will testify that the board decided that it was obligated to exercise its authority as asset manager to distribute the funds to all investors. After consultation with the bankruptcy counsel, Mr. Seery will testify that the independent board decided to provide the Committee with notice prior to making such distributions as were required by the operating protocols approved as part of the settlement.

The Committee objected to the distributions which led to the filing of this motion. The objections relate to distributions to be made as follows. Mr. Seery will testify that Dynamic proposes to distribute $35 million of investor funds that are held by Dynamic of which CLO Holdco stands to receive $872,000 and Mr. Okada stands to receive $4,176,000.

With respect to ARF, Mr. Seery will testify that they propose to distribute $22 million of investor funds held by ARF. HoldCo stands to receive $1.5 million. And with respect

to Restoration Capital Partners, it proposes to distribute $123,250,000 of which 2.1 million will be received by ACM Services and, importantly, the debtor will receive 18 and a half million dollars, the balance of approximately 121 million would be distributed to non -- or 103 million would be distributed to non-related parties, including CalPERS which filed the statement with the Court.

The Committee and Acis argue that the Court should prohibit the debtor from making distributions to related parties, notwithstanding the debtor has contractual, fiduciary, statutory obligations to do so as an asset manager. It is important for the Court to understand that the money to be paid to these related parties is not the debtor's money, it's not property of the estate. It's actually funds that are the investors' funds that were invested in these various funds.

Essentially, the Committee argues and Acis argues that because the debtor may assert claims against some of all of these related parties at some time in the future, the Court should prohibit the debtor from authorizing the distribution of non-debtor estate funds. Essentially as we said in our papers, the objectors are asking this Court to issue a pre-judgment write of attachment adjoining these distributions without the filing of any complaint which would assert causes of action, without the need to satisfy applicable standards for a pre-judgment writ either under Federal Rule of Civil Procedure 64

estate law, and without appropriate notice to the parties and an opportunity to object.

The objectors want to use the debtor's position as an asset manager to stop distribution of funds in which the debtor has no interest to gain a potential litigation advantage against these related parties. The debtor just submits that is not appropriate. The Committee and Acis spent a lot of time in their papers talking about the allegations and in some estate case findings against the debtor's prior management relating to the operation of the debtor's business, some of which have matured into claims against the estate.

However, the fact that the debtor's actions taken by prior management led to claims against the debtor is not legally relevant as to whether the debtor should be permitted to make these distributions of non-estate funds. Allegations of prior wrongdoing would not be sufficient in the context of a pre-judgment attachment, and it should not form the basis for essentially the injunctive relief the Committee and Acis urge to the Court.

The Committee also argues that because the Committee's currently investigating claims against the released parties and other insiders that the distribution should be held up essentially indefinitely until the Committee completes its investigation. Whether or not the estate has claims against the related parties and insiders is unknown at this point

except for the notes which I will address in a moment.

Also, whether or not there are claims and how the related parties acquired their investment in the funds is also unknown at this time. Since January 9th, the Committee has had standing to investigate and prosecute these claims and the debtor is cooperating with the Committee in its investigation. If legitimate claims exist, they should most certainly be prosecuted, and the independent board will cooperate with the Committee in its efforts.

However, at this point other than with respect to the notes, there is no admissible evidence that any claims exist, and no claims have been clearly articulated other than some vague allegations of fraudulent conveyance, breach of fiduciary duty, the garden variety of claims you would expect to be asserted in a case like this. Again, no bankruptcy court, no non-bankruptcy court would be authorized to enjoin payments on the basis of these vague and unasserted claims, and the Court shouldn't accept the invitation to do so wither.

The Committee also points to certain demand notes executed by Jim Dondero, Mark Okada, and ACM Services in favor of the debtor as a basis for withholding the distributions. The debtor has made a demand on Mr. Okada to pay back the note, and he has asserted that he may have potential offsets and the nature of potential service obligations and expense reimbursements allegedly owed to. At some point in time, we

suspect those issues will be resolved either consensually or there will be litigation to recover the demand.

ACM Services which is owned 75 percent by Mr. Dondero and 25 percent by Mr. Okada, executed several notes in favor of the debtor of which 850,000 are demand notes. The total amount is approximately seven and a half million. The remaining notes are current and have been paid down over the years.

The debtor has not made demand on ACM Services for payment of the notes, nor have they made demand on Mr. Dondero for payment of the notes he issued in favor of the debtor. Mr. Seery will testify that the reason for that is that, as I indicated before, the board recognizes that in order for there to be a consensual restructuring in this case, it's going to involve not only resolution with the creditors and their claims but also resolution with Mr. Dondero or potential claims the estate has.

The independent board at this early stage in the case does not believe that commencement of an adversary proceeding against Mr. Dondero at this time is in their best interest. If this case turns into a litigation case, and as Your Honor experienced previously, then such litigation will be commenced. However, until the board has the opportunity to try to forge a consensual resolution, aggressive action is premature. The last thing, Your Honor, CLO Holdco is not a party to any demand notes.

THE COURT: Let me stop you.

MR. POMERANTZ: Sure.

THE COURT: You mentioned dollars on the notes. The note receivable from Okada I think is 1.3 million.

MR. POMERANTZ: With credentials, yes.

THE COURT: And then you mentioned roughly seven and a half million of notes receivable from HCM Services.

MR. POMERANTZ: Of which 950 are demand notes. The rest are currently before me in accordance with the terms.

THE COURT: Okay. You didn't mention a dollar amount on the note receivable from Dondero. My notes show 9.3 million.

MR. POMERANTZ: Yeah, and so I think that's around that --

THE COURT: Is that a demand note or notes?

MR. POMERANTZ: That is a demand note and then the related party notes, yes --

THE COURT: Okay.

MR. POMERANTZ: -- Your Honor. And, again, we're now the board knows, fully aware. The board could have commenced a lawsuit. Honestly, Your Honor, the Committee could have commenced a lawsuit in the last two months. I suspect the Committee also would like to see a consensual restructuring.

And I think parties are taking the view of, again, this can be a litigation case which would be like a lot of

money for all the professionals, not really do all that well for the creditors. Or the parties could cooperatively work towards a restructuring to see based upon the leverage, based upon the claims everyone has that it makes more sense. And the board's determination, again, made on its own coming into this case in the last two months is that proceeding aggressively now just does not make sense.

Even though it has not commenced any litigation against the related parties nor presented any evidence of any claims against the related parties, the Committee asks this Court to use its equitable powers under Section 105 to enjoin the distribution again of non-estate funds to the related parties. Your Honor, bankruptcy court -- bankruptcy practitioners in certain cases love to use 105, assert 105. My experience has been when you assert 105 and that's all you assert 105, it really means you don't have much authority and I think that's the case here.

The courts have held that 105 is not -- grant the court authority to be a roving commission to do equity because it has to be tethered to something in the Bankruptcy Code. Here the proper way for the Committee to obtain the relief they sought was to file a complaint and seek pre-judgment remedy, either an attachment under Rule 64 or an attachment under applicable provisions of Texas law or other applicable law, or an injunction under FRCP 65.

The debtor would not stand in the way if the Committee decided to do that. That's what the debtor bargained for. They gave the Committee the authority to do that. The Committee has not yet done that. And the Court should just not allow the debtor -- the Committee to use the debtor's position as fiduciary to its investors as leverage. That's what's really happening. The only reason we're here is because the debtor is the asset manager of these other funds, and the Committee and Acis want the debtor to use that leverage and somehow to gain an advantage.

Your Honor, we would submit that the fiduciary duty of the estate is to act in accordance with its obligations, and that's the primary fiduciary duty and that the creditors are best served if the company complies with its obligations and doesn't expose the estate to any liability.

Lastly, Your Honor, I want to address the Committee and Acis's allegations regarding the circumstances surrounding the sale of the MGM shares, the proceeds of which the debtors intend to use to distribute as part of the RCP fund. Whether or not Mr. Dondero's authorized to make that trade, it's really irrelevant to the issues before the Court. The independent board first learned about the trade only a few weeks ago, and the independent board -- and, again, this happened back in November, two months before the independent board took over. They promptly investigated the circumstances around the trade,

engaged counsel to advise whether it was binding and, importantly, evaluated whether the trade was a sound exercise in the debtor's business judgment at that time.

The board concluded that the trade was binding and that it in fact was a good trade as of November 2019 and disclosed that information to the Committee and engaged the Committee in a dialogue to discuss the options that the debtor had with respect to that trade. The Committee, while I understand was not unanimous, ultimately agreed with the independent board that it was in the debtor's best interest to consummate that trade. While we understand that the Committee and Acis may want to investigate the circumstances surrounding that trade to determine whether the estate has any colorable claims that could be asserted, that doesn't provide a basis for enjoying the distribution of the funds.

Moreover, the allegation in Acis papers that Mr. Dondero used his position on the board of MGM to facilitate the trade so that ACM Services could receive $2.1 million of 123 and $250,000 sale, it just lacks and factual support. And, in fact, Mr. Dondero has steadfastly encouraged the investment board not to sell the MGM shares because he believes they will continue to appreciate and the estate and its creditors would be benefitted thereby.

The reason that the RCP shares were sold is as I mentioned before, the RCP, the term of that private equity fund

expired. No more extensions were given, and the debtor as a fiduciary and as an asset manager needed to liquidate the assets in that estate which included the shares. But, again, if there are claims surrounding how that happened, we understand there's concern that the creditors have about the circumstances, they can investigate them and the independent board will surely cooperate with such investigation.

In conclusion, Your Honor, this independent board was installed because of its independence and sophistication in managing a business as complex as the debtor's. As you will hear in the testimony, the independent board has been thoughtful and thorough in its approach to the issues raised by this motion and is trying to manage the debtor in a responsible way to maximize value and prevent the estate from incurring any liability. The independent board understands and shares the Committee's and Acis's decision to hold other parties accountable for any liability they have against the debtor arising out of conduct that occurred pre- or post-bankruptcy. But trying to use the debtor's role as an independent asset manager and fiduciary duty to investors is inappropriate and create risks for the estate.

For these reasons, Your Honor, the debtor respectfully requests that the Court approve the motion and overrule the objections.

THE COURT: All right, thank you. Other opening

statements, Mr. Clemente?

MR. CLEMENTE: Yes, Your Honor. You actually touched on a question that I had. I assume I have more fulsome comments that I had anticipated making after testimony, but so I would reserve the opportunity to do that. It was quite a lengthy opening there, so I didn't know whether there was going to be the opportunity for that after testimony, but --

THE COURT: Certainly.

MR. CLEMENTE: -- I certainly want to reserve that. Thank you, Your Honor.

So I do have some opening remarks prepared, but I'm going to react a little bit to what I just heard. I and the Committee do not dispute the credentials of the board. We obviously were involved in choosing them. I heard a lot about the duty to, quote/unquote, investors. I don't think I heard a word about the duty to the creditors and to the estate. And I think it's important when thinking about the investors that Mr. Pomerantz keeps referring to, the Committee is not talking about the legitimate third party investors, the CalPERS. The Committee is talking about the very people that were in charge of this debtor while breaches of fiduciary duty were rampant and their related entities that resulted in the filing of this bankruptcy case.

And I find it a little bit rich, Your Honor, that their debtor is using the duty to investors to include third

parties to try and come in here and passionately argue that distribution should be made at this time to these insider parties without a word at all about why it may actually be in the creditors' best interest or this estate's best interest to not make those distributions at this time. So those were a couple of comments that struck me as I was listening to what Mr. Pomerantz said.

But let me be clear, Your Honor, as Your Honor is aware the debtor is in bankruptcy because of the documented and egregious breaches of fiduciary duties and contractual obligations to its creditors and its propensity for fraudulent and litigious conduct as documented. Mr. Dondero and until recently Mr. Okada dominated all aspects of the debtor and controlled all of its decision-making, including the decision-making that led various tribunals, including this Court, to conclude that the debtor had breached its fiduciary duty, engaged in fraudulent conduct, and employed persons who are not credible and not truthful.

Against this backdrop, Your Honor, the debtor wants to make distributions to investors, again, the investors we're talking about here are Mr. Okada, and entities owned and/or controlled by Mr. Dondero and Mr. Okada without regard apparently because I didn't hear anything about that to the interest of creditors under the rubric of a fiduciary duty that is supposedly owed to those insider parties, the same insider

parties, Your Honor, who were found to have breached the duties to the creditors of this estate or to the investors which then resulted in them becoming creditors of this estate and led to the bankruptcy.

Your Honor, I think the irony is fairly thick, and I don't think the Court should allow the distributions at this time. These insider parties, and I'm glad Mr. Pomerantz mentioned it to you because their papers did not mention the notes that were owed, they owe the debtor millions of dollars. The numbers that Your Honor read are just the direct notes among those parties. They do not include the notes that are owed by, for example, affiliated entities of Mr. Dondero. So those numbers are even larger than what Mr. Pomerantz suggested to Your Honor.

Second, as the debtors do finally disclose in their papers, the insider parties receive certain of the insider interests from the debtor pursuant to transactions that were only recently disclosed to the Committee and not have been examined by the Committee. So in many of the circumstances, the very interests that are giving rise to the basis for these distributions once belonged to the debtor.

Third, obviously, the insider parties are the focus of the Committee's ongoing investigation of the estate causes of action, and that's entirely appropriate given the long history and the findings made by this Court and others

regarding the behavior of this debtor prior to the bankruptcy.

Your Honor, instead of allowing the distributions to be made, the Court should direct that the distributions that the debtor seeks to make to the insider parties to be placed into a segregated interest-bearing account pending the resolution of potential claims against the insider parties including the collection of notes owed by the insider parties and the investigation into the validity of the insider interests.

If the insider parties have an issue with this, obviously, they can come before Your Honor, perhaps they'll come before Your Honor today, and explain to you why what is being proposed is unfair to them or why despite the circumstances surrounding this case, the rampant breaches of fiduciary duty, the questionable transactions, and the existence of the notes they owe the debtor they should receive those distributions now. And we can do that after a fulsome discovery of those parties, a fulsome record, full opportunity to brief.

I believe, the Committee believes this is a very sensible proposal, and it would seem to serve all interests. The interests of the estate would be protected. Let's talk about those. Obviously, we're more likely to recover on the notes and any potential claims, including claims that the insider interests were inappropriately obtained.

Mr. Pomerantz referred to the word "leverage." Again, it's the estate, the estate should be thinking about how it can actually collect on its claims and notes. So the word "leverage" I don't think is appropriate here. It just seems sensible. The interest of the insider parties would also be protected. The money will be placed in a segregated account, and the status quo would be preserved. And legitimate third party investors, we are all fully in support of the legitimate third party investors receiving their distributions. We've never had an issue with that, Your Honor.

Mr. Pomerantz referred to the authority, Section 105. I do believe the Court has ample authority under Section 105 of the Bankruptcy Code to order the relief requested by the Committee. Obviously, Section 105 is broad and, as we'll discuss further later, it's been interpreted by this Court and other courts to apply very broadly and in circumstances similar to this.

Additionally, Your Honor, although I do not believe 105 needs to be tethered, I believe is the word that was used, to other sections of the Code. I do believe that other sections of the Code are implicated as the relief the Committee requests impacts property of the estate which includes the notes and potential claims against the insider parties as well as the rights and obligations of the debtor under the various contracts that Mr. Pomerantz referred to.

So, we have 105. If we need to tether it to something, we can tether it to 541 and we can tether it to 363. What we're asking the Court to do impacts property of the estate, impacts the rights and obligations of the debtor.

Finally, Your Honor, there was a long discussion or somewhat of a discussion about the fact that the Committee has not sought a preliminary injunction or has not filed claims against the insider parties. First, again, I believe Section 105 gives the Court the authority that it needs to provide the relief. Second, the Court has the flexibility should it choose to construe or find it necessary to construe our objection as a request for a preliminary injunction and the request satisfies that standard.

Third, Your Honor, this has been an expedited process initiated by the debtor. If this Court believes that other or further proceedings or processes are necessary or appropriate, the Court should allow the parties the time for that. We agreed to an expedited motion practice under the protocols. That's a fact. The protocols cover a variety of circumstances designed with the exigencies of the debtor's business in mind, not designed with trying to speed distributions to Dondero, Okada, and the insider parties. There simply is no exigencies surrounding that, and the Committee should not be prejudiced if this Court believes a further or other procedural vehicle is necessary.

And a moment, Your Honor, on the investigation, as Your Honor is aware the insider parties have dominated the debtor for years. Only recently January 9th the Committee has gotten the ability to investigate. And to date, we've been doing that. I do dispute what Mr. Pomerantz said about the debtor's cooperation. I believe that they've used words to that effect but we've not gotten the documents that we need. This is a complicated enterprise as Your Honor is aware. It's unrealistic to think that we would be in a position to bring claims against insider parties at this particular time in the case. And we cannot be prejudiced by saying we should have completed our investigation and had brought claims every time the debtor thinks it should make a distribution to Mr. Dondero or one of its related entities.

And so, Your Honor, to sum up, we think that the most logical solution here and frankly the one that I assume the debtor would have agreed with me on would be to come to this Court, allow the distributions to be made to all the third party investors, to withhold the distributions to the related parties while the investigation occurs, while the notes are settled, and while the Committee determines and the Court may perhaps ultimately determine whether the interest that gave rise to those distributions were in fact appropriately with those parties.

Instead, we're here talking about duties owed to,

quote/unquote, the investors without considering what it is that's owed to these creditors and to this estate. And with that, Your Honor, we would ask that the motion be denied or however you'd look at it but that the relief we noticed in our paper be ordered by Your Honor.

THE COURT: Let me follow up and make sure I understand a couple of things. You've said a couple of times that it's just the distributions that would go to related investors, Mark Okada, CLO Holdco, HCM Services. And I got the impression from your pleadings as well as your oral statements that the Committee is not challenging in any way the decision to wind down these three funds, if you will. You know, my reading of the pleadings was November 2019, you know, less than a month after the bankruptcy was filed or about a month after the bankruptcy was filed, you know, there were significant redemptions. In the face of significant redemptions, the debtor decided it was appropriate to wind these down.

Is that going to be the subject of evidence and testimony today? Is the Committee at all concerned about how that all played out, whether it was legitimate unaffiliated investors seeking redemption or if it was by chance insider investors?

MR. CLEMENTE: No, Your Honor. The Committee is not challenging the wind-down as I believe you're referring to. We are not doing that, Your Honor.

THE COURT: Okay. And this may be one instance where it's kind of hard for me to separate what happened in the related case of Acis versus this where we had all of a sudden we don't want Acis to, you know, manage these in that case CLOs anymore until redemptions were happening.

MR. CLEMENTE: I understand, Your Honor.

THE COURT: And the business judgment of that -- well, it's complicated, right.

MR. CLEMENTE: I completely understand.

THE COURT: It was, in the end of the day, depriving Acis debtor of management fees. Same thing is happening here, right? Highland is being deprived of management fees by the wind-down of these three funds, but you're not challenging the business judgment of the --

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: -- whole process of the redemptions period?

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: There is a pot of funds sitting in those funds, and there is a pot of funds sitting in RCP --

THE COURT: It was a legitimate non-affiliated entity's --

MR. CLEMENTE: We're not challenging it, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: What we are challenging obviously is now the distribution of those funds to the related entities. That's where we take issue with it at this particular moment in time.

THE COURT: Okay.

All right. Who else wishes to make an opening statement? I know Acis had a joinder or a slightly different objection, I think.

MS. PATEL: Yes, Your Honor. Good afternoon. Again, Rakhee Patel on behalf of Acis. And I'll address Your Honor's question first. Acis has concerns about the wind-down of these funds. I'll just clear with respect to it. And Your Honor referenced, you know, perhaps we need to separate what happened in the Acis case and whether that's happening here or not.

Your Honor, I'm not sure from Acis's perspective that we don't object to the wind-down of these funds. We just frankly don't have enough information to kind of take a position with respect to that whether these funds should be wound down. But the fact of the matter is is in the lead-in into this motion -- and this is sort of the source and subject of Acis's additional objection and not just plain vanilla joinder and with the Committee -- is is that the transactions happened. The sale of the stock has happened. So whether it's in connection with the wind-down of the funds or whether it's

just a sale, it's happened now.

So I'm not sure that we can unring that bell, but Acis's whole point and as we sort of set out in our joinder and our separate comment or objection was, Your Honor, the light of day needs to be cast on this transaction as a whole and we need to be talking about it that the transaction needs to be discussed here in open court. And, frankly, the entire creditor body needs to have and the Court needs to have transparency with respect to that.

So to that point, Your Honor, the debtor filed the motion to approve the distributions of the proceeds from the sale in accordance with the procedures approved as part of the broader settlement motion that Your Honor heard in January. Now the debtor incredibly takes the position that this Court and the creditors are effectively powerless to stop these distributions. And here's the problems with that position.

First, from a technical legal perspective, the debtor ignores the language of Section 363. Frankly, it's easy to have a strong initial knee-jerk reaction that Section 363 doesn't apply here because there's no sale of property to the estate. The MGM stock was held down in a different entity. Your Honor, frankly, I did it myself. But when you analyze the language of Section 363, it also prescribes the use of property of the estate outside of the ordinary course of business. And here, the use of property of the estate is the debtor's

valuable management rights of the various entities, so Dynamic, AROF or AROF or NRCP.

And let's just assume for argument's sake that the debtor's statement is correct and enforceable and there's no problem with it that the funds are in liquidation. No one can rationally argue that that liquidation of a fund or a manager's actions in liquidating said fund are ordinary course. So there is sort of the Section 363 hook for lack of a better term.

Second, from an equity perspective, it is wholly inequitable for the debtor in an attempt to derail the Court and the creditors from inserting a Chapter 11 trustee -- and recall, Your Honor, that this case was filed on October 16th of 2019 where the debtor filed to seek protection from the imminent within minutes if not hours of entry of $189 million judgment against the debtor. And it's really frankly, and as Mr. Pomerantz acknowledged, the product of failed -- numerous other failed litigation strategies. Acis, UBS, Pat Daugherty, quickly all -- and all of those the pieces of litigation quickly coming home to roost.

Acis was clear right out of the gate, Your Honor, at the first day hearings held on October the 18th, 2019 that it would seek the appointment of a trustee. And in an attempt to sort of take itself out of a trustee potentially being appointed or, you know, as to forestall that happening, the debtor filed an ordinary course protocol motion. And this is

in October of 2019. And as a part of that ordinary course protocol motion, the proposal was that Mr. Sharp, the CRO of the debtor, be appointed the CRO of the debtor and that he would be the gatekeeper, he would be in charge of all related party transactions, and he would oversee all of those transactions.

And, Your Honor, indeed Mr. Sharp testified that he was the gatekeeper. He was the guy in charge, and that was on I want to say like November 20th of 2019. And commensurately, Mr. Waterhouse, the CFO for Highland Capital Management, also testified and Mr. Waterhouse was the first day declarant for Highland as well. He testified that everyone understood that Mr. Sharp was to be the gatekeeper. And, indeed, Mr. Sharp would -- they had training at Highland Capital Management to the effect that all employees knew if you've got a related party transaction, it's got to go through Brad Sharp.

So in an attempt to sort of derail Acis from getting a trustee appointed, they affirmatively sought out these protocols and ultimately agreed to protocols that look similar, not exactly but similar to those proposed ordinary course protocols. And the protocols that ultimately were approved required court approval. And now we've got them coming back and saying, ha ha, just kidding, no one can do anything about it anyway and we have to make these distributions because we've got a fiduciary duty to do it.

On that note, the debtor who should be fully transparent during this process while it seeks the benefit of bankruptcy including the automatic stay, argues in its reply brief filed this morning at Footnote 9 that the underlying sale transaction in excess of $123.25 million is sacrosanct and irrelevant because the Committee blessed it. Acis objected, Your Honor. When that transaction was presented to the Committee, Acis objected.

First, it would have its cake and eat it, too. It can't take advantage of the protocols it likes while at the same time stiff-arming those that are inconvenient to it. It can't say the transaction's good because the Committee blessed it, but the Committee didn't bless the distributions to the insiders and, oh well, you can't do anything about that anyway.

Second, the broader transaction is violative of at a minimum traditional notions of transparency in bankruptcy and likely 363 along what the debtor's fiduciary duties to its creditors. As Mr. Clemente pointed out, the debtor has dueling fiduciary duties, and we didn't hear nearly a word with respect to the debtor's fiduciary duties to its creditors. And, Your Honor, we're not looking to generally micromanage what this debtor is doing, but this transaction is fundamentally flawed and at a minimum has red flags all over it.

As we now know from the CalPERS objection, Mr. Dondero entered into a transaction with Highland Capital

Management buying CalPERS' interest and likely others' interests at June 30 prices or by giving over a set number of MGM shares to CalPERS. That's the agreement that's attached to the CalPERS objection. The agreement was always a win-win for Highland Capital Management because it could either make money on the arbitrage of the stock -- it bought it at a particular price, and if it's ordered at a different price, you got to keep the differential -- or give over the stock if the stock be valued and priced. Win-win.

He then immediately the very next day fraudulently transferred that agreement from Highland Capital Management to Highland Capital Management Services, an entity in which he is the 75-percent owner and Mr. Okada is the 25-percent owner. That is 15 days before filing this Chapter 11 bankruptcy case. The only purported consideration for the transfer, and I think this is Exhibit B, to the CalPERS objection, was an indemnity by Highland Capital Management Services. That's the only consideration that was transferred as a part of that transaction, Your Honor.

Then when the stock price rises in November, he seeks committee approval for a transaction that still benefits Highland Capital Management Services. Despite not having a Committee response, he enters into a rogue unauthorized trade of MGM stock on whose board he serves on and is thus privy to information, violative of the very protocols that the debtor

was pressing so strenuously to avoid the appointment of a trustee. Indeed, Brad Sharp testified the day before the rogue trade that this exact type of transaction had to go through him. And Mr. Waterhouse's testimony came right after that to indicate that everybody at the debtor knew that Mr. Sharp had to approve it.

Ultimately, the Committee rejected that transaction in November, but the trade was already done. If Mr. Dondero had his way, Highland Capital Management Services would have benefitted from the transaction. Frankly, every one of these transactions needs the light of day shed upon them here in court to determine what is in the best interest of creditors. The debtor's attempt to cloak itself in the Committee's non-objection, and I want to be clear on this, it was a non-objection. I think reference was made that the Committee agreed to the sale of the MGM stock. That's not what happened. The Committee just did not object to the transaction which can likely best be characterized frankly as everyone plugging their nose while simultaneously telling this Court it can't do anything about the proceeds is the exact reason why the Court should be inquiring into the transaction in the first place.

And not so incidentally, that stock that Mr. Dondero traded without authority in November is trading approximately 20 percent higher today, around the low 90s.

THE COURT: All right. Thank you.

Thank you. All right.

Do we have any other opening statements? I'm probably going to have to take a break before we do evidence and hear my 2:30 matter, which I don't think is going to take very long, at all.

All right. Judge Lynn.

MR. LYNN: Your Honor, thank you.

We're not opposed to the motion, and we understand the concerns expressed both by the debtor, the debtor's independent board, which feels that it's compelled to make the distribution to insiders. And while we don't necessarily agree with them, we understand the Creditors Committee's concerns as well.

We'd like to suggest the following should the Court determine that the motion should be denied. And that is that instead of the debtor retaining the funds, that the debtor distribute the funds into the registry of the Court. That way, they lose control over the funds and they can say that they've distributed them in accordance with their agreements and applicable law.

The funds would remain there until either a recipient or prospective recipient posts a bond or other suitable collateral or the Creditors Committee agrees to the distribution to the insider or there is a Court entered for another reason after a showing made before Your Honor. The

debtor and the Creditors Committee would, of course, retain all rights to seek the funds they would have had, which rights they would have had immediately before the distribution to the registry, plus any rights that would be gained by reason of the distribution itself.

The debtor thus distributes, the Creditors Committee retains its rights, the Court retains control, and this can all be done, we believe, by a Court order and we hope this may give the Court a suitable alternative.

THE COURT: Okay. Let me make sure I understand. You said, if the Court is inclined to deny the motion. Are you offering, I guess Mr. Dondero's proposal that -- I mean, these aren't disbursements that would all go to him, they would -- some would go to Okada, and -- who's not objected or appeared. But -- let me cut to the chase.

Are you trying to avoid a hearing and evidence altogether by saying, you know, these related entities agree their distributions will go into the registry of the Court right now?

MR. LYNN: Mr. Dondero supports this position. We do not speak for Mr. Okada.

THE COURT: Right.

MR. LYNN: I understand that more than one of the entities -- and Your Honor must forgive me. We're relatively new to this case.

THE COURT: Yeah. One is Holdco, and that is technically a DAF, a charitable entity that --

MR. LYNN: Yes. I believe that's so, and I understand there may have been communications between the independent board and the trustee of a DAF, but I was not a party to those communications. I'm just trying to give the Court an alternative -- Mr. Dondero is doing so -- that might be acceptable to the debtor and at the same time would accomplish what the Creditors Committee wants, which is to retain control of the funds.

I must say, Your Honor, that having been there myself, I have a great deal more confidence in the registry of the Court protecting funds than I do in just about anyone else.

THE COURT: All right. Well, that would certainly seem to give the Committee everything it's asking for, and --

MR. POMERANTZ: Your Honor, if I may interrupt.

I understand from members of the debtor's independent board who have spoken to Grant Scott, who is the principal in charge of CLO Holdco, that CLO Holdco would also support the proposal that has just been made by Judge Lynn. We do not have the agreement of Mr. Okada to support that proposal.

THE COURT: Okay. Although, he has not weighed in with any sort of -- well, I don't know. How do we feel about Mr. Okada's interest here? I mean, he's obviously been given notice of all of that, and --

MR. POMERANTZ: Well, actually we asked him --

THE COURT: Okay.

MR. POMERANTZ: -- when we heard last night that this might be a possibility. He has rejected that. And in light of his rejection of that proposal, we as the debtor feel we need to proceed with the motion. I would think it substantially narrows the issues that are going to be in evidence, all the stuff we've heard about MGM Trade, which may at some point in time be something that people don't testify from the podium and that actually the subject of real evidence. But with respect to Mr. Okada, we will have to go forward with the motion.

MR. LYNN: Yeah, so let me express that at this point, Mr. Dondero is of course not supporting the Acis suggestion that a trustee should be appointed. We did not understand that this hearing would address that issue.

THE COURT: Yeah. I'm not sure. That's what they were suggesting today. I think they were just saying at one point, they adamantly wanted a trustee, and these protocols alleviated their concerns and caused them to back off. And now, they're upset that, you know, the debtor is resisting the protocols in a way. So -- all right.

Mr. Clemente, what say you? I --

MR. CLEMENTE: Your Honor, I --

MR. LYNN: Thank you, Your Honor.

THE COURT: Thank you.

MR. CLEMENTE: -- I think you can tell from our papers, this is effectively what we asked for.

THE COURT: Right.

MR. CLEMENTE: I don't even know why it took us to get to this point for that. It seemed so obvious to me. But when it was articulated by the former Judge here, it -- I think it just held more -- maybe it made more sense.

As far as Mr. Okada's concerned, I think Your Honor could clearly deposit the funds in the registry of the Court, and he's free to come in. I think that's what Counsel for Mr. Dondero was actually suggesting. So I'm not sure that anything is required further with respect to Mr. Okada, unless he has a representative here that would like to raise something with Your Honor. So, to me, on behalf of the Committee, I think that accomplishes what the Committee was trying to do with its objection.

THE COURT: All right.

Anyone else wish to be heard? Ms. Shriro, I know that you filed something for CalPERS, but obviously, your client is an unaffiliated investor in the private equity fund, RCP. You just want to get paid.

MS. SHRIRO: That's correct. We just want to get paid, and I would defer to my co-counsel on the phone. If he has any comments, this would be the time to raise them.

THE COURT: All right.

Co-Counsel on the phone, I think it's Mr. Cisz. Is that correct?

MS. SHRIRO: Yes.

THE COURT: Okay. Anything you want to say about what's (indiscernible)?

MR. CISZ: That's correct, Your Honor. This is Louis Cisz on behalf of CalPERS, and Ms. Shriro is correct. So long as CalPERS receives its distribution relative to the sale of the MGM stock, CalPERS otherwise doesn't take a position with respect to the motion.

THE COURT: Okay. Thank you.

All right. Well, turning to the literal terms of the motion, the relief the motion sought was simply an order authorizing distribution of the cash from these wind-downs of the three funds to insider investors. And so we have the Committee objection, we have the Acis objection, we have Dondero's counsel here appearing. I think I can, given this request for relief and the opposition of the Committee, as well as one of the Committee members, Acis, and due to these representations of Dondero's counsel and the board, I can order that the money that would otherwise go to insider investors -- I think it's roughly about 8.6 million -- will, instead of going to the insider investors, will go into the registry of the Court with reservation of everyone's rights later to file motions requesting that it be disbursed to them. So everyone

understands, this is just kind of a holding place for the funds right now.

MR. POMERANTZ: Your Honor, we do not have Mr. Okada's representation and the debtor is not modifying its motion. The debtor would like to proceed with respect to Mr. Okada. We asked him, he did not want to agree to the same things that would be in consideration by CLO Holdco, and for the reasons we've identified in the motion and I've expressed to Your Honor, we feel we have the obligation, we have the duty to proceed, and we would request the opportunity to put on evidence so you can hear from Mr. Seery and ultimately make a determination whether the Committee and Acis have laid out a legitimate basis for use of 105. I'll reserve my comments and their comments until the end.

But we would want to proceed in that limited matter because we don't have all agreements of the parties and the same reasons stand for why we filed the motion to proceed with the distribution for Mr. Okada.

THE COURT: Okay. Well, I guess I misinterpreted everything that I thought was going on out there. Mr. Okada, I guess, you said is owed 4.176 million from the Dynamic Hedge Fund, and then -- I don't know if that was the total amount from the three funds, but you feel like you have a fiduciary duty to pursue that disbursement.

MR. POMERANTZ: Absolutely, Your Honor.

THE COURT: All right.

MR. POMERANTZ: And again, you know, we could get this into argument. Mr. Okada is in a much different position than some of the other insiders. We understand the comments about Mr. --

THE COURT: Well, I remember some of the dynamics here, but let me tell you what I'm going to feel the need to get into if we hear evidence. And what we'll do is we're going to take a short break in a minute. Let me ask the Barker people who I think are in the back.

(Off record discussion 2:34:51 to 2:35:01)

THE COURT: Okay. So we'll take a 10-minute break in a minute.

But again, one reason I was sort of delighted to get the suggestion of Judge Lynn is I see this evidentiary hearing as being a little more involved than looking at contractual obligations and whatnot, and you know, the fact that these are non-property of the estate funds that we're talking about. I have fundamental questions having read the pleadings about the decision to wind-down these funds that was made in November 2019, days after Highland filed bankruptcy.

Who made the decision? Was it insider investors seeking redemption? Or was it, you know, did we have large unaffiliated investors exercising redemptions, and so therefore, it was reasonable business judgment, you know, we

need to wind down?

I know the issues are a little bit different with the two hedge funds versus the RCP fund that had the term. And I understand, I read the pleadings, how the term expired in April 2018, it was extended for one year, and then the advisory board didn't consent to an additional extension.

Again, maybe the new board has thoroughly scrubbed this and you're going to tell me that in evidence. And maybe the Committee has thoroughly scrubbed this, and you're going to tell me that with evidence. But I -- I'll want to hear that. I'll want to hear that this was all legitimate, independent, non-affiliated investors pressing for the wind-down of these funds, and we didn't have what I refer to as the Acis situation where -- well --

MR. POMERANTZ: Your Honor, Mr. Seery is prepared to testify to each of those. And as I mentioned, the board did thoroughly consider it and you will -- Your Honor will hear evidence that led Mr. Seery and the board to conclude that each of these were appropriate. But we intended to get into that in the evidence.

THE COURT: Okay.

(Proceedings recessed from 2:37 p.m. to 3:01 p.m.)

THE COURT: All right. We're going back on the record in Highland. Mr. Pomerantz, are you ready to call your witness?

MR. CLEMENTE: Your Honor, if I might before.

THE COURT: Mr. Clemente?

MR. CLEMENTE: Matt Clemente on behalf of the Committee, again.

I would just like to revisit the colloquy we had before we broke.

THE COURT: Okay.

MR. CLEMENTE: I'm still confused as to why Your Honor just can't enter or so order that the debtor has satisfied its duty upon depositing the money into the Court registry. And we don't need to have any of this this afternoon. I see it as similar to the Foley hearing where Your Honor expressed some frustration. It's kind of maybe not the best use of time. I'm not sure what exactly we're trying to accomplish here.

If the debtor's concerned about its duty to a constituent who is not present in Court today, I think Your Honor can deal with that by entering an order that says, you know, based on the pleadings and the record so far, the debtor has satisfied its duty and placed the money in the Court registry.

And if Mr. Okada has an issue with that, he can come back before Your Honor. I'm just not quite sure what the point is here, Your Honor.

THE COURT: All right. Well, let's turn back to

Mr. Pomerantz, and let's talk about what my, I guess, unrefuted evidence is. I have -- Mr. Okada would be due for the Dynamic Hedge Fund, 4.176 million is what I read in the pleadings where you told me.

And then, I don't know that I have written down what he would be owed from either the Argentina Fund or the RCP Fund. Anything?

MR. POMERANTZ: Zero.

THE COURT: Zero. So we're talking about the 4.176 from termination of the Dynamic Fund.

MR. POMERANTZ: Right.

THE COURT: Meanwhile, we know there is a $1.3 million demand note --

MR. POMERANTZ: Correct.

THE COURT: -- owing to Highland from Okada. And I feel like I heard that there was more, but that's the only --

MR. POMERANTZ: That is the only note from Mr. Okada.

Your Honor, I think part of it is I stood up and gave a lengthy presentation, and I told Your Honor what the testimony would show. Now there's been a lot of issues in this case about what the board's doing, what it's not doing. Part of our reason for being here today and part of my presentation was to get Your Honor comfortable with how the board is handling its duties. I didn't want you to hear that just from me. I wanted you to hear that from Mr. Seery.

There also have been allegations by Acis and concerns Your Honor has raised as to what went into the wind-down of these funds, given Your Honor's past experience with Acis. And I'm sure Ms. Patel's past experience with Acis.

I think it's important to hear from Mr. Seery because he has good explanations of why each of these funds are in wind-down. And then, furthermore, look, Your Honor will decide what Your Honor decides and whether the Committee and Acis have met the showing under 105 to hold back the Okada funds. If Your Honor decides that, of course we will abide by that decision.

But we didn't want any implication that we were sort of laying down for that issue. So I think it would be helpful maybe to hear some testimony from Mr. Seery. If Your Honor then concludes that funds shouldn't be disbursed, Your Honor will conclude that funds shouldn't be disbursed. I don't think this has to be very lengthy. I think we've -- we've narrowed the issues, given that we don't have an issue with respect to RCP anymore. We don't have the issue with HCM Services receiving money on account of a trade that Acis is very critical about. Again, those issues at an appropriate time can be raised in appropriate form, and Your Honor will have a full evidentiary hearing, as opposed to a tail wagging the dog on this motion when it's not even relevant anymore.

So what I would propose is that we allow Mr. Seery to

take the stand. We allow him to address Your Honor's concerns. We allow him to testify to the things that I said he would testify to so it gives Your Honor some comfort, and hopefully the other parties comfort, exactly how Mr. Seery and the other board members are performing their duties.

THE COURT: Okay. Can we all agree to some reasonable time limitations here? I'm thinking we're done in an hour. Maximum 30 minute direct of debtor, or redirect, and maximum 30 minute cross of all objectors. Can we do that today?

MR. POMERANTZ: I think we can do that, Your Honor.

THE COURT: Okay. Then that's --

MR. CLEMENTE: My only question, Your Honor -- Matt Clemente on behalf of the Committee -- is what are we still talking about here? Are we just talking about the distribution to Mr. Okada? And the other distributions are off the table as suggested by -- or as agreed to at least on behalf of Mr. Dondero? I don't even know what we're talking about.

MR. POMERANTZ: That is correct, Your Honor. It's only the distributions to Mr. Okada.

THE COURT: Although, I think he wanted the Court to get some testimony from Mr. Seery about sort of the business judgment of the three wind-downs, but I don't think that's going to --

MR. POMERANTZ: That shouldn't take a long time.

THE COURT: -- be a probe today of MGM stock sales.

MR. POMERANTZ: No, it won't be at all, Your Honor. And again, look, we understand Your Honor has had experience with Acis, and we understand the concerns, Your Honor, coming in, seeing redemptions, and the questions you asked.

Again, it's important for the debtor to be able to demonstrate to Your Honor that this board is doing its appropriate things and hearing from Mr. Seery why he made these decisions so Your Honor can get comfortable, not only in these matters, but in other matters that brought before Your Honor in the future that this board is doing exactly what they should be doing acting as an independent fiduciary.

That's why I think some of our testimony, but we're happy to live within the time frame that Your Honor has given us.

THE COURT: Okay. All right. Thank you.

MS. PATEL: Your Honor, I just wanted to follow along with one of the comments that I made during my opening statement and hopefully, it will help further narrow the issues and keep us within the time limits, is is that when -- in responding to Your Honor's question about the wind-down of these funds, and I said Acis had concerns, I want to say we've got concerns with respect to the Argentina and the Dynamic fund. We frankly just don't understand or have that much information with which to really evaluate the transaction, so

we're a little hamstrung today for purposes of cross-examination because that's not something that necessarily Acis has inquired into.

But separate and apart from that, just again so everyone's clear, with respect to the wind-down of RCP, Acis does not take issue with respect to the genesis of the wind-down. So the decision to wind it down is a find from Acis's perspective that should probably have been wound down. Now, the methodology of how it's being wound-down, that's fair game.

THE COURT: I don't know what that meant --

MS. PATEL: Okay.

(Laughter)

THE COURT: -- the methodology of how it's being wound-down.

MS. PATEL: Okay. Let me --

THE COURT: Very quickly because, you know --

MS. PATEL: Yes. Your Honor, what I meant by that was, in terms of the decision to wind-down RCP, that makes sense to Acis because it is a fund that should have been wound-down. How it is going about being wound-down, that is open for dispute, and one of those things being here this MGM stock sale, etcetera.

THE COURT: We'll hear from Mr. Seery. I thought there was a pile of cash at this point, but maybe I misread the pleadings.

Okay.

MR. POMERANTZ: Your Honor, let's remember what this motion is. This motion wasn't a referendum on wind-down, it was the ability to make a distribution.

THE COURT: Right.

MR. POMERANTZ: Mr. Dondero's counsel, who is speaking on behalf of ACM Services, said they're prepared to hold those distributions in the registry of the Court. The issues regarding what Ms. Patel testified from the podium, at some point, they may very well be the subject of a hearing in the Court. We're happy to continue responding to the Committee and Ms. Patel's comments and questions about how, but it's just not relevant here.

And, Your Honor, there is no way if Ms. Patel is going to go down that road that we will ever be here only an hour. That is a much longer discussion.

THE COURT: And let me just clarify where I was coming from.

I thought if we were evaluating whether insiders should get $8.6 million of distributions, the bona fides of the decision to go into wind-down mode needed to be explored a little bit and see if some of these insiders were improperly exercising control in that.

So I agree with what you're saying. Now, that we're just talking about deferring to another day all but maybe

Mr. Okada's disbursement, we don't need to hear great detail about the whole decision-making process for the wind-down of these three. A little bit of background would be useful, but --

MR. POMERANTZ: Absolutely, Your Honor, and we will --

THE COURT: -- it doesn't need to be, you know --

MR. POMERANTZ: -- tailor our testimony to the issues that Your Honor was concerned about and the comments that I made, and we will keep within the time limit that Your Honor wants us to keep it to.

THE COURT: All right. Very good.

Mr. Seery?

MR. SEERY: Yes, Your Honor.

THE COURT: There you are. If you could approach the witness stand. I know I've been introduced to you before. I'm not sure if you've taken the witness stand yet.

MR. SEERY: I have not.

THE COURT: I don't think you have.

Please raise your right hand.

JAMES P. SEERY, JR., DEBTOR'S WITNESS, SWORN

THE COURT: All right. Please be seated.

MS. HAYWARD: Your Honor, may I approach with an exhibit binder?

THE COURT: You may.

MS. HAYWARD: Or two?

THE COURT: Okay. One for the Court.

Thank you.

MS. HAYWARD: May I approach the witness?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. HAYWARD:

Q Well, good afternoon, Mr. Seery. Since this is your first time testifying, would you introduce yourself to the Court and give her just a little bit of background?

A I'll go pretty quickly because of the time constraints. James P. Seery, Jr., for the record. I am an independent director for Highland Capital. I've been in the asset management restructuring business for about 32 years.

I started as a restructuring lawyer handling everything from real estate to debtor's side to financial transactions. From there, I moved into asset management and distressed investing.

From there, I moved into managing a large global loan portfolio for a big investment bank. That included teams of people who both underwrote, distributed, held, managed, restructured, and traded both loans, indicated loan assets, primarily, but also high end bonds, distressed assets, as well as CLO assets.

After that, I went into a hedge fund. We had a

billion, three long-short credit fund. I was the senior investment partner and president of that firm. We did similar types of investments, high yield, high yield loans, distressed loans, CLO assets, and some other structured products, long-shorts. So we were domestic primarily, but we also had a global investment view and an office in London.

Subsequent to that, I was a co-head of a credit business for an investment bank. And then, in the last six months, I've decided to do this job.

Q So of the three board members, you're kind of the stock guy. Would that be a fair --

A I think -- stock isn't really my stock and trade, but I do know my way a little bit around the stock market. But it's primarily been credit products, but I do -- I am familiar with equities and equity trade.

Q Okay. So since coming onto the board, give the Court a day in the life, if you don't mind, and maybe starting with the day that the board took over on January 9th.

A I think, as Your Honor will recall, when we left and we talked about what the role would be and what the compensation would be, I think your comment was, Your Honor, that it -- we wouldn't be 50,000 feet. Well, we -- we're actually fully on the ground. We're not even five feet above. We don't keep track of our hours like lawyers, but probably logged about 190 hours in January starting on the 9th, and then about 150 hours,

160 hours in February. And I know my fellow board members are similar time commitments.

We're involved day-to-day in each of the decisions that the debtor makes from assets management decisions, understanding how the funds are being managed and what the ways that they could either be walled off if they're in liquidation, or if what the proper way to treat them on a day-to-day basis is, evaluating assets that the debtor owns directly or through funds, be thinking about ways to monetize those assets; employee issues, what they're doing, who they're reporting to, how they're -- how they're performing, how they're being paid; claims issues.

This case got started, as we all know, by three major litigations, and they're not all easy to understand. They've got the redeemer arbitration, which I think is fairly straightforward in terms of liability and amount. There's a number of offsets that are complicated.

We've got the UVS litigation that is a lot more complicated because it's not against the debtor. The judgment is against two offshore funds that are, in essence, shells, and there's a very complex history around the 10-year litigation that that is.

Then we have the Acis litigation, which comes out of the Acis bankruptcy, but is an unliquidated claim. So understanding those thinking about what the pros and cons of

those claims are, how we would manage them down the road, how we would go forward. Thinking about how to resolve them has been a key part of what we're doing on a day-to-day basis.

Q So has the board done an independent analysis of all these various litigation claims?

A Not yet. So we've -- we've done a preliminary analysis, and then we've gone further. So with respect -- we haven't sat down with -- frankly with Redeemer, yet, although one of the board members has had a call with them separately. But we have sat down with the Acis creditors, and we've done some significant analysis around that. And we have sat down with UBS claimants, and we've done significant analysis around that.

All three of those require a ton more work, and not because it's not easy to figure out what the numbers are. It's really difficult to figure out what the liability is, how it rolls up to the debtor, and then how to satisfy it, and so we're trying to get our hands around that. But that is a critical component of resolving this case.

Q When the board took over, did -- what types of things did you do immediately upon taking over control of this debtor? Did you meet with people at the facility?

A Oh, sure. So the first thing we did, actually, is have lunch with the Committee and with Acis, and we wanted to get their perspective because they were here and it was easier to do that than to run back to the debtor and try to -- try to

then set up another meeting.

And so we wanted to get their perspective. They'd been living with the debtor from the litigations and through the time in Delaware and the litigation in this case. So we got a feel for them of what their desires were, how they thought the case would work out or potentially resolve, and also, how they thought about our role.

One of the things we stressed at that time, and I stressed when I was interviewed for the role, is that -- I know my fellow directors feel the same way, but I'm a pretty independent person, and I wasn't going to be certainly the management of Highlands guy, nor would I be the guy of the Committee. So we're going to -- I'm going to work independently make decisions with the fellow board members in what I think is the best way.

I'm going to try to exercise my duty in both care and loyalty to the estate, but then if the estate has duties, I'm going to make sure we exercise those. And I feel very strongly about that because this is just one -- a decent sized matter, but one small piece of a career, and I'm not going to compromise myself to satisfy either people on the management side or people on the Committee side.

Q Yeah. Well, and I want to talk a little bit about the duties since you mentioned them, because we heard I think the Committee say that we -- the debtor has not mentioned the

fiduciary duties to the estate in the opening statement. Do you think that by presenting this motion the debtor -- does this motion contemplate protecting the fiduciary duties that the debtor owes to the estate?

A To me, it absolutely does. But to be fair, I think that the rhetorical flair and opening remarks and missing the duties to the estate, we're very conscious as a board of our duties to the estate. We're also very conscious of our duties as an asset manager. And what is in the pleadings is absolutely the case, it's been -- it's my experience, my understanding of the law, and it's being confirmed by both Cayman counsel, and by fund counsel in the U.S. separate from bankruptcy counsel.

We owe a duty under the Advisor's Act to the funds and to the investors in those funds. That duty actually supercedes the benefit to the estate, but it doesn't undercut it because by vindicating the duty to the funds, you actually vindicate the duty to the estate. If you create liability at the funds, it will roll to the estate. So by exercising your duty correctly, you do in fact, vindicate the duty of the estate.

And what's important in the Advisor's Act, and it's an interesting part of U.S. law. At least my understanding, it's been confirmed by outside counsel, is if the manager, which would be Highland, has an interest, it's actually required to subordinate that interest to the interest of the

investors in the funds it managed. And it makes sense.

If you have funds invested in a fund with an outside investor, you want to make sure that that investor is not -- that manager is not using your funds to aggrandize itself as opposed to looking out for your best interest. And so, I think by vindicating our obligations with respect to the funds, we actually enhance our obligations with respect to the estate.

Q Let's talk a little bit about the funds now. So originally, the motion pertained to three different funds. Could you just briefly explain to the Court the status of those funds and how they got there?

A Yeah. I'll try to go quickly, and if I skip something or I go too quickly, Your Honor, please let me know.

The Highland Dynamic Fund, which is the primary one we're talking about now, I think you'll see at the end of Tab 1 how it's set up right before Tab 2. And I haven't looked at these exhibits in a long time, so I apologize. I didn't know I was getting this. But it's really straightforward.

These funds are set up, and this is a pretty typical structure. It's a limited partnership structure. It's got a master feeder structure. And what does that mean? The master is the main fund. That's the King Exemptive Limited Partnership at the bottom.

It's fed by two feeders, a domestic feeder and an offshore feeder. Why is it done that way? Purely tax.

Offshore investors, non-taxables in the U.S. who are worried about ECI or UVTI, or unrelated business income, we want to make sure that there's no withholding or any tax ramifications with respect to the distributions they get off the fund. Since it's a pass-through entity, both of those investors, either domestic or foreign, are non-taxables in the U.S., will have their own tax treatment when it gets up to them. So they don't want anything withheld.

When you look at the left side of the page, Dynamic domestic feeder, the other investors is where you'd include Mark Okada. This fund was founded originally under a different name. I believe it was called the Highland Loan Fund. It might have been CLO Loan Fund, I apologize. And then that was in 2013.

Mark Okada put $2 million cash into the fund at that time. Why did he put it in? This fund was designed to own CLO assets and loan assets. Okada was the founder of that part of the business and the driver of that business. It was pretty essential that he put some money in.

However, in '13, they did get third-party investors, but this fund never got real scale. I think it was only a bit over $100 million. Not insignificant, but not a big fund. And they went out looking for loan funds, loan opportunities, and CLO paper. So the CLO papers, the debt of the CLOs, generally (indiscernible) type paper that was higher yielding unless

there was some interesting opportunity in the -- in the higher rated tranches.

In 2018, the fund got restructured, and they -- I'm pretty sure that's when the name change occurred. Okada put another two and a half million dollars of cash in. So he didn't get this as free-carry or anything. This was actually cash that he deposited in the fund.

In 2019, Okada in the spring of 2019, determined that he was leaving Highland. And his separation was finally completed in September of 2019. So he is no longer an employee of the debtor. He has no influence, say, discussion, he's not involved in anything. He hasn't been since we've been there.

The investor, I think it was late summer, either understood that or the fund hadn't performed that well. Frankly, it was undersized anyway. Realdania, a third-party, I believe they're European, issued a redemption notice. This was a hedge fund style fund. So we've got three different funds here, two of them are hedge fund, and we explained a little bit in the papers, but the real dynamic, no pun intended, difference between the two is that Dynamic and Argentina are hedge funds which provide liquidity to the investor.

What does that mean? Monthly, quarterly, semi-annually, they can look for redemptions. The fund manager sales assets because the assets are supposed to be a little bit more liquid, makes distributions per the redemptions.

If the redemptions are too big and the sales will somehow disadvantage the remaining investors, either gates come down or you put the fund into liquidation. Realdania had made a, I believe it's a $65 million -- it was initially a smaller one, then there was a $65 million redemption, and it -- this is prepetition. The debtor determined we've got to wind this fund up because we can't basically more than halve it and then continue to try to function. It would have been far too undersized.

So the debtor then went about selling the assets, creating a pool of cash, and then this motion is to liquidate it and pay the investors, including Okada. When it's done, assuming they made the full distributions, about 80-something percent of the assets will have been distributed. There's a few small assets that are left. They're not particularly liquid, but they're small and I'm relatively certain we can unload those at decent prices, create cash for the investors, make the final distribution, so it would be a hold cash to wind-down and then dissolve the various little limited partnerships.

Argentina is similar. The basically different premise of why that fund existed, the original theory was post the Argentina crisis with the election of Macri in '15. Late '15, Argentina started going through a number of changes in its economy and the thought was that Argentina would start to grow

and really be able to realize the potential of its people and its resources. That didn't work out that well, and then at the end of, I think it was '18, Macri was voted out and the former Kirchner, effectively, government is going to back. Argentina economy has slid into basically -- certainly recession over multiple quarters, but even some would say depression.

Very difficult time. This was not a unique fund for Highland. There were a lot of these Argentina-type opportunity funds, and that -- that performance has not been particularly good. The decision there was made to wind-down a third-party investor who made a 15 percent withdrawal, and that a number of other funds that I forget the percentage, but they're managed by UBS, third parties made a -- indicated that they were going to have full redemptions, as well, so that fund was put into liquidation.

Importantly, I think something that was mentioned before, there's no benefit to keeping these funds around. They don't make any fees.

Q Why is that?

A And once they've gone into liquidation, they're not paying any fees. Similarly, RCP -- now, RCP is a different style of fund, and I think Your Honor, you mentioned it in the papers, you saw that it was a 10-year old fund. That term was extended. It was originally a 2008 fund. It was done as a distressed for control. Very different opportunity,

(indiscernible), at the time, they probably didn't see the global financial crisis, but saw it as distressed and the opportunity to do distressed for control positions had to be long term. So that fund had no liquidity provisions for investors. Typical PE-style fund.

The -- when it got to the end of its life, the 10-year life, Highland didn't have the ability to extend the term. A steering committee of third-party institutional investors with no Highland influence whatsoever, Ontario Teachers, CalPERS, some of the biggest, most sophisticated investors in the world in both debt, equity, and distress were driving that. There was also a couple of other funds that are third parties on that steering group. And they still exist. They gave a one-year extension. Highland had no ability to do anything about that.

In exchange for the extension, Highland waived fees. So there are no fees being paid on the RCP Fund. There was a series of one-month extensions that went -- was finished in November of 2019. And with this distribution, there's still a lot of assets in RCP that have to be managed, about 175 million. And so we're going to -- after we make the distribution -- we've had a few calls and I've been on them, with the steering group.

We've told them we're coming to Court to make the distribution. We were confident that we would be able to -- to

be able to make a distribution to them subject to the Court's order, that we make that distribution and somewhere in the next two weeks we're going to have a steering group meeting to talk about the other assets and how we monetize them.

They are different types of assets. Some have more liquidity than others, so we're going to need to come up with a plan. It's 85 percent, roughly, third parties. Highland Capital Management, the debtor, actually has a roughly 15 percent interest in HCM Services, has as a couple percentage, because I think there would have been about 2 percent of the distribution.

So it's vast -- the vast majority of the owners of the fund are outsiders, and we're going to need to come up with a structured plan to get them their cash because they've been invested for 12 years in this fund.

Q Do you agree, having had the chance to come in and look over all these things, that these funds should be wound-down?

A Oh, absolutely. So I think it's easiest to say, Dynamic -- Okada was the driver. It never got to where it wanted. The biggest investor wanted out. It's not big enough to support itself. Even if one were to look today, and say, it should have, frankly, owning CLO paper when this fund was started until today, there should have been good appreciation in it, and it just didn't -- I don't know the reasons it didn't, but it didn't perform the way it should have, and it

didn't attract the investors it should have. Perhaps that had something to do with it, you know, the way the other cases or litigations were going on and the public nature of them.

And frankly, coming out of the global financial crises, Highland had had a tough time of it, so it wasn't as if it was the easiest thing to raise funds. Argentina, there's absolutely no question that the purpose and structure of that fund and what it set out to do doesn't work, just doesn't work. So it makes no sense to keep that going, and that's why the investors -- third-party investors sought redemptions.

The insider interests, while not immaterial, are pretty small. Okada's interest is about 12 percent in the fund, and he's not driving it. Like I said, he's not even at the debtor. These two -- but to be fair -- both the decisions to wind-down Dynamic and Argentina were made before the board was involved and before the petition was filed, and they really related to the withdrawals from third parties.

Q So why are we here today? Do you -- do these funds wind-down in the ordinary course of their business?

A Well, it -- they all have life. So I'd say in the case of RCP, it's pretty clearly in the ordinary course because it reached the end of its life. And the investors were very clear that they wanted to be cashed out. So the difficult part is that it -- because of its structure and in the way it was originally set up as a PE-style fund, it has illiquid, a number

of illiquid assets.

And the challenge in any of the PE funds is to time your exit, and the timing on this hasn't been opportune because the opportunity to sale has not been as good as one might hope and the investors are just at the point where they want to get cashed out as we've heard today from CalPERS. But we've seen it in the documents and our discussions -- and my discussions directly with them.

The other funds, once they've reached this -- it's an ordinary course thing for funds. When funds either they're -- they've reached their life or investors redeem and they get to this state where they really can't support themselves, it's a very ordinary thing for managers to wind-down funds.

Q And as part of the winding down of the funds, is it also ordinary then to make distributions once the funds have become liquid?

A Well, I mean one of the questions you started to ask, or maybe did ask, and I didn't answer, was why are we here?

Our view as an independent board, my view as an independent board member, is we have an obligation to all investors. It would be really easy if the documents or the law said all investors, other than ones who might have been related somehow to the asset manager. It just doesn't say that. And as we talked about, this is -- these are not funds from Highland. If they were funds from Highland, again, it would be

really easy.

As I described for Highland Dynamic, I don't need to hold and carry water for Mark Okada. But I do need to carry my own fiduciary duties and make sure that I exercise them well. The gentleman put $2 million in -- this is April 2013, put 2 million -- 2.5 million in cash in 2018, and the fund is being wound down. It's not the debtor's money. If it was the debtor's money, it would be really easy to say, you know, Mr. Okada, I'm not going to give you the money because we may have claims against you, and a different discussion would ensue.

Q Well, I want to walk through that just a little bit. You say it's not the debtor's money. Where is the money?

A This money sits in funds or in bank accounts. Its assets are denominated and they're held in trust. And the cash that's in accounts, they're denominated in the name of the fund. The asset manager, Highland, has the ability to access the accounts and use the funds in accordance with the fund documents. It does not have the ability to access the accounts and use the funds however it see fit.

Q So it's like an authorized signer?

A It's certainly an authorized signer in terms of what its ability to do in terms of accessing the funds. Typically, that's done through the trustee. But it can manage the funds. It couldn't take the funds and make an unrelated investment.

It couldn't take the funds and use it for its own purposes and pay them back later. It's just simply not permitted.

Q Well, taking that to the next level. If the Court did not allow these distributions to be made, would the distributions then go to the debtor?

A No.

Q Where would they go?

A There's really no provision for it. There are certain provisions in the underlying documents that would enable the manager to withhold funds. If there was a change in law that didn't permit a distribution. If there was some other reason that it became unfeasible to make the distribution. If you couldn't find the investor, and sometimes that happens. There are provisions of how you deal with those funds. But they never would go to the manager.

Q So what is the -- why is the primary reason then that we're here today asking this Court for permission to distribute these funds?

A It's pretty straightforward. We have a fiduciary duty and we've confirmed that with outside counsel, both Cayman and domestic fund counsel, to make distributions and treat all investors in the funds pro rata. And we're here to make sure we vindicate our duties, not exercising our fiduciary duties, doing things that were not permitted. One, we don't think that's right or appropriate. Two, that's not going to help

resolve this case that probably contributes to some of the things that led to this case. So we're not real interested as an independent board in doing things that are close to the edge, along the margin, try to use our positions to leverage investors.

Q Are you familiar with the protocols?

A I am.

Q Okay. But for the protocols, do you believe that the debtor would need to obtain the Court's permission in order to makes these distributions on behalf of these funds?

A I don't think so, no.

Q So then, why are we asking the Court's permission?

A Well, the protocols require it, and I think the Committee, you know, with due respect and I mean that truly, would like us to withhold the funds, and that provides certain leverage potentially over insiders. I think when I look at the protocols, I think the main function of the protocols is to assure that there isn't undue influence by insiders over the actions of the company, and that insiders are not somehow benefitting themselves by virtue of their control over the company.

The independent board has control over the company. We're not naive and think we have control over every single persons every single second of every day, but we do have control over what happens with the accounts, how payments are

made, when we wind something down, when an asset is sold, how the proceeds will be used. That's the board. That's not anybody in management. The decision around these distributions was made by the board independently. We did consult with the CCO, and that was important to make sure we got all the facts with respect to these funds.

We then sought outside counsel to inform our decision, both Cayman and domestic. We didn't have any influence whatsoever and we didn't speak to Mr. Dondero nor Mr. Okada other than to tell Mr. Okada that we were coming to court and then to ask him if he would defer his distribution. And we know his response.

Q I want to ask you just a couple -- I know I'm almost at my 30 minutes here, so I just want to ask you a few quick questions because one of the issues that came up were these demand notes. I understand that Mr. Okada does have a demand note.

A He does. We've --

Q And has the board --

A And we've sent a demand.

Q Okay. And what was -- what is the status of that demand note?

A He acknowledges that he signed it and he said that he's owed certain things from the company. He's asked how we work those through because he was severed -- or severed himself in

September, and he has -- they reached a severance agreement according to Mr. Okada. I haven't personally investigated it yet, but we will get to it quickly. And he has some expenses that are owed, but I don't think those are material.

I'm quite confident. He said his severance was agreement not money, but terms, was very standard. We'll take a look at that and make sure there's agreement on that.

I think it would be covered by the protocol, but it's probably a transaction, so we'd have to talk to the Committee about it, but we'll work -- I'm confident that we can work our way through a standard severance agreement very quickly and resolve that issue and collect on the note.

Q Now, to be clear, the demand note is payable to whom?

A The demand note is payable to the debtor.

Q Okay.

A It was actually a note that was -- he didn't receive cash for the note. It's basically a tax -- rather than gross-up salary sometime in the past, for whatever reason they decided not to gross it up to cover taxes.

Because of the structure of the limited partnership, they could have had taxable income without matching cash, and so they issued notes back to Highland to cover certain of those obligations rather than actually making a distribution.

Q To you knowledge, does Mr. Okada owe any money to the fund?

A No. Not a -- my knowledge is that he does not. So I am knowledgeable of it, and he does not owe any money to the fund.
Q Okay. Quickly, I just want to talk a little bit about Mr. Dondero. One of I think the points that was made at the very beginning of opening statements was that Mr. Dondero is still around. Why is that?
A He's around because he has incredible knowledge about the investments. He is a portfolio manager for the fund. He does work with respect to non-Highland unrelated funds, some of which Highland employees do work under shared services arrangement and we get paid for them. But Mr. Dondero is around for those reasons and his knowledge about a number of the investments in which we're involved.
Q Does the Debtor -- or does the board have the power to terminate Mr. Dondero if it decides to?
A Yeah, he's -- we could, he's unpaid so there's no cost to his involvement. His expertise around certain investments, particularly the equity funds as well as some of the larger investments, including the PE investments, is really important.
Q And with respect to the Dondero notes, what are the status of those demand notes?
A We've done an investigation of the notes and I wouldn't say it's as exhaustive as -- it's in similar stages as our examination of other assets. We've looked at Dondero's notes, we made a decision to send a demand letter to Okada because

he's no longer a part of the company and there's no real benefit that we saw strategically to not making that demand. It's a small amount of money relative to the size of the case, it's real money, but it's a small amount of money relative to the size of the case. We should clean that up and move on from Mr. Okada.

With respect to the Dondero notes on Dondero entity notes, we want to think about those strategically. They're a sizable amount of money, not just the ones that are demand, but also there's a number of the notes that ate notes with maturities and they're actually current, they're all current, but how can we use those cash, can we collect those, and I think that's more strategic in terms of how we resolve this case.

I agree with Mr. Pomerantz's statement that I think it evolves into a pure litigation case and we really hope it doesn't. That then -- those can just be sued on and the demand notes are pretty clear as to how they work and even include cost of collection. So they're pretty straightforward notes.

Q But so for now the board --

A Well, we thought about it, we don't think it makes sense to make that demand at this time. There's -- our initial -- we're not -- we haven't come up with what the plan is for this case, but we have ideas. We do think they involve Mr. Dondero and they involved contributions from Mr. Dondero whether in the

form of notes, whether in the form of cash, whether in the form of other assets. We haven't discussed those with him, but we do think that's ultimately, at least preliminarily, where we're going to end up somewhere. So strategically we think that that'll make sense to include in that sort of a resolution.

Q Okay. And --

THE COURT: You have one minute.

MS. HAYWARD: Yes, thank you, Your Honor.

BY MS. HAYWARD:

Q Last question I'm going to ask you, are you aware of any legal basis to withhold these funds now from Mr. -- from these investors and these related parties?

A I'm not aware of any, but as the Court has contemplating, as the Committee has said, perhaps now that Section 105, you know, grants that sort of authority, but that'll be up to the Judge.

MS. HAYWARD: Your Honor, a housekeeping matter. I move for the admission of Exhibits 1 through 12. I don't think any of them are controversial. But I will let --

THE COURT: You want me to look through

MS. HAYWARD: Your Honor, they are --

THE COURT: -- all of these.

(Laughter.)

MS. HAYWARD: Your Honor, just for the record, they are Number -- Exhibit 1 is the chart showing the structure of

the Dynamic Income Fund.

THE COURT: Right. We looked at that.

MS. HAYWARD: Exhibit 2 is the partnership agreement, so I know they're large documents, but they're not numerous documents. Exhibit 3 is just the chart of the Latin America Argentina Fund. Four, the partnership agreement for that fund. Five, the chart (indiscernible) Third Fund. Six would be the agreement, the limited partnership agreement for that fund. Seven, Your Honor, is Your Honor's order on the ordinary course governance procedures.

THE COURT: Okay.

MS. HAYWARD: Eight is the final term sheet. Nine is the notice of amended operating protocols that was filed last week.

THE COURT: All right. And then CVs of our board members.

MS. HAYWARD: And then the CVs for the board members.

THE COURT: Any objections to these?

MS. REID: No objection, Your Honor.

THE COURT: Okay. They're admitted.

MS. HAYWARD: Okay.

THE COURT: All right. Any cross-examination?

MS. REID: Yes, Your Honor.

THE COURT: Okay.

MS. REID: Good afternoon, Your Honor. Penny Reid on

behalf of the Creditors Committee.

CROSS-EXAMINATION

BY MS. REID:

Q Good afternoon, Mr. Seery.

A Good afternoon.

Q You are aware, Mr. Seery, aren't you, of the Acis bankruptcy?

A I'm aware of it, yes.

Q Okay. And you're aware that prior to that bankruptcy Mr. Terry obtained an arbitration award in October of 2017. Correct?

A I'm aware of that, yes.

Q And, Mr. Seery, are you aware that four days after that arbitration award assets started being transferred away from Acis, stripping it of its value at that time?

A I've read the judge's decision in the Acis case but I'm not aware of any of the underlying facts, other than from reading that case.

Q So you aren't aware of all the assets that went out of Acis the day after an arbitration award was entered.

A No, I haven't looked at any of those.

Q Okay. And you're not aware that the day after a final judgment was entered more assets were stripped from Acis. Is that correct?

A Other than reading the Judge's decision I'm not aware of

any of the specific assets, no.
Q Are you aware that two days after that, or entry of the final judgment was ordered, Acis' entire risk retention structure was transferred away from it and into the ownership of Highland CLO Holdings?
A I'm aware of some of the facts relating to the Acis case from the decision and I'm aware of some of the facts from the Acis case because of my discussions with Ms. Patel and Mr. Terry. I'm not aware of the specific transfers to which you're referring without having -- looking at them.
Q Okay. So you're not aware that some of the assets that were stripped from Acis went to one of the entities you're wanting to send money to today. Is that right?
MS. HAYWARD: Objection. Your Honor, I'm not sure how this is relevant to the Debtor's distribution motion --
MS. REID: Well, it's relevant to the distributions that you're trying to give to the same entity.
MS. HAYWARD: Your Honor, I think right now Mr. Okada --
THE WITNESS: What I --
THE COURT: Just a minute.
THE WITNESS: Sorry.
THE COURT: We have an objection. Let me hear the objection.
MS. HAYWARD: Your Honor, I think at this point Mr.

Okada is the only one getting a distribution at issue in this case as of now in light of the representation that was made by Judge Lynn.

THE COURT: All right. Well, what is your response to the relevance objection? She's saying that this line of inquiry has kind of been taken off the table since -- I'm not sure which entity, I think you're talking about the Holdco, CLO Holdco. Right?

MS. HAYWARD: Yes, Your Honor.

THE COURT: Since now the disbursement that would have gone to it is being put off the table and would go into the registry of the Court. So what is your response?

MS. REID: Well, Your Honor, and I can take it off, but currently it's my understanding that Mr. Okada is a 25 percent owner in Holdco. But I can move on to the next question.

BY MS. REID:

Q Which is, are you aware that Mr. Okada right after the final judgment was entered transferred their entire interest to Nutra Limited?

A Who transferred to whom?

Q Right after the final judgment --

A Right.

Q -- that Mr. Terry obtained, Mr. Okada transferred their entire limited partner interest in Acis, LP to Nutra.

A So I apologize. A couple of things. One is it goes to what you said, I don't believe Mr. Okada has any interest in sale of Holdco, but you're saying Mr. Okada and their in your question, and so it doesn't make sense. He's an individual. So I just don't know what you're asking me. You said Mr. Okada transferred their interest. Who's their?

Q Are you aware that Acis -- that you're aware that after the entry of the Acis judgment that Mr. Okada's limited partners interest in Acis was transferred to Nutra?

MS. HAYWARD: Again, Your Honor, I lodge the same objection to relevance.

THE COURT: All right. Again, what is your response to the relevance objection?

MS. REID: I think it's very relevant because I mean he has been saying that they have a fiduciary duty to investors. Mr. Okada is not your normal independent investor. It's a related party that has engaged in prior improper acts in this court which you're aware, aren't you -- well.

THE COURT: Yeah, I'll overrule the objection and allow a little latitude.

THE WITNESS: So I think what you're referring to is the position in Nutra and I'm aware of some of those issues. Mr. Okada apparently owns 25 percent of Nutra, Mr. Dondero owns 75 percent of it. The control in Nutra is actually vested in Highland Capital Management through a control agreement. So

I'm not -- I'm aware that they made a transfer and that Nutra owns that interest now, and I'm aware that that split is 75-25, I assume because of that split just like ATM Services, Mr. Okada doesn't have any say in how it's run. And the control in that entity anyway is vested in Highland, the Debtor.

BY MS. REID:

Q So you're aware there were improper transfers made at -- during -- before the Acis bankruptcy. Is that correct?

A I'm aware --

Q You're not aware?

A I'm aware of the decision and I'm aware of the transfers. The designation of it then as improper, I'm not sure that I can say one way or the other because I've looked at the transfers and I can't tell you whether that transfer was improper. So if you're asking me if I'm aware that that transfer occurred, I think I said I was. I don't think it's fair for you to color that the transfer was improper. If somebody --

Q Are you aware of the Court's decision --

A I am --

Q -- that they were improper?

A -- I don't recall the Court's decision with respect to that transfer. There were a lot of transfers, a number of which the Judge ruled were improper.

Q Okay. So you are aware that there were improper transfers made from Acis that the Judge found were improper. Correct?

A Yes, I am.
Q Okay. And you're aware that Mr. Okada was the Chief Investment Officer at the time those transfers were made. Correct?
A Of which entity?
Q Of Highland, of the Debtor.
A I believe he was -- I believe he was a co-CIO of the Debtor at that time, but I'm not positive.
Q So you don't know.
A I'm not sure, no.
Q Okay. Do you know he was -- he was the Debtor's -- so you do not know one way or the other.
A I am aware that at some time he was the CIO and then the co-CIO. I don't know the specific time that he was the sole CIO. I just don't know.
Q Do you know if he was involved with the Debtor at the time these improper transfers were made?
A He definitely worked for the Debtor at that time.
Q Okay. You -- the reply that was filed today by the -- this morning by the Debtor states that the making of these distribution to Mr. Dondero and Mr. Okada is essential to rebuilding the Debtor's reputation in the marketplace. Is that correct?
A I believe that's what it says, yes. I assume you're reading it?

Q I am.
A Okay.
Q Aren't you -- is the marketplace not well aware of Highland's history including the Acis and the Redeemer Committee litigation?
A I believe the market is aware of the Acis and Redeemer litigations.
Q Okay. And is the marketplace well aware of the extensive wrongdoing that Mr. Okada and Mr. Dondero engaged in as found by this Court and the other tribunals?
A I don't know how the marketplace -- I know that they're aware of the decisions, I can't tell you whether the marketplace as a large general matter knows the specifics. I don't know.
Q Have any non-insider investors expressed concern to you over the possibility of Mr. Okada not receiving the distribution?
A No, I don't believe so. I think -- just to make sure I answered your question, have the non-insiders raised issues about Mr. Okada --
Q Not getting distribution.
A No, there won't --
Q No one is really concerned about that except Mr. Okada. Correct?
A I think each investor is concerned about their own

distributions, so like with respect to RCP I don't CalPERS referred at all to the distributions to Ontario, they probably don't care, they care about their own distributions.

Q And the only one we're talking about right now is the one to Mr. Okada. Correct?

A That's correct. I hope so. Right? Meaning I'm under the impression that the Committee doesn't object to the investment, to the release of funds and the distribution to third-party investors.

Q Mr. Seery, you testified that one of the reasons you're seeking to distribute these funds is because the Debtor has fiduciary duties to investors. Correct?

A Yes.

Q Okay. But these funds aren't being distributed to just regular investors. Correct? They're being distributed to insiders.

A Again, unfortunately these are things one has to be precise with. The question is insider under some securities law, or insider under the Bankruptcy Code? So --

A Insider under the protocols.

Q I believe the term there, again, we should be precise, is related party. So he's a related party under the protocols. As far as I know there's no separation under the Investment Advisors Act, under the Cayman law, under Delaware law, or under the contracts with respect to persons who might have

worked for the investment manager who made an investment in the fund.

Q Are you aware that the Debtor also has duties to the Creditors Committee?

A I don't believe the Debtor has any duties to the Creditors Committee.

Q To the estate?

A I believe the Debtor has significant and overriding duties, but that's what we're here for, to the estate.

Q To the estate. And were very conscious of those duties. Correct?

A I am indeed.

Q That's what you testified. Right?

A Yes.

Q Okay. So can you explain to me what -- how you consider the estate's considerations in deciding to distribute these, what was your consideration of the estates, how does this benefit the estate?

A This benefits the estate because we have an obligation to the funds and to the investors in the funds to perform according to the terms of the funds. Unfortunately there is no provision in the fund documents or in the law that allows us to treat the investors in the funds in a disparate way. And we believe, after consulting with outside counsel, domestic and Cayman, considering federal law under the Advisors Act, as well

as Delaware law, that the only way to make distributions, other than if there was a law change, was pro rata to all of the investors.

So in order to vindicate our obligations to the outside investors, we also have to pay the inside investors. In addition, if we don't pay the inside investors, there's no basis not to do that. Now there may ultimately be no liability because it will be hard to bring a case. But it seems to me that incurring potentially liability is not in the best interest of the estate. Holding up a distribution from non-estate property doesn't seem to do anything to help the estate. In fact, it puts it at risk.

And so we did the work and that's how we determined, exercising what I think is our duty of care, which is really researching this, and we spent a lot of time and a lot of money making sure we got this right. And our duty of loyalty. Is there some good reason that the fund could hold up the distribution. Until we have a claim is there a valid to attack these distributions.

By the way, there were $8 million out of 180 million. Now if there had been 180 -- if there had been 172 out of 180, maybe we would come in here and say, We should something a little bit different because we're really letting the small outside investors dictate us and force us to make distributions to related parties that the Committee has some concern about.

But while $8 million is real money, and I don't deny that, again, it's not huge in this case. And it seemed to us, after doing the work, that we were putting the estate at risk by no exercising our fiduciary duties. Moreover, we each have reputations, and they're important to us, and they don't override our fiduciary duties. We're not going to do things to aggrandize ourselves, to help our reputation versus the estate. But running this Debtor correctly seems to us, looking at the history, was the right thing to do.

Q Has anyone, Mr. Seery, threatened to bring a fiduciary duty claim against you if you don't pay these funds?

A No.

Q Has any -- has Mr. Okada said he's going to bring a claim against you if you don't distribute these funds?

A No, and nor did I consult him about it. We just told him what we were doing. We're not -- I'm not inviting someone to sue us. That I think would be, you know, grossly wrong for us.

Q Now we've touched a little bit on this, Mr. Okada owes the Debtor 1.3 million. Correct? In the demand note?

A Approximately, yes.

Q All right. And you have made a demand on Mr. Okada. Correct?

A That's correct.

Q And he hasn't paid it. Right?

A No, he has not.

Q And that's money into the estate. Correct?
A That will be, yes.
Q Now do you still think it's okay to just hand him off, you know, $4 million and even though he's not paying the estate that you have a duty to?
A There's no such thing in my life as just handing off $4 million. This is fund money --
Q Distributable.
A -- that will be distributed to the owners of the fund pro rata. We're not handing off anything to Mr. Okada or anybody else.
Q But Mr. Okada has not agreed to pay back his note. Correct?
A He's not agreed to pay it back, no. Technically I would say no.
Q Okay. And that's because of some severance agreement that you're not aware of what the terms are. Is that right?
A I have not -- we have not -- I have not looked at the terms, I don't believe many of my fellow directors yet have. It's something that is on the burner for us to get to as soon as this is over.
Q And are --
A He's pushing for it.
Q -- are you aware that the Committee has asked for that severance agreement?

A I was not aware of that, no.
Q You're not aware of that.
A I haven't seen it.
Q And you don't know that it hasn't been produced to us. Is that correct?
A I don't -- I have not seen it myself, I don't -- didn't know that you'd asked for it, nor do I know that it hadn't been produced.
Q Okay. And you haven't looked at it.
A I haven't seen it.
Q So you don't know if his failure to pay that money back is valid or not. Is that correct?
A That's -- I don't -- he still owes the money whether he has appropriate setoffs and whether a settlement agreement would actually work as one. I don't -- haven't really analyzed that and I don't know that our counsel has either. It may be that he owes the money and we're holding a severance agreement, but those aren't mutual obligations that are subject to setoff.
Q You don't know one way or the other whether he has a right of setoff. Correct?
A I don't believe he -- other than perhaps expenses I don't -- haven't heard any articulated monetary setoff against the obligations he owes.
Q If the Court orders that his distribution be put into the Court registry, do you still think you've breached your duty to

the estate somehow by that?

A I think if the Court orders it, I don't think we would be subject to a breach of liability. I think that we're here vindicating our responsibilities and our duties to investors. If there's an interceding court order, we will follow it.

Q Thank you.

MS. HAYWARD: I have no further questions.

THE COURT: All right. I think that was about 17 minutes. Any other examination? Okay. You'll have 13 minutes.

MS. PATEL: Just a few questions, Your Honor.

CROSS-EXAMINATION

BY MS. PATEL:

Q Good afternoon, Mr. Seery.

A Good afternoon.

Q Mr. Seery, I think your testimony was that the fund, let's use RCP -- or I'm sorry, that's the wrong one --

A Dynamic?

Q I think it was the Dynamic --

A Dynamic.

Q -- Income Fund is the one that Mr. Okada has an investment in. Correct?

A That's correct.

Q Okay. And the fund has duties to Mr. Okada including fiduciary duties as an investor. Right?

A That's correct.
Q Okay. Does Mr. Okada have duties to the fund?
A I don't believe he does, no.
Q Okay. Did he ever?
A I believe he did.
Q Okay. That was during his tenure at Highland Capital Management. Right?
A I think as an officer of Highland Capital Management, the investment manager, he would have had duties to the fund, yes.
Q Okay. And have you investigated whether he's breached any of his duties to the fund?
A We have looked, we have not seen anything. We know that the redemptions came in without any objection. We have not spoken to the individual investors.
Q Okay. So would it be fair to say then that you haven't concluded your investigation of whether Mr. Okada has breached any of his duties to the fund itself?
A I don't think that would be fair. I think what would be fair to say is we've taken a look, we see no evidence whatsoever that there were any breaches by Mr. Okada of his duty to that fund, so there would be no reason to undertake an investigation that we had yet to complete.
Q Okay. And who undertook that investigation, was it just the board or did you have others involved?
A It was the board.

Q Okay. No one else?
A The investigation with respect to the -- we got data from other people but I'm the one who looked at whether there were any claims related to the redemptions, any objections to any of the other distributions, any objections to the fees, and we found none.
Q Okay. So no outside counsel advised you with respect to whether Mr. Okada had potentially breached any duties to the fund?
A No, again, it's not something that we would have looked at with no evidence whatsoever that there was any sort of complaint or breach.
Q Okay. All right. Mr. Seery, with respect to the, I'll call it the agreement because I'm assuming that it is an agreement, that Mr. Dondero's counsel announced on the record regarding putting the funds that would otherwise be payable to Mr. Dondero into the registry of the Court. Do you have an understanding whether that agreement also extends to Highland Capital Management Services?
A Yeah, just to be clear because, again, we should be precise, Mr. Dondero was not going to receive any money. The CLO Holdco, which is owned by the charitable DAF has investments in the Argentina Fund and the Dynamic Fund. It was going to receive money. Highland Capital Services has around a 2 percent interest in RCP, it was going to receive money.

I understand that Mr. Dondero, through his counsel, directed that the distribution to Highland Capital Services would not be made. Mr. Okada owns 25 percent of that, he was not consulted. I know that because I spoke to Mr. Okada. The distribution with respect to the CLO Holdco has been similarly treated, but that was done by Grant Scott talking to Mr. Nelms (phonetic) for the charitable DAF that controls the CLO Holdco.

Q Okay. So, again, to be clear, Mr. Okada has not consented to the agreement that was announced on the record with respect to any distributions to Highland Capital Management Services. Correct?

A He has not, but since he doesn't control it and Mr. Dondero does, the agreement is binding.

Q Okay. And how do you know that Mr. Dondero controls Highland Capital Management Services?

A Mr. Okada told me.

Q Okay. All right. Mr. Seery, with respect to Mr. Okada, I believe your testimony was he separated from Highland Capital Management in September of 2019. Correct?

A I believe I testified that he originally began his separation in the spring, I don't know exactly when it was, and I believe his official resignation was some time around September.

Q Okay. Would September 30 of 2019 sound about right?

A It -- approximately, I don't know the date.

Q Okay. So it was towards the end of September though. Correct?
A I don't -- I don't know whether it was September 1, September 15 or September 30, I just don't know the answer.
Q Okay. And at the time Mr. Okada separated from Highland or any time before then, did Mr. Okada have a non-compete agreement?
A I have not looked at Mr. Okada's contract.
Q Okay.
A So I don't know.
Q All right. Does -- did Mr. Okada have something called a non-solicit --
A I don't know.
Q -- where he wouldn't solicit clients for example of Highland Capital Management?
A I don't know.
Q Okay. Did Mr. Okada have what's called a non-recruit where he wouldn't come in and try and recruit employees of Highland Capital Management?
A Again, because I haven't looked at his contract, if he had one, I don't know that he did, and because I haven't looked at it, and I testified that I haven't seen this severance agreement he's talking about, I don't have any understanding of the terms of Mr. Okada's employment with Highland Capital Management.

Q Okay. So you just haven't looked at any of those things.
A That's correct.
Q All right. Are you aware -- well, did you have an opportunity to look at -- I believe there was a press release that was somewhere around September 2019 where Mr. Okada said he was actually retiring from Highland Capital Management?
A I would have no reason to have looked at such a thing in September.
Q Okay. All right. So you haven't seen that. Let me ask you another question, are you aware that Mr. Okada has a new business by the name of Sycamore Tree Capital?
A I'm aware that he intends to start a new fund, I have no idea what the name is and I'd have no idea what development -- stage of development it's in.
Q Okay. Are you aware if any Highland employees have been engaged by Sycamore Tree Capital
A I'm aware that at least one maybe, I'd have no idea whether that employee, ex-employee now, is involved or not.
Q And isn't that employee Troy Parker?
A That's correct, yes.
Q Okay. What did Troy Parker do for Highland Capital Management?
A Most recently he ran the PE book.
Q Okay.
MS. PATEL: No further questions, Your Honor.

THE COURT: All right. We have seven minutes. Do you have questions, Judge Lynn? We have a little bit of time?

JUDGE LYNN: No, but I just want to make clear Mr. Dondero's suggestion for resolving the motion was not a dickered agreement, it was a suggestion that we would hope would make life easier for the parties and the Court.

THE COURT: Okay. Thank you. Thank you.

I had one or two questions. Is there going to be redirect? Well, no, you used all your time, you don't get redirect.

(Laughter.)

MS. HAYWARD: And, Your Honor, I don't have redirect.

THE COURT: Oh, very good.

EXAMINATION

BY THE COURT:

Q Let me ask you, sir, I want to revisit Dynamic, that's the one I hear most about obviously since that's the one that Mr. Okada --

A Yes.

Q -- has the distribution rights from. You know, I was fixated before I came out here a little on the time line. Right? So the pleadings said Dynamic, the termination date was November 15, 2019.

A Correct, Your Honor.

Q About 30 days after the Highland bankruptcy was filed. What I heard your testimony to be was that pre-petition the largest third-party investor -- I wrote it down phonetically --

A Realdania.

Q -- Realdania --

A I'm not sure if there's someone in the courtroom who know them.

Q Sounds like a Spanish company maybe.

A I believe they're a European company, it's an investor I'm not familiar with, Your Honor, but I have seen the redemption notices.

Q Okay. They issued a $65 million --

A I believe it was in the neighborhood of 65 million, yes.

Q And it was pre-petition? You wouldn't know?

A It was pre-petition, I think it was around 40 percent of the fund.

Q Okay. I mean do you remember when? Was I t --

A I believe it was in the spring and it followed a -- spring or early summer and it followed a separate redemption from a different investor.

Q Okay. So there was another third-party investor, even before Realdania that --

A That's my recollection, yes, Your Honor.

Q -- that was unaffiliated with Highland.

A That's correct.

Q Okay. So it's your business judgment that once these two biggies issued their redemptions, it just wasn't worthwhile to keep this fund going anymore.

A That's correct, Your Honor. And as I said, Mr. Okada was a driver to that fund and he had left. He did not actually redeem, but he was being compulsory redeemed as the fund went into liquidation. So all of the investors, redeemed and non, will be treated the same.

Q All right. So I guess one thing I'm getting at is timing of Mr. Okada leaving versus timing of these third-party redemptions happening.

A Right. I could --

Q Is there any --

A I see no connection whatsoever. And, again, his piece of the fund was about -- I believe it was round 12 percent of the fund.

Q Yeah, his --

A And it's a material amount of money I suppose to most folks, including myself, but it's not -- it wasn't a driver whatsoever that we could see, and he did not redeem. So the third-party redeemed, Okada was leaving having been the driver of the fund, it was an undersized fund anyway, there was no real valid reason to keep a small fund trying to do this around after Mr. Okada left.

Q Okay. I'm just wondering whether I should or not, you

know, the timing of this. So this is -- starts spring of 2019, but then a month post-petition let's terminate this thing. I mean who actually makes that decision?

A Well, the decision to continue forward is made by the board. Before that it would have been made by the managers of the funds or the compliance group. So I have not looked into specifically who said, Let's terminate it. To be perfectly frank, I don't know --

Q But it would --

A -- the specifics.

Q -- the manager, Highland?

A It's Highland who determines to terminate it. Ultimately, if all the investors issued redemption notices, then the fund would have to liquidate --

Q Right.

A -- on its own. So Highland --

Q Right.

A -- wouldn't have any say about it. But to put it into liquidation, I believe it was Highland that did it. Some of the funds, it could be foreign directors, but that's not what happened.

Q Uh-huh. Okay. So there are third-party non-affiliated investors still in it, there's 35 million that would go out the door and --

A It's about -- there's a couple of assets that still have

to be liquidated. Approximately 85 percent of the distribution is to third-party un-affiliated investors. And then we -- we'll have -- we'll retain some cash to make sure that we can manage the liquidation of the fund and the dissolution of the entities. But we still have to get rid of a small amount of assets that are pretty liquid.

Q Okay. Now I heard you also say that Highland isn't owning any fees anymore on these refunds. Did I not hear you say that?

A Yeah, certainly -- so I think on ours I think. On Dynamic and on AROF, the Argentina Recovery Opportunity Fund, once they were put into liquidation they don't earn any fees anymore. The --

Q Okay. Let me -- okay, so when did that stop, when were they "put into liquidation" so the management fees stop?

A I believe that Dynamic would have been in the fall, I don't know the exact date, and Argentina --

Q Well --

A -- was before that.

Q -- the Court termination date used in the pleadings was November 20, 2019.

A Yeah, but I don't recall the exact date, Your Honor. We can certainly figure that out, I just don't recall off the top of my head. When the fee cutoff date -- the fee cutoff date for RCP was I believe in April of 2018 when the one-year

extension was given. That was the trade for the extension.
Q Okay. But you don't know for sure when the management fee cutoff was --
A No.
Q -- on either Argentina or Dynamic.
A No, that's correct, Your Honor.
Q I mean would it have been in November 2019 you think?
A I think it was before that, but I don't -- I believe so but I don't know for sure.
Q Okay.
A If I'm wrong, I'll figure that out and correct it to you.
Q Okay. All right. Thank you. You're --
A Thank you.
Q -- excused.
A Thank you.
THE COURT: Does anyone in the room know the answer to that?
MS. HAYWARD: Your Honor, we can figure it out very quickly I think.
THE COURT: Really? Okay.
(Pause in the proceedings.)
THE COURT: Actually I had one more question for Mr. Seery.
THE WITNESS: Yes.
BY THE COURT:

Q Do we have any other Highland managed funds out there that are imminently going to be going into wind-down mode? Is that easy to answer?

A We have a number of CLO funds that are what we call 1.0 CLOs. They're old and they're effectively winding down. And a number of those we don't get fees off of, but they had -- because they own very illiquid assets, we have to realize on those assets. May of those have cross-ownership to funds that we do get fees on. We need --

Q Let me back you up. Why didn't Highland get fees on those?

A Because sometimes in the CLO structure it depends on what kind of asset gets treated under the net asset value, so for example if it's equity, it may not count, even if it has a value, you don't get paid a fee on it. So if you had a loan that converted to equity, some of those CLOs you may not get a fee on because you don't own any loans anymore. So, but most of those assets, if a CLO owned equity for example in a PE company, we would have other funds that owned additional equity in that same PE company.

We do have other assets where they aren't necessarily wind-down, but there will be distributions to entities that may or may not be related parties under the protocols, and we are in the process, and the Committee's aware of it, selling certain assets, and hopefully those sales will go the way we

want them to. They're valuable assets so we feel we have a good opportunity to realize good value for the estate. There would be requirements on certain of them to pay off debt from certain entities before we can distribute money back up to Highland Capital.

Q All right. Thank you.

A Thank you.

THE COURT: You're excused.

All right. Anything else today?

MR. POMERANTZ: Do you want to hear closings, or have you heard enough, Your Honor?

THE COURT: I mean if you have a quick one or two minute closing, I'll hear that, to recap anything. Did you have that quick answer that Ms. Hayward --

MR. POMERANTZ: We are --

THE COURT: -- was confident about?

MR. POMERANTZ: We are trying to find it.

THE COURT: Okay.

MR. POMERANTZ: We have a couple of emails out, hopefully by, we get a couple of answers.

THE COURT: Okay. Okay.

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Your Honor, I just wanted the highlight the fiduciary duty as you -- I know it was a subject of discussion with Mr. Seery, cross-examination. Again, as you

heard, and as the only evidence before Your Honor is, Mr. Seery, who as Your Honor knows is a restructuring lawyer, practice in it. He's fully aware of what the fiduciary duty requires.

And first and foremost, I think it may even be 28 USC 959, the Debtor has to operate in accordance with applicable law. Every debtor before Your Honor has to act in accordance with applicable law, and if the debtor is not acting in accordance with applicable law, then they are creating liability. As Mr. Seery testified, that is exactly what that the Debtor is doing. And this concept of dueling fiduciary duties or the board taking certain actions that just happened to benefit insiders as indicating that they are not looking out for the estate is just not accurate. That's not how the law works and I think Mr. Seery said it correctly, that the Debtor fulfills its fiduciary duty to the estate by operating in accordance with applicable law.

With respect to 105, Your Honor, the cases cited by the Committee don't support granting injunctive relief forward of attachment without going through the necessary process. They do cite the DeLorean case which at first blush sounds like a court authorized the holding of money, but if you read that case carefully, it was done because there was a complaint and because the Court ultimately determined that the evidence before the Court established grounds for preliminary

injunction.

Mr. Clemente has asked Your Honor to hold that the objection filed satisfies the standard. But the objection isn't a legal document. The Committee has not put on any evidence to support any claims that exist. The testimony from Mr. Seery is that there's a claim under a note and that there are defenses to the note. So Your Honor does not have the sufficient evidentiary basis in order to meet the standards of the injunction of which irreparable harm -- there's a whole host of reasons.

So while we understand what the Committee wanted to do. If they wanted to file an action, they could have. We don't expect them to have completed their investigation on all the types of claims they're looking at. But they've been aware of this Okada note for a couple of months. It would not have been difficult for them to file, as they have standing, a lawsuit to recover any. They asked us to issue a demand note, we did, and we got the answer.

So, Your Honor, I don't think there's a basis under 105, the way it's being used here and the lack of evidentiary record to support it. And for those reasons, Your Honor, we would ask that Your Honor support the motion and other than the distributions that are being held in the registry, allow the distribution to be made to Mr. Okada.

THE COURT: Okay.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: All right. Other quick closings?

MR. CLEMENTE: Your Honor, I'll be very quick.

CLOSING ARGUMENT ON BEHALF OF THE COMMITTEE

MR. CLEMENTE: There's obviously a lot more that I could say, but I'll be respectful and be very quick.

First of all, Your Honor is the judge and you're the one that determines what the law is and what the duties ultimately are for this Debtor. Mr. Seery I think indicated in his testimony that, for what it's worth, he does not believe that there would be a viable claim for breach of fiduciary duty if Your Honor ordered the distribution to Mr. Okada be put in the Court registry.

I think the testimony was clear from Mr. Seery that Mr. Okada, at all times relevant, when all the things that happened that involved the Redeemer Committee, that involved Acis, that involved UBS, Mr. Okada was at least co-Chief Investment Officer and we all know he was co-founder of Highland. I think Your Honor's questions, and perhaps frustration with sort of trying to figure out some of the answers, show how interrelated all of these things are and the various capacities and roles that Mr. Okada had back at the time when all these different transactions occurred.

I think the testimony we heard is that Mr. Seery did a lot of work around why we should pay Mr. Okada, but almost no

work around why we shouldn't pay Mr. Okada. And so I go back to what I said earlier, Your Honor, I think Mr. Okada is perfectly capable of coming into this court and arguing that once the monies that were put into this Court's registry should be distributed to him, he can come in and do that.

But I think for purposes of today, Your Honor has heard more than enough to come to the conclusion that the appropriate remedy here is to place the money within the registry of this Court. It satisfies the fiduciary duty of the Debtor and it protects the interest of Mr. Okada, who is free to come into this court and make whatever argument he so chooses as to his entitlement to those funds.

Unless Your Honor has any questions of me, I'll sit down.

THE COURT: Thank you.

MR. CLEMENTE: Thank you.

THE COURT: Anything else?

MR. POMERANTZ: Your Honor, in answer to you question, November 11 was the date that the fees were no longer payable to the Debtor in the Dynamic Fund.

THE COURT: November 11 post-petition.

MR. POMERANTZ: Correct.

THE COURT: I like being transparent and I -- and so I sometimes share my thoughts hoping that it will help. But I'm -- you all get why I'm fixated on this point? Maybe I'm

sharing my thoughts when I don't have to. But the time line looks suspect, whether it should be or not, it looks maybe problematic. Do you see what I'm saying?

We had this fund that I understand never got to real scale and in spring 2019 we have a couple of big unrelated third-parties -- third-party investors issue redemptions and that makes it really not a very worthwhile fund, so maybe it should go into wind-down mode. Nevertheless, Highland has been continuing to get its management fee. I don't know how much management fee, but it's been getting a management fee until it files bankruptcy, and then, Oh, let's wind this sucker down.

Do you see what -- you know, I don't know. I mean again, a hearing for another day. But this is the kind of thing I get concerned about, and maybe kind of want to look into the bona fides of the decision making process to wind down, let's terminate this thing and make disbursements. And, you know, did we have any fingerprints of this on insiders that should make me troubled. I don't know. I mean if I'm going out on a lark here, just stop me.

MR. POMERANTZ: Well, look, Your Honor, I certainly understand why you're concerned. As you said at the first hearing, you have stuff in your head that you can't forget, and I understand. I wasn't around but I understand the history and especially the history with certainly similar things that may have happened in the Acis case.

The facts are that Realdania made its redemption request on August 15, the fees that the -- August 15, but that the liquidation was the time where the management fees stopped, which incidentally were $12,000 a month based upon the level of this spot.

THE COURT: Okay.

MR. POMERANTZ: So, Your Honor, I understand your concerns, however, what I would say is, you have Mr. Seery here answering your questions. You have Mr. Seery who said he's conducted an thorough investigation. At some point, and I'm -- you know, obviously you brought up a couple of questions, at some point the creditors -- Your Honor has to accept that if the board has done a thorough analysis, and we're coming into this hearing today, and before we filed the motion, as Mr. Seery said, we crossed all our Ts and dotted all our Is.

We spent a lot of money collectively, the different firms that are involved, because we wanted to make sure it's the right thing. We understood that coming to Your Honor asking to pay investors who are related parties, given the context of this case and given the Committee's opposition, was going to be a big challenge. We thought it was the right thing to do, but we wanted to make sure Your Honor knows that the board actually did a thorough investigation, again, spearheaded by Mr. Seery, who is not just someone off the street, but as he testified, this is what he's done over the last 10-15 years.

So I certainly understand Your Honor's concerns. Mr. Seery I think has testified about the thorough investigation, and that the 12,000 a month, that I think if he got back on the stand, he would testify that would be a breach of duty to the investors to continue on getting fees. There's an obligation at some point, when the redemptions happened, to either pay the redemptions, put the fund in liquidation, and that's what happened.

And just because it wasn't done by the board, it was done before, it was important, as I mentioned in my opening, and as Mr. Seery testified, he looked at that carefully and thoroughly. He didn't want to be embarrassed, we didn't want to be embarrassed coming in and not having those answers. So, Your Honor, this is a long way of saying I think at some point the board is entitled to the deference of business judgment if they can demonstrate that they've gone through the process necessary to earn the deference to business judgment, which I think Mr. Seery has done.

THE COURT: Okay. And while we're on the subject, I mean 12,000 a month was the management fee to Highland from Dynamic. What was the management fee from Argentina, do you have that off the top of your head?

MR. SEERY: It would have been in the same -- these are approximately --

THE COURT: The same range?

MR. SEERY: -- the same neighborhood.

THE COURT: Okay.

MR. SEERY: That the meetings would be based upon fees.

THE COURT: Okay.

MR. SEERY: Or the redemptions (indiscernible) variable asset now (indiscernible).

THE COURT: Okay.

MR. SEERY: (indiscernible).

THE COURT: Okay. All right. Just a minute while I do some math.

(Pause in the proceedings.)

THE COURT: All right. I'm doing this math in my head. There's a $7.4 million note receivable from HCM Services of which Okada is the 25 percent owner of.

MR. POMERANTZ: Your Honor, 7.4 is not the demand notes. Again, 985,000 is the demand notes. The rest of those notes are performing and not in the fall.

THE COURT: Okay. All right. With regard to the motion and the objection and the Committee there's been a lot of argument about 105 and what it permits the Court to do and what it doesn't as far as fashioning an equitable remedy here. Here I mean it's clear that this Debtor has receivables owed by these related parties, although they don't necessarily match up perfectly with the amount of disbursements that are owed by

these funds and of course the funds are separate legal entities than the Debtor. So I'm not glossing over that fact or ignoring that fact.

But I do think the Court has broad equitable powers to remedy -- to fashion remedies that preserve the status quo and I think it is appropriate here to order that most of this money, that most of the 8.6 million that would go to related investors in these three funds, be put into the registry of the court pending further motions, orders, adversary proceedings anyone wants to file to make a claim to that money. I said most of it.

I am going to order that with regard to the amount that would be payable to Mr. Okada, the 4.176 million, we will subtract from that the 1.3 million that represents the demand note receivable that the Debtor has so that I'm essentially doing an equitable offset at that point. So he can only be paid -- he should only be paid from the Dynamic Fund whatever 4.176 million minus 1.3 million is, and the rest shall be put into the registry of the court. And everybody's rights are reserved on anything and everything with regarding to do tos and do froms.

I reserve the right to supplement in more detail in a written form of order to justify the Court's 105 action here. But, Mr. Pomerantz, I'd ask you to upload a form of order on this, please.

MR. POMERANTZ: We'll be happy to, Your Honor. We'll circulate it to the Committee and Ms. Patel as well.

THE COURT: All right. Well, thank you all, and --

MR. CLEMENTE: Your Honor, but just to be clear though, the other amounts, correct, to HCM Services and CLO Holdco, would that be part of the order or what did Your Honor have in mind with respect to that?

THE COURT: Well --

MR. CLEMENTE: Because I believe those are to be deposited with the Court as well, yes.

THE COURT: -- all of -- everything gets deposited in the registry of the court, except Mr. Okada will get whatever the differential is of 4.176 minus 1.3. Okay?

MR. CLEMENTE: Thank you, Your Honor.

THE COURT: All right. Thank you.

COURT SECURITY OFFICER: All rise.

*****

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

We, DIPTI PATEL, KAREN WATSON and TERRI STARKEY, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel
DIPTI PATEL

/s/ Karen Watson
KAREN WATSON

/s/ Terri Starkey
TERRI STARKEY

J&J COURT TRANSCRIBERS, INC. DATE: March 6, 2020

EXHIBIT 16

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

In Re:	)	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas June 15, 2020 1:30 p.m. Docket
Debtor.	)	
	)	UBS'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO PROCEED WITH STATE COURT ACTION (644)

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

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DALLAS, TEXAS - JUNE 15, 2020 - 1:35 P.M.

THE COURT: Please be seated. All right. This is Judge Jernigan. We have a hearing in Highland. I've got problems with this chair. Just a minute. Here we go. We have a motion to lift stay in the Highland Capital case, Case No. 19-34054. It's a motion of UBS for relief from the stay to go forward with litigation in the New York state court.

I'm going to do a roll call, hopefully as efficiently as possible. I'm going to first call the names that I think are likely to be with us, and if I don't call your name, at the end of the roll call, if you wish to appear, I'll invite you to go ahead.

All right. First, for UBS, the Movant, I'm guessing we have some Latham & Watkins folks, and perhaps Marty Sosland as well. I'll start with you. Mr. Sosland, are you by chance on the phone?

MR. SOSLAND: I am, Your Honor.

THE COURT: Good afternoon.

MR. SOSLAND: I'm on WebEx.

THE COURT: You're on the video?

MR. SOSLAND: Good afternoon.

THE COURT: Good afternoon. Who else do we have? Do we have Mr. Clubok, Ms. Tomkowiak? Who do we have from Latham & Watkins?

MR. CLUBOK: Good afternoon, Your Honor. It's Andrew

Clubok from Latham & Watkins. And I'm here with my partner, Sarah Tomkowiak.

THE COURT: Okay. Good afternoon. All right. So I think we have four objectors in all. I'll start with the Debtor. Mr. Pomerantz, I'm assuming you're on the phone with some of your team?

MR. POMERANTZ: Yes, I am, Your Honor. I'm also on the phone with Robert Feinstein, Alan Kornfeld, and Greg Demo.

THE COURT: All right. Good afternoon to all of you.

MR. FEINSTEIN: Good afternoon, Your Honor.

THE COURT: All right. Do we have your local counsel, Ms. Hayward or Mr. Annable?

MR. ANNABLE: Yes, Your Honor. Zachery Annable and Melissa Hayward on behalf of the Debtor. We're here.

THE COURT: All right. Very good. Now I'll take --

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz. Before we went to the relief from stay, there was one minor other item that Mr. Demo is going to handle that's resolved, Hunton & Williams' application. So if he could put the resolution on the record before we go into what's likely going to be a lengthy hearing. But I didn't mean to interrupt Your Honor from taking appearances.

THE COURT: All right. Thank you. You know, I didn't see that on our calendar and I thought in my brain, we continued that to today, I think. So we'll start with that

once we finish the roll call.

All right. For the Unsecured Creditors' Committee, do we have Ms. Reed, Mr. Clemente? Who do we have on the phone?

MR. CLEMENTE: Good afternoon, Your Honor. Matthew Clemente from Sidley Austin on behalf of the Committee.

THE COURT: All right. Anyone else from Sidley Austin?

MR. CLEMENTE: I think we're -- I think we're set, Your Honor.

THE COURT: All right.

MR. CLEMENTE: Thank you.

THE COURT: What about for the Redeemer Committee? Do we have Mr. Platt or others on the phone?

MR. PLATT: Yes, Your Honor. Mark Platt is on, and I believe Terri Mascherin from Jenner & Block is on video as well, and Marc Hankin is on the phone --

THE COURT: All right.

MR. PLATT: -- from Jenner.

THE COURT: Ms. Mascherin, Mr. Hankin, are you there?

MS. MASCHERIN: Yes, Your Honor. Terri Mascherin.

THE COURT: All right.

MS. MASCHERIN: Good afternoon.

THE COURT: All right. Then --

MR. HANKIN: Marc Hankin, Your Honor.

THE COURT: Okay. Very good. All right. We also

had a joinder in the objections by Acis. Do we have Ms. Patel or others for Acis?

MR. SHAW: Yes, Your Honor. Brian Shaw and Ms. Patel are on for Acis.

THE COURT: All right. Well, those are all --

MS. PATEL: Good afternoon, Your Honor.

THE COURT: Oh, go ahead.

MS. PATEL: Good afternoon, Your Honor. This is Rakhee Patel.

THE COURT: All right. Thank you, Ms. Patel.

Those were all of the most likely appearances. If you want to appear and you've not appeared yet, you may go ahead. (Pause.) All right.

MR. ROSENTHAL: Good afternoon, Your Honor. Michael Rosenthal from Gibson Dunn on behalf of Alvarez & Marsal. They're the investment manager of the Highland Crusader Funds.

THE COURT: Okay. Thank you, Mr. Rosenthal.

Any other appearances?

All right. Well, Mr. Pomerantz, or I think you said --

MR. DEMO: Your Honor?

THE COURT: -- Mr. Demo wanted to present the resolution of Andrews Kurth Hunton & Williams' employment. You may go ahead.

MR. DEMO: Yes. Thank you, Your Honor. Greg Demo on behalf of Highland Capital Management.

We did work with the Committee to come to a resolution on this retention application. We are looking to retain Hunton to help us with a tax situation arising from a 2008 tax audit. The Committee had some reservations, and we're able to resolve them. The resolution that we have is that the engagement, at least in the first instance, will be limited to a certain time period, and that's between June 15th through September 30th. And it'll also be capped at a specific dollar amount, which is $65,000 a month that is calculated on an average rolling basis over the period. So, total of fees of $227,500, although, obviously, everybody will work to keep those fees down.

At the end of that period, the end of the September 30th period, the idea is that either we'll come to a further agreement with the Committee on how to expand the retention of Hunton, or else we'll come back to this Court and seek a further retention.

The Committee would reserve all of their objections, if they had any, to the expanded retention, and the only objection that they would not retain would be objecting to Hunton's fees based on the fact that their retention was not expanded.

All fees would be applied for under Section 330 and all the other applicable provisions of the Bankruptcy Code.

And that is the resolution that we have with the Committee, Your Honor, on the Hunton retention.

THE COURT: All right. Very good. Mr. Clemente, will you confirm that that reflects the deal?

MR. CLEMENTE: Your Honor, Matthew Clemente on behalf of the Committee.

I will, Your Honor. I will confirm that. As Your Honor undoubtedly is aware, we're keenly focused on making sure that Debtor funds, you know, benefit only the Debtor estate and not other parties, and that was really the issue we had in dealing with Mr. Demo. But he accurately reflected our agreement.

THE COURT: Okay. Very good. Well, I thank you all for working that out, and I'd be happy to sign an order to this effect. So if you could please electronically submit it, Mr. Demo.

MR. DEMO: Will do, Your Honor.

THE COURT: All right. Well, the main event today, as we have discussed, is the motion to lift stay of UBS. Before we talk about oral -- or, opening statements, are there any housekeeping matters or announcements, stipulations, anything of that nature that affects how we proceed this afternoon?

MR. CLUBOK: Yes, Your Honor. Again, Andrew Clubok on behalf of UBS.

The parties, all of the parties have agreed that all of the exhibits that are attached both to UBS's motion and to all of the Objectors' papers, all of them, with one exception,

which I'll explain, are to be admitted for purposes of this hearing only. So, we've all stipulated to their admission. We won't (inaudible). And they're -- they will be deemed admitted for all purposes, but just for this hearing. We all reserve the right to object to their use in further proceedings or other matters.

The one exception and -- is Exhibit D to the Redeemer's objection. I believe that -- I believe the Debtor objected to Exhibit D. And I think that Redeemer, can't speak for them, but I think everyone agreed that that would need to be admitted for purposes of this hearing. So that's the one exception.

THE COURT: All right. I'm going to ask people to speak up or forever hold your peace. The Court is going to admit into evidence today, only for today's hearing, not for other hearings, all exhibits that were attached to the various parties' -- UBS's motion, the objections -- except Exhibit D to the Redeemer objection.

Before I get people's confirmation, let me just clarify one thing. All parties except the Debtor refer to Exhibit A, B, et cetera to their pleadings. The Debtor actually filed a separate Appendix A of exhibits at Docket No. 688 with 12 items. I assume that was included in addition to the attachments to the motions and objections.

MR. CLUBOK: Yes, Your Honor.

THE COURT: Okay.

MR. CLUBOK: Those were just duplicative of the exhibits, is my understanding, --

THE COURT: Oh, okay.

MR. CLUBOK: -- that were otherwise filed as part of the objection.

THE COURT: All right. Thank you. Anyone have anything to change about this announcement?

All right. Very good. So the record is clear, the Court is considering all exhibits attached or submitted by the parties before the hearing, except Exhibit D to the Redeemer objection.

All right. Well, I thank you all. That saves some time here today.

(All parties' exhibits admitted into evidence except Exhibit D to Redeemer Objection.)

THE COURT: Anything else?

MR. CLUBOK: Your Honor? Yes, there's one other housekeeping issue, and that is UBS filed a motion to request leave to file a reply brief. And we submitted the reply brief along with that motion. Oh, dear. Did we lose -- can you still hear me, Your Honor?

THE COURT: Yes, I can. Can you hear me?

MR. CLUBOK: Okay. We had -- yes, we had a technical glitch for a second and it warned me that we were losing

video, but everything's worked out.

THE COURT: Okay.

MR. CLUBOK: So, Your Honor, UBS filed a motion for leave to file a reply. And by the way, there were further exhibits attached to that, which are part of that stipulation that we just referenced. Your Honor, I believe, has not yet technically ruled on that, but we -- we wanted to preview those arguments. We could obviously have just made them all cold here, but there's a lot in there, so we thought it would be helpful to the parties and hopefully to the Court to seek leave to file a reply brief so that everyone can know, you know, plenty of time in advance our response as to many of the different arguments raised in the objection.

Your Honor, I think, technically, because of the Rules, we were prohibited from providing you with an unredacted copy. So I think that all Your Honor may have before you right now is a redacted version. There are some minor issues that to the extent we need to get into those details, we can certainly talk about them in open court. But we do ask that the Court rule on our motion for leave to file a reply brief.

THE COURT: All right. Do we have any objections to that? It was filed, I think, about 6:15 Thursday night, and I saw the motion for leave on Friday. Anyone have a problem with the Court considering the reply?

It's something in our Rules, I think it's pretty common,

that -- you know, obviously, the motion, the average motion to lift stay that's filed in the bankruptcy court deals with a car or a house and we have very streamlined procedures to, you know, a motion and an objection and that's it. This is obviously an atypical or something more complicated than usual motion to lift stay. Anyone have a problem with me considering the reply?

All right. Leave is granted, then, on that. I will consider the content of that reply.

MR. CLUBOK: Thank you, Your Honor. And I believe those are all the housekeeping issues that I'm aware of.

There was -- Ms. Tomkowiak reminded me -- I guess a motion -- motion to seal. Some of the exhibits are -- I think both sides are impacted by confidentiality agreements and so forth. I don't think any of the motions to seal on any side are objected to.

So perhaps those could all be agreed upon, particularly for our reply brief, and that would allow us to then get you an unredacted copy, if we're permitted, if the motion to seal is granted. Then you'll be -- we'll be able to get you very quickly an unredacted copy of our reply brief.

THE COURT: All right. Anyone have a problem with this?

All right. Let me be clear. We're only talking about the reply and attachments to it? We're not talking about anything

else out there?

MR. CLUBOK: That's correct, Your Honor.

THE COURT: All right. Well, I will grant that motion to seal.

So, again, I just want to make sure the Clerk's Office ends up being clear. You'll end up filing the unredacted version, and then I'll -- I'll be able to, obviously, compare it to what was filed. And I think -- I'm just thinking through the mechanics. The Clerk's Office always wants clarity. I'm giving you permission to file under seal an unredacted version. It's as simple as that. So, the Clerk's Office will follow up with you if they need any other piece of paper.

MR. CLUBOK: Thank you, Your Honor. And would you like -- I think Mr. Sosland can arrange, either by, whatever's the easiest, to give you a courtesy copy, either by email or by messenger, so that you can just quickly look at the unredacted version, if that'll be helpful.

THE COURT: All right. Well, yes, let's have him send it to my courtroom deputy. So he should have that email address: sgjsettings -- wait, is that it? Or is it sgj_settings@txnb.uscourts.gov? All right?

MR. SOSLAND: We have it, Your Honor. Thanks.

THE COURT: Okay. Very good. Thanks.

MR. CLUBOK: Thank you very much, Your Honor.

THE COURT: All right. Well, are there any other housekeeping matters? Otherwise, I presume you all want to make some opening statements to kind of tie this all together.

All right. Well, you may proceed with your opening statement.

OPENING STATEMENT ON BEHALF OF UBS SECURITIES, LLC

MR. CLUBOK: Thank you very much, Your Honor, and good afternoon.

Your Honor, we're here today seeking relief from the automatic stay provided by Section 362. And we also ask that the Court enter a related order that will explicitly allow us to preserve UBS's rights to try the state court action, the entirety of the claims that are permitted. Have a jury. Before a jury. So we've asked the Court do that in one of two ways, either by noting that pursuant to Section 105(a) or simply by extending the times in the bar date past the trial that we expect to have in the state court.

That's why we're here. Now let me explain why we think that relief should be granted, if I may.

Your Honor, very simply, to tie all -- you've got a mountain of paper in front of you. It is a lot more than the usual motion --

THE COURT: Uh-huh.

MR. CLUBOK: -- for relief, as you noted. And that paper that you have before you, that mountain of paper and

those many, many exhibits, are a tiny, tiny fraction of the paper that has been generated over 11 years of litigation in New York state courts.

We are here seeking the relief to allow us to proceed and complete that litigation because right now we are literally in the middle of a trial that will finally resolve the claim that UBS brought more than 11 years ago against Highland and other non-debtor related entities.

Those claims involve, like I said, not just Highland, but non-debtor entities that are not subject to the bankruptcy stay, against whom we have jury rights, and those claims have been litigated as extensively as certainly any case I've ever been involved with, and according to Justice Friedman, she said this in open court, it was the most complicated case she's ever dealt with, and she's a judge who has dealt with enormous complexity in the New York courts, including much litigation related to the aftermath of the fiscal crisis, Lehman Brothers, et cetera.

But after 11 years of litigation, five trips to the appellate court in New York and back down, five different opinions from the appellate court, including a TRO at one point -- they found that we had a substantial likelihood of success on our fraudulent conveyance claims -- after all of that, we get to a trial. We complete half of that trial. The second half of the trial is ready to be completed -- granted,

as soon as the New York courts reopen, but we'll come back to that. We expect that to certainly be within a matter of months, certainly not years.

And we should be allowed to complete that trial, a trial that has already had the judge make credibility determinations about some 20 witnesses that she's seen either live or through videotape deposition designations, almost all of whom testimony will be relevant in the second phase of the trial, many of whom, certainly, Highland's key witness, witnesses and experts. And she's literally in the middle of that trial. She's in the middle of deciding one of the so-called threshold issues. Actually, she's already decided it, and we'll get to that. But this is a case, if any case screams out for relief from the automatic stay, it's this one, to allow us to simply finish the trial that is right now literally in the middle of it.

Now, over that 11 years of litigation, I am pretty sure that every single argument that could have been made has been made, ruled on, and/or waived. And that includes these so-called two new threshold issues that, by my count, Highland's fourth set of lawyers that have touched this case over the years have now come up with and said, oh, gee, here's the key to the kingdom, some new -- two new supposed threshold issues. Those are their arguments in their papers, that if they could just convince Your Honor somehow that our claim for the breach

of implied duty of good faith and fair dealing that's directly against Highland, somehow that's affected in a way by res judicata that's not consistent with those five appellate court decisions and the countless decisions already by the trial court.

And also they want you to rule right now on how the settlement with two prior Defendants in that litigation affects the -- or may potentially affect an offset against our total ultimate judgment.

Now, mind you, that issue was already litigated and presented to Judge Friedman, and as reflected in her decision, she said that that -- that issue is properly to be dealt with as a post-trial motion. She's already ruled on that. A post-judgment motion, not right here in the middle of the case, where it's -- it's both too late and too early. It's too late because it's after the deadline for summary judgments and they didn't make this argument. In fact, they made a very inconsistent argument, and they will be estopped from making this argument.

It's also too early because it's not yet at the -- what Justice Friedman ruled in her decision was the impact of that settlement will be decided once we have a final judgment, because Highland had argued that they should get a $70 million setoff and we've argued that they may or may not, depending on what claims we ultimately win at trial. But it's a fairly

simple post-trial motion.

Justice Friedman already said -- and Highland already urged her to rule on it upfront, in the first phase. We had briefed the issue, both sides, extensively. She said no, it can be decided later.

But what's happened here is what we have seen time and time again over 11 years litigating with Highland. As I mentioned, this is their fourth set of lawyers who have been -- whose thoughts have been brought to bear on this litigation. And we noted in our brief, I think Mr. Pomerantz's firm has spent something like a million dollars by our estimate in developing these new thoughts. At least according to their fee petition as of a couple months ago, they're already up to $800,000; I'm guessing they're pushing a million by now.

And what they've done is simply reargue, tried to relitigate the same issues that have been litigated time and time again. As we explain -- it's obviously quite familiar -- on Page 4 of our reply brief, courts have routinely said you cannot use Chapter 11 to relitigate instead of reorganize. And this is a classic case of what the Debtor here is trying to do.

Now, in terms of timeliness -- and I'm going to get to that in a moment -- but in terms of how to deal with those so-called threshold issues quickly, the very fastest way to deal

with those threshold issues is to give us relief from the stay and let's present those two issues to Justice Friedman. Because from experience that we've seen and how Justice Friedman dealt with this the last time it happened, and I'll talk about that in a moment, Justice Friedman could deal with those issues extremely quickly. I would expect she wouldn't even require briefing by us, because she knows those issues extremely well, she's written decisions on both of them over the years, and there's a carefully-studied appellate court decision that relates to them.

And Justice Friedman, what she's already done in that case, and Highland knows well, is that after we tried Phase I but before the decision was issued, Highland swapped out its attorneys and came on with I think by then its third set of lawyers. And when the third set of lawyers came in, after we had already tried Phase I but before Phase II -- so, basically, where we are now -- this was, I've lost track of time, but maybe, you know, eight, nine months ago, or maybe even a year ago, as we were waiting for the decision -- that set of lawyers, they were brought on and they said, well, gee, we've got a brand-new theory that cracks this case wide open. Here's the new theory of Highland can avoid liability. And Judge, if you just let us bring this up, you won't even have to bother with silly old Phase II and you can just end this thing right now. It's a simple rifle shot.

Justice Friedman -- I wish it had been on video, I wish there had been a camera -- let's just say her reaction was clear, unmistakable, and key. And very quickly she rejected Highland, in no uncertain terms, effort to do that. Forced them to withdraw the motion. Explained to them, this is not the proper time to bring new threshold motions, years after we litigated motions to dismiss, years after we litigated summary judgment, years after all those issues went up and down to the appellate courts.

THE COURT: Can I stop you?

MR. CLUBOK: So, Highland knows this.

THE COURT: Can I stop you right there? I want to make sure I am clear on what the so-called threshold issues that you think Judge Friedman might be able to deal with better, more efficiently. I have in my brain that you're talking about the res judicata issue, and then also this issue of whether UBS released Highland as to fraudulent transfers that might be related to Redeemer Fund assets. Does that makes sense? I'm not sure I said that as crisply as possible. They say that as to these fraudulent transfers you would be pursuing, 80 percent plus were released as part of the settlement with the Crusader Fund. Are those the two threshold issues, or are there many that I'm not naming?

MR. CLUBOK: You've got them, Judge. You've got them. Those are the two issues. The one, the impact of res

judicata, which literally we've had, you know, multiple different up-and-downs to the appellate court and summary judgment rulings that are unmistakable that those should be rejected.

The other one, I would put it more broadly, a little bit. It's the impact of this prior settlement on our claim. And Highland has a brand-new theory of how that settlement agreement supposedly impacts our claim. I believe it's -- it appears from the papers and from what we've been told that this is coming from the Redeemer Committee primarily, because they make the same argument and it seems to be a new argument perhaps they came up with. Perhaps, in the million-dollars-plus spent, Mr. Pomerantz's firm came up with it. But regardless, it's a brand-new theory of supposedly how this settlement agreement operates to supposedly cut the legs out of most of our claim.

Now, mind you, Highland has already argued to the Court how the settlement agreement operates, and what they've previously argued -- and by the way, these settlement agreements were signed, I believe, five years ago. For four years and nine months or four years and ten months, we never heard this argument. Instead, what we heard in the court in New York was, oh, the settlement agreement means that Highland gets $70 million of setoff to the total claim out of -- we were seeking $500 million plus interest. They said, well, we

get a total of seventy million point five as a setoff. And there was arguments back and forth and it was briefed in front of Justice Friedman, and they asked her to rule on that upfront in the first phase of the trial.

After the briefing and after the argument that it was a $70.5 million setoff, Justice Friedman, agree with you, yes, and we said, look, it is possible they will get that $70.5 million setoff. We agree. It depends on what total claims we win at trial. For instance, if we won complete relief from all of our claims, I think UBS would agree that $70.5 million may well be an appropriate setoff, that amount. However, if Highland only wins some of its claims, and depending on how we win the claims, they might not be entitled to that $70.5 million setoff.

Nowhere did Highland ever dream up that this contract we signed with them five years ago somehow meant that they got $200 million off or $400 million off or $800 million off or $950 million off, whatever the new theory is, that somehow that settlement agreement had some incredible destructive power of Highland -- of UBS's claims. This is the first we have heard of it, you know, three months ago, after four years and nine months of living with the settlement agreement, a course of conduct, clear writing to the contrary, and parol evidence that we, if we ever had to litigate this, we would bring out.

But Justice Friedman would just look at, I predict -- it's always dangerous to predict what a judge will do -- but we have seen how Justice Friedman reacted to the last set of Highland lawyers who came in after the trial and tried to create a new argument that they hadn't raised before, post-summary judgment, post even the trial starting. I suspect Justice Friedman would be able to handle this quickly.

I've only given you, even on this one little issue, I've given you a very superficial statement about it, because it goes back years of having -- entering into this agreement, living with it for years, having a course of conduct that reflected how the parties interpreted this agreement and what it meant and how it didn't reduce -- if Highland had thought that that agreement reduced our claim from a billion to $950 million, I'm pretty sure they would have argued it four and a half years ago or 4.11 -- four years and eleven months ago.

The fact is, it's a brand-new argument. We could prove that if we had to litigate it. But if we had to litigate it, there's no one better, with all due respect, Your Honor, there is no judge in the country more equipped to handle that issue and every other issue relating to this case than Justice Marcy Friedman, who has been living with this case almost as long as I have. I think she's on her eighth year now of overseeing this case, through all these different iterations, all these different efforts by Highland to delay proceedings and to

avoid ultimately getting to a jury, which will finally set our -- the liability they owe.

So, and by the way, those two supposed threshold issues, what Highland tells you is, well, gee, Judge, if you just rule on them -- first of all, you learn about them and hear about how we characterize what was said in front of Justice Friedman, trying to tell you third-hand what we said, reconstruct what the parties have argued there, ask you to revisit her ruling. If you do all that, and by the way, if you rule in their favor, then somehow there's going to be a significant reduction in our claim for fraudulent conveyance.

It's not even true. Their math is wrong. Even if they were right about all that, we'd still have a claim for fraudulent conveyance of over $150 million. So, again, I could write a whole brief explaining that to you. Justice Friedman would know it off the top of her head.

But even if all that happened, it would not impact our claim for breach of implied duty of good faith and fair dealing, a claim that has survived summary judgment, survived an interlocutory appeal, which, by the way, Highland obtained a stay from -- this trial would have been done years ago except Highland obtained a stay from the loss of summary judgment on our breach of duty of good faith and fair dealing. It went up to the appellate court and the dismissal -- denial of summary judgment was sustained and we finally got to go

forward with the trial.

So, this little one issue that's supposedly a threshold issue, it alone has enough complexity to take up months of this Court's time. And nine, you know, nine out of ten of the results of that is not going to impact Highland's argument -- or, Highland's claim or Highland's defense in anything like the way they tell you it will. And we'd have to brief that extensively and you'd be asked to decide it, you'd be asked to ignore what Justice Friedman already said about this very same issue. All of that doesn't make sense when we're right in the middle of a trial. And those are the two supposedly threshold issues.

Now, what else will deciding those two supposedly threshold issues not get you? Or not get any of the parties? What it won't get is, if we go forward as the Debtor now wants to do, we will be stuck with two parallel proceedings. We have claims against non-debtor affiliates to the tune of well over a hundred million dollars, from non-judgment-proof defendants including in that. We have these claims. We have a right to a jury. They are not subject to the automatic stay. And we will proceed in front of a jury, as we're scheduled to do in New York state court.

Now, what does Highland say to that? They say, well, you know, we haven't done it yet, but one day we could try to remove those claims. Then we could ask the federal court in

New York to transfer those claims to the federal court here in Texas. Then we could ask the Texas court to refer it to Your Honor for a bunch of other proceedings, only so, at the end of the day, that referral then is withdrawn so that we could actually try it with a jury I guess in federal court in Texas.

I mean, it doesn't get us to a different place, because ultimately we will have a right to -- even if they get what they dream of, we'll have a right to try those claims in front of a jury, and those claims substantially overlap in terms of witnesses, facts, you know, all the -- the total trial, with the claims that they're saying, well, gee, you could just try them here after the threshold motion. Then you're going to have a trial here on the nonjury claims.

And, you know, Your Honor, that's best-case scenario. Because what actually will happen, if they ever remove the case and if they try this maneuver of getting it to Your Honor, we will, as we've made clear in our reply brief, as we made clear in our opening brief and then clarified in our reply brief, we will seek mandatory abstention, or in the alternative, permissive abstention. And those claims clearly fall within the rule for mandatory abstention. They are -- there is no independent basis for jurisdiction for those claims in this Court. The claims are a non-core proceeding, the ones against the non-debtors. The actions are obviously commenced in state court, about 11 years ago. And they can be

timely adjudicated there.

And basically all the Debtor said in response, this is -- their whole defense boils down to this: Um, we think, because of COVID and the unusual circumstances of COVID, the trial that you would theoretically have will be faster than a trial that the state court will have in New York. And by the way, when I say you, I mean really the two trials. That, at the end of the day, there'll be a trial of -- against Highland, and a jury trial against the non-debtor affiliates after the reference is withdrawn after all of the up and down. And that will supposedly be faster than just finishing things up in New York as soon as the courts open up in a few months, being the first in line with Justice Friedman to finish this trial.

Now, that is not -- there's no -- they have certainly not met their burden of proof that that is true, but moreover, it's also not the standard. We don't have to show that our trial in New York will be two months after than the trial here or two months slower. The rule and the cases we cite -- we cite these in our opening brief, and they were unresponded-to -- is that the action -- the ability of the Court to timely adjudicate is just something that you are required to analyze, not as a relative matter, not as a prediction of, gee, the state court could be four months and this Court could be two months, or the state court could be six months and this Court could be four months, even if that were possible. No. The

test is whether or not it is timely in and of itself.

And the cases that we cite on this issue, you know, in our opening brief, you know, really make it clear the way the Court should look at this. *In re TransWorld Airlines* and *In re Legal Extranet*, the latter being Bankruptcy Western District of Texas, the former being Bankruptcy District of Delaware, the courts both said, in effect, the issue is not whether the action could be more timely adjudicated theoretically here in bankruptcy court, but only that the matter can be timely adjudicated in state court.

And Your Honor, as the Plaintiff in that state court action, who've spent 11 years getting halfway through trial, and now the only thing that's stopping us is the ability to ask the Court to set the next available trial deadline, we have hopes the courts will open in the fall. Worst-case scenario, it'll open up in about six months, in the first quarter of next year, by all expectations. A few extra months to allow us to decide our case is certainly not -- it's certainly timely.

THE COURT: Okay.

MR. CLUBOK: Because some of the cases we cited --

THE COURT: Mr. Clubok, I want to drill down on that just a bit. The Phase II, which you hope will be a jury trial, there's the breach of implied covenant of good faith and fair dealing, but there's fraudulent conveyance and alter

ego. Do I understand correctly those have actually not been pleaded yet, fraudulent conveyance and alter ego? Did I misread, misunderstand, or is that correct?

MR. CLUBOK: No, Your Honor, that is incorrect. It's not your fault that you misunderstand it, because, frankly, reading some of the objections makes it very confusing. Okay?

For example, alter ego? Alter ego, the alter ego claim that has been properly pled and is the issue that we tried in that case, is an alter ego between two non-debtors, Highland Financial Partners and an entity called SOHC. Acis, in their objection, spent a lot of time trying to explain to you how somehow that you're going to know more about the alter ego claim because since UBS's assets increased in value, somehow it affects the alter ego claim. And I don't blame Acis. They haven't lived with that case for 11 years. I don't think their -- I am sure their counsel didn't do this intentionally. That has nothing to do with our case. What it does is just demonstrate how confusing and complicated the proceedings are in New York and for some new lawyers, particularly ones from, you know, representing either Acis or the Redeemers, who don't really understand our case. They start sending things, and then the next thing you know the Court is I'll just say misunderstanding the claim.

The alter ego claim that is going to be litigated in Phase II is one that we have dealt with for years, and it's a part

of our TRO in which we showed a substantial likelihood of success in a decision that we received in the appellate court when we originally froze certain assets.

It is -- again, I could write a whole 'nother four page -- four -- you know, extended the briefing just on that part of our case. But suffice it to say that alter ego claim has also gone up and down to the New York appellate courts, that not only was it pleaded, it was pleaded, it survived motions to dismiss. It went up to the appellate court at least three times. It was the subject of a summary judgment motion. They lost the summary judgment motion. The summary judgment motion was appealed. They lost that.

So that alter ego claim, not only was it pleaded, it's ready to be tried.

And by the way, in all of the briefing that the parties did in New York -- I suspect Acis doesn't know this. I suspect Redeemer -- why would they; it's not their responsibility to know this -- the parties all agreed: That was a New York State law issue. The test that the parties have agreed should apply is a New York state test for alter ego. It, again, relates to two entities that are not the Debtor. It's complicated by how that relates into the case. But it really just shows the perils of asking Your Honor to come along, after 11 years, and try to figure out what the heck is going on in that case, when Justice Friedman would

answer that in five seconds.

THE COURT: Okay. You're probably getting to this, but you didn't answer the fraudulent conveyance question, and I'm guessing the answer is no, that has not been pleaded yet, and you have to win on the alter ego argument before you have standing to pursue that, or no?

MR. CLUBOK: I hate to say this, Your Honor, but that's incorrect. Again, I don't like to say that to judges ever. But what we pleaded from the beginning, or actually from -- I think from maybe 2011, not the -- you know, two years into the case, we amended our pleadings, subject -- and that briefing or those repleadings were subject to motions to dismiss, summary judgment, held argument, et cetera. Both the fraudulent conveyance and the alter ego have all been pled. They've survived motions to dismiss. They've survived summary judgments in New York, where you get interlocutory appeals of state court decisions. They've survived multiple trips up and down in the courts. And, again, like the alter ego, the fraudulent conveyance was already subject to a -- the TRO, which is -- which is the basis of our TRO. We presented both the fraudulent conveyance evidence and the alter ego evidence already to the appellate court as a part of getting our TRO. We submitted it all to the trial court as part of defeating summary judgment. And all of this has been upheld.

THE COURT: Okay.

MR. CLUBOK: So, yes, all of that has already been litigated. It's not --

(Sound cuts out.)

THE COURT: Whoops. What just happened? What just happened?

(Pause.)

MR. CLUBOK: ... issues.

THE COURT: Okay. Here we are. We lost you for about 30 seconds there, Mr. Clubok.

MR. CLUBOK: Those were my best 30 seconds, Your Honor.

THE COURT: Let me ask you something. Maybe it's fate. What I hear you saying, and you may have a lot more to say, but is that if I lifted the stay, there would be great efficiency, Judge Friedman would quickly, quickly deal with these threshold issues, and there has been so much already adjudicated and motions to dismiss and motions for summary judgment and appeals back and forth that you think you'd get to your jury pretty darn fast? Nobody can say when, but you think you're going to get to a jury pretty fast if it goes back to the state court. Yes or no?

MR. CLUBOK: Absolutely yes.

THE COURT: And so you -- okay. Giving you, you know, the benefit of every doubt here, you think -- and I'm going to be as kind as I can be on this -- but a jury of 12

New Yorkers, you know, cab drivers, janitors, nurses, God love them, they are the best trier of fact on issues of credit default swaps and CLOs and offshore transfers? I'm just trying to get that one, why you want a jury trial on this kind of subject matter. That's a hard question for you to answer, I suspect.

MR. CLUBOK: No, Your Honor, it's not. It's easy. All the hard issues, all the complicated questions of CEOs and credit default swaps and CSs, those were already decided by Judge Friedman, who was the finder of fact on the breach of contract claims. The contract has a jury waiver clause. So Justice Friedman is the -- she --

THE COURT: Right.

MR. CLUBOK: -- was the finder of fact on those complicated issues. She's already made factual findings and credibility determinations on all those complicated issues. There are two sets of remaining issues that are -- were scheduled to be tried concurrently. That is the relatively simple issues of fraudulent conveyance, alter ego, and punitive damages. Those, we have a right to a jury, as Justice Friedman has already found, against all the Defendants. Okay? And we absolutely want our right to a jury.

I don't -- Your Honor, we don't do it lightly. I can't get into the jury research that's been done by both parties,

but suffice it to say we are one hundred percent (audio gap) we want a jury for the claim. And we've already told Judge Friedman that's what we're going to do.

The more complicated claims, the, gee, what's a credit default swap and all that other stuff, that has already been decided, all those issues, by Judge Friedman.

And what happens in the second phase is Judge Friedman gets to say to the jury, I've already decided these following facts. I will instruct you that you are to accept these facts as true because I've already found them. That's the way it works in these bifurcated trials where you have a judge deciding some issues and then you have a judge and jury deciding others, in New York state court.

We -- the parties spent months and months and months going through how to do this. We agreed this is -- by the way, I think it was originally Justice Friedman's idea. Something else in the papers and they try to -- I could write a whole 'nother brief about how we ended up with that kind of proceeding. But it was, I believe, originally Justice Friedman's idea. Highland's lawyers were very much for it. In fact, they -- they were the ones originally who insisted on the jury. Originally -- it is the case that long ago we had a noted issues years ago where we hoped that maybe the case would just go faster if we went to a jury and there was no position filed. But Highland insists on a jury, and under the

law in New York, when any party insists on a jury, all parties have the right to it.

We spent months and months going back and forth on that issue. Many discussions, both on the record and in chambers. And we got to the point where what Justice Friedman said was, I'll do the hard stuff, I'll do all these hard issues in Phase I, the stuff that maybe we don't trust a jury to do. But besides, we have a jury waiver.

By the way, frankly, Your Honor, I believe in juries. I've had super-complicated cases and we try to make them simple if we can, and, you know, I think New Yorkers or Texans, whether we try -- whether we try these claims in New York or if the defense gets their way and they get to remove, to transfer, or refer down, then withdraw the reference, and we try it to a jury in Texas in federal court, I trust the jury will be able to understand it. We'll make it simple and we'll make it clean for the jury to understand. And we're sure as heck not going to waive our right to a jury because now Highland's fourth law firm suggests we could.

What's really going on here, Judge, is that they've been in front of Justice Friedman for years. They know how a lot of these issues are going to come out, because she's already ruled on all these issues. And we're in the middle of a trial, and except for COVID and except for -- and I haven't -- this is the one other issue that I've not really gotten to --

except for the detrimental reliance we had on the promise that Highland made to us back in December, late November/early December, when we first got this decision, we would have come right away to the bankruptcy court and said, hey, we're in middle of a trial. Justice Friedman had promised us, as soon as she issued her first ruling, she would set the next available jury trial date immediately. That was the deal we all had.

We were ready to try the case, if not before Christmas, certainly in January of 2020. Certainly, the first quarter. We would have done that. We would have come to the bankruptcy court and we would have said, Give us relief from the automatic stay because, come on, we're in the middle of a trial. There's a bunch of non-debtor affiliates. This will go fast -- there's no possible way it could go faster. And we were ready to do that, and Highland said to us, their general counsel, Scott Ellington, said to us, no, no, no, please don't do that. There's all these reasons why we don't want you to do that. We think it'll facilitate -- we'll work with you in good faith on settlement. We want to keep the decision nonpublic for a while, while we have good-faith settlement discussions. We -- we will enter into good-faith settlement discussions with you, and we will work with you over the next few months. And don't you worry, because we will tell Justice Friedman that if you give us six months, we all agree that the

trial can happen in six months from now and we'll all push for a speedy trial as soon after what is now June of 2020 as possible. That was the agreement we reached.

THE COURT: All right. Mr. Clubok, I'm going to save you some time right here. If you're arguing that there was a waiver of Highland's right to oppose the motion to lift stay, if you're arguing there's an agreement that should be binding on them to lift the stay, that's just not going to persuade me. We have other parties in interest who are the beneficiaries of the 362 automatic stay. So I'm just going to tell you right now, I don't think there's anything more you can say that's going to persuade me on that one. Okay?

MR. CLUBOK: Appreciate it, Your Honor. And I will take your advice and not continue, although I will reserve my right to reply to say one more thing about it, or -- if you let me. But we -- I want to be clear. We're not saying you're forced to hold -- uphold that agreement, even though we had it in writing and even though we told another -- a judge, a state court judge, that that was the deal. We're not saying that you're forced to hold it.

We are saying that you are entitled to consider, when you balance the equities, and you hear them now saying, gee, there's going to more -- several more months before you get to trial in New York: Well, sure. The reason we didn't have a trial back in January was because of that agreement. That's

the only part we're saying. We're not saying you're forced to now hold onto it. But there was some serious detrimental reliance, because they said that they agreed with us that the right thing to do six months hence from now, after trying to settle, would be to tell Justice Friedman and to try to seek to lift the stay.

That's the only reason we bring it up, not because you're bound by it, because we respectfully ask you to consider that when you hear their arguments of, gee, now it's going to take another six months or so, or three months or four months or six months or whatever it'll take in New York. Yeah. The reason we've waited six months was because of that agreement. Okay? That's the only reason I bring it up.

The final thing that I want to say, Your Honor, is just that I want to make it clear: These so-called threshold motions, they are not threshold motions. They are motions that are rehashing arguments that were made years ago, repeatedly, that they think, because they're not in front of Justice Friedman and because the New York Court of Appeal I guess wouldn't have jurisdiction over however you rule, that they can get away with relitigating issues that have already been decided in litigation, they've already been ruled upon, or they were long ago waived. Or there's estoppel that applies.

And we -- the threshold issues that we would argue about,

those so-called threshold issues, are -- is all of that stuff. But we'd be litigating whether they could even pursue those claims in front of Your Honor. Then we'd litigate the merits of the claims. Then, even if they were resolved, they don't take care of 95 percent of the claims that we have against the Debtor.

If we were in front of Justice Friedman, she would know what I'm talking about in a heartbeat and she would be able to rule on this and she'd -- because she's done the same thing when they tried this. They came up with some brand-new threshold issue about a year ago that they tried to present to her. They said, hey, don't bother to issue your ruling; we have a new threshold issue that'll just cause us to win. And she, you know, politely let them have it. And that is because it's too late, it's past summary judgment, it's already been decided on by the appellate courts in New York, we shouldn't have to relitigate it, that alone is prejudicial, and by the way, won't even have the impact they say.

So, Your Honor, I'd just like to conclude this opening. I really appreciate you giving me all the time to make all of these arguments. I realize you don't love our they got a promise argument, but I do, like I said, even on that one, there's a reason we raised it.

But at the end of the day, there's no court better equipped to conclude these proceedings than Justice Friedman's

court in New York. There's no judge in the country who could possibly ever catch up to her on this case. There is definitely no judge in the country who's already made credibility determinations, in the middle of a trial, in which, by the way, she'll be called upon to be the fact-finder again in the second phase, because part of the claims are for a judge to decide.

So she's in the middle of making these determinations. She's already seen witnesses. There was no videotape of the trial so there's nobody who can now jump into the middle and make new credibility determinations. And Highland, you know, at least the new Highland, the new folks in charge of Highland now, I guess they think a new bite at the apple, a chance to relitigate here in this Court, maybe a different result, maybe confusion will reign and the Court won't understand, you know, what the nature of the claims are or think that, you know, that we just pled these for the first time or they haven't been pled. For, again, no fault of Acis, no fault of Redeemer, they don't seem to understand these claims, and there's no way they could because they haven't lived with them. And again, our claims involve claims against non-debtors as well as the Debtor.

All of those reasons are why it would be very prejudicial not to lift the automatic stay. There has been no substantial showing to the contrary. And UBS, having come forward with

this evidence of cause, showing that cause exists to lift the automatic stay, as Your Honor knows, the Debtor then bears the burden to show otherwise. They haven't met that burden. They can't meet that burden. The things they say in their papers are all what-ifs and speculation and, gee, if we just do this, maybe we'll win this and maybe this will happen. That is not satisfying the burden to overcome our request for relief from the automatic stay, so that after 11 years of litigation our case can finally finish, be brought to a closure, and we can get a -- one court to conclude this business of deciding the merits of these claims.

THE COURT: Okay. Just one more question for now. The trial, the bench trial, was 13 days between July 9th and July 27th, 2018 in Phase I. The judge issued her written ruling -- when was it? Quite recently, right?

MR. CLUBOK: Well, November of 2019. So, a little -- it was actually issued originally in November of 2019. The parties, as I said, as part of the deal, we agreed to keep it nonpublic for a while and it wasn't really issued until January because we, in good faith, Highland said they wanted to work with us on settlement, and that's what we started doing.

THE COURT: Okay.

MR. CLUBOK: So it was issued in November of 2019.

THE COURT: Okay. My point is, does it help you or

hurt you that it took Judge Friedman almost a year and a half to issue the written ruling? I mean, when I say does it help you or hurt you, help or hurt you, I'm thinking, whoa, the Fifth Circuit would really slap my wrist if I took a year and a half to get a written ruling out. We have, you know, our slowpoke reports. If I take more than 60 days to get a ruling out, you know, I'm going to get an embarrassing phone call, perhaps. That sounds like a very long time.

On the other hand, you might tell me, well, she was becoming such an expert during that 18 months that now she'll be really quick.

So, what is your response to that?

MR. CLUBOK: Several things, Your Honor. Originally, when Justice Friedman, we had the trial, she said, you know what, I'll have -- this is complicated. It was enormously complicated. And it did take a long time for her to digest the mountains of evidence. It is not an easy case. Okay? She said, it'll take me a while, but I'll finish up by about October and then we'll immediately -- then we'll be ready to try the case in the jury trial in October. That's what she originally said.

We had post-trial briefing, though, Your Honor, and the parties both wanted it. And then, frankly, there was medical issues on the side of the Defendants that were raised, and we were asked to greatly extend the period for post-trial

briefing. We did that, obviously, without a second question, without, you know, oh my gosh, is it going to delay the trial for another few months, our decision, even though it'd been ten years. We didn't -- we -- and counsel, I'm sure, I'm a hundred percent certain, would confirm this. They were very appreciative. And we just said, you know, take whatever time you need.

That significantly delayed the post-trial briefing. So the post-trial briefing wasn't completed until, I believe, you know, after the original time she was going to do her trial. So that was a big delay.

The other thing that happened was Highland then brought in new counsel. And like I said, they all of a sudden -- so we'd already tried the case. We'd already done the post-trial briefing. Highland then brings in new counsel. That was their third firm. And those counsel said, hey, we've been looking at the record and we see a massive issue that the other two prior counsels missed and now we want to bring a new threshold motion. That's what they call it, a new threshold motion. And then we got deterred on that, with them seeking to bring -- file leave to bring new threshold motion and asking the judge and we got delayed on those things as well.

The -- that motion that they brought, it took Judge Friedman one week, one week to rule on it once they brought that.

So, yes, she learned a lot during our trial. She studied a lot. She is a perfectionist, and she dug in like I've -- you know, few judges I've had. But that so-called new threshold motion, which was super-complicated and it had all kinds of new theories and was going to crack the case, one week, it took her, to opine.

So I'm confident that these new so-called threshold motions, she would see them for what they are, not threshold motions, rehashed arguments, either too late or already overruled, and she would be able to deal with them quickly.

Also, Your Honor, a jury, you know, the next phase, as soon as we can get a jury, the jury doesn't get -- juries, it's usually my experience, don't take weeks or months to deliberate. You know, they're not going to take weeks or months. We're going to go sit in front of a jury, we're going to present our case, and we're going to get a decision lickety-split from that jury, I'll bet. Maybe in a few days. You know, any jury, I guess, could hold up. But even the fastest judge, I daresay that jury will be faster than the fastest judge.

It is funny how we trust 12 people, or New York may be fewer than 12, to make a decision very quickly, where a judge is given, at least in federal court, 60 days, and in state court sometimes more. But juries somehow, with that collective group, figure out a way to do it, and they'll give

us a decision, you know, within a few days after the trial.

THE COURT: Okay. I said that was the last question. This really is the last question, for right now. Mediation. Did you all ever mediate this?

MR. CLUBOK: Yes, Your Honor. That's a terrific question. So, we did mediate this several times over the years. Those mediations ultimately led to settlement with two of the other Defendants. One of them, the Redeemer Committee. So those mediations were successful, then. We did not get to a success point with Highland back then.

However, in November, once we got the decision -- and by the way, for years, all we heard was: You have no chance of winning, we have a million in setoffs, there's going to be this, that, and the other thing, your $500 million plus interest to a billion-dollar claim is going to be -- you're going to have lost money -- Highland. That's what we had to hear for many years. So we couldn't get to settlement.

But after the judgment and after, I think, reality set in, prior to the new law firm and new set of directors taking their fourth fresh look at this, we -- we didn't lightly enter into the agreement in November. We very much believed the people who were running Highland at that point, that we could have a very productive settlement discussion. I don't really -- I think, if you were betting, I don't think you would bet that there's going to be a trial, regardless. I think what

you'd bet is reasonable people, at this point, now that we have the guidance of Phase I, should be able to go have a mediation, figure out a value for the claim, and we wouldn't have to try this case anywhere.

What Highland wants to do, though, what they're trying to do is naturally put their thumb on that scale of that mediation. I mean, by the way, we thought that would have happened in the last six months. We've asked for it repeatedly. We've suggested mediators. That's what we'd like to do. We do think that the claim should be subject to a mediation. And frankly, all the claims in this case could probably be -- could do with mediation and help from a -- mediation or an arbitrator.

We thought that would happen. It hasn't happened. We hope that it does happen. But what Highland wants to do here now is put their thumb on that mediation by saying, hey, we already know how Justice Friedman would rule on these so-called threshold issues, and by the way, we know what we're probably faced with, because we probably did juror research too and we know what we're facing in front of a jury in New York. So we just want this judge to help us out in our --

THE COURT: Okay.

MR. CLUBOK: -- settlement negotiations by making it more complicated for you to recover.

THE COURT: All right. Thank you, Mr. Clubok. All

right. I will hear from Highland --

MR. CLUBOK: Thank you, Your Honor.

THE COURT: -- now. Who is going to make the argument for Highland?

MR. FEINSTEIN: That'll be me, Your Honor, Robert Feinstein, Pachulski Stang Ziehl & Jones.

THE COURT: All right. Thank you. You may proceed, Mr. Feinstein.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. FEINSTEIN: Thank you, Your Honor. First, good afternoon. Can you hear me and see me okay?

THE COURT: I can, perfectly. Thanks.

MR. FEINSTEIN: And one of my colleagues, Elissa Wagner, is going to share her screen so that Your Honor can see just a few slides --

THE COURT: Okay.

MR. FEINSTEIN: -- while I talk.

So, Your Honor, this is a very important day for Highland, the Debtor. You know, my colleagues are on the call, and I believe some of our directors are on the phone as well. The Debtor wants to make progress towards confirming a plan in this case and make distributions to creditors. That's one of the principal goals of Chapter 11. But here, the Debtor's ability to do that has been stymied by one creditor, by UBS, asserting a putative claim -- and I say putative literally --

putative claim so large as to dwarf every other claim in the estate.

Mr. Clubok has argued since I've met him that he has got a way of showing that Highland is going to become liable for the billion-dollar judgment that was entered against the Funds, but there he leaves out a lot of the story. He's testified quite a bit from the podium, Your Honor. And while I can't cross-examine him along the way, I will tell you things that he said that are not consistent. And there's a lot of testimony about what Judge Friedman said, what the client said, what previous lawyers said. There's not enough time to go into it, Your Honor, and some of it, I think, is irrelevant.

But after all this time, and Mr. Clubok in this case, since the beginning of Highland's bankruptcy, has said that UBS has a good claim against the Debtor for over a billion dollars. On that basis it obtained a seat on the Creditors' Committee, which, by the way, opposes Highland's motion. But it's now serving to gridlock the entire bankruptcy case. Nobody is going to negotiate a plan -- and this is not just Highland, but other creditors -- with a creditor who claims, without a judgment in hand, that he has got a claim of a billion dollars against the Debtor, and on theories that are atypical, unusual, and that should be rejected.

But, you know, let's start with the fact that when Mr.

Clubok started the case, he brought a breach of contract claim against Highland, the Debtor, for the liability of the Funds that, you know, was the subject of the Phase I trial. That breach of contract claim against Highland was dismissed. But now what he's resorting to are a bunch of theories, and breach of implied covenant and alter ego.

And Your Honor asked a question before. It was a good one. And that is: What is the status of the alter ego claim? And Mr. Clubok answered about a different alter ego claim. Their fraudulent conveyance claims don't work, Your Honor, unless there's a link in the chain that's created, meaning that HFP and SOHC have to be alter egos. Otherwise, Highland would not have standing -- excuse me, - UBS would not have standing to bring the alter ego -- to bring the fraudulent conveyance claim.

But here's the point, Your Honor: The alter ego claim against Highland, the Debtor, has never been asserted. Never. What's going on here is -- and I'll testify, I guess, in this instance -- Mr. Clubok has said to me and others, hey, I didn't -- I never brought a pleaded claim against Highland, the Debtor, as the alter ego of the Funds, but I didn't -- I didn't have to. I can do this later. I can do this as a supplementary proceeding under New York practice. And that's categorically wrong, there, as here. Highland was a party to the initial case. And we cited the *Board of Managers* case in

our brief, Your Honor, which I'll get to in a bit, to show that that claim had to be brought at the time or it's barred by res judicata.

So, but the salient point here, Your Honor, is that one of the claims that Highland -- that UBS is asserting as a basis for a billion-dollar liability has never been pleaded, has never been brought, has never been tried. So when Mr. Clubok says we'll be litigating, these are issues that were already rejected, that is categorially false as to the alter ego claim.

And so much of what else he said in terms of what we're relitigating is simply inaccurate. The trial court in New York never ruled on the effect of the credits from the fraudulent conveyance settlement. What you heard Mr. Clubok say is that Justice Friedman said, we're not dealing with this now, we can deal with it later. But to suggest that that's being relitigated is just categorically false. Mr. Clubok may know more about the state court proceedings, but that doesn't give him the right to mischaracterize them. This is why there are transcripts. This is why there are opinions. That's what we're relying upon, Your Honor, to make our case.

So, Mr. Clubok has acknowledged that, on this motion, UBS has the burden of showing cause. And that's a heavy burden, Your Honor. And we don't think that's been established here, for a variety of reasons that I will try to relate.

As we've said, Your Honor, we do think that there are two threshold issues that have not been litigated in state court that, if decided, would take a lot of the mystery out of this case about whether UBS's claim is a billion dollars or $50 million. That's a huge difference. And parties, the other creditors who hold substantial claims, who want their recoveries, aren't going to engage with a creditor who has a highly-disputed billion-dollar claim that they knew, as we do, is a small fraction of that, if it can be established. And again, there are serious substantive defects with the fraudulent transfer claims that we think, Your Honor, on a threshold basis, Your Honor can dispose of the notion that there's a billion-dollar claim in this case relatively easy, easily.

So I do want to just revisit a little bit of the background to this case, Your Honor, just to kind of set the record straight. And, you know, as I said, the first time that UBS filed suit, it brought a contract claim against Highland, the Debtor, and that was dismissed. And the basis for the dismissal is that the documents that were signed between UBS and Highland -- there was an engagement letter for the structuring of the CLO syndication, and then there were two warehouse agreements. And Highland was a signatory to the warehouse agreement, but it was the Funds, it was the non-debtor Funds who were the parties who were ultimately liable

if there were investment losses.

And when the state court dismissed Highland, the Debtor, from that case, it did so saying that Highland never, quote, undertook that liability. It was not a guarantor of that liability. So there's -- that is Mr. Clubok's first foray. It was a complaint that he started in February of 2009. And while he's amended it to try to add different claims, it does not change the fundamental fact that, as a matter of contract, Highland, the Debtor, was found to be not liable for that billion-dollar judgment that was adjudicated in Phase I of the trial.

And, as a result of the fact that Mr. Clubok put his -- all his eggs in a basket in his complaint that he filed in 2009, under res judicata, and the single action theory, which is -- I think it's true outside of New York as well as in -- is that if you're going to sue somebody based on a set of facts, you need to put it all in there. You need to put all of your claims in there. You can't sue people seriatim. You can't file certain claims and then, if you fail, come back later and try to add new claims based on the same underlying facts that were available to you when you first filed the complaint.

That is the basis of an important ruling, Your Honor, by the Appellate Division on res judicata, which is that, having had his opportunity to plead claims based on the facts as he

knew them, Mr. Clubok chose certain causes of action and left others out. And his claims were dismissed. But now he can't come back and come up with new theories based upon facts, operative facts that were known to him when he filed his first complaint.

So the upshot of the Appellate Division's ruling is that UBS is barred from bringing claims based on operative facts that occurred prior to the date of their first complaint.

Now, Mr. Clubok tried to spin this in his opposition papers, in the reply, and I think mischaracterized it. He said that it's simply untrue that he is barred from asserting claims based on pre-February 2009 conduct. That's not what the Appellate Division ruled. What the Appellate Division ruled was it may be possible to bring in evidence of stuff, the things that occurred prior to that date, but you're -- did I lose Your Honor?

THE COURT: No.

MR. FEINSTEIN: Oh, okay. I see a little circle.

THE COURT: Oh.

MR. FEINSTEIN: I thought maybe you froze.

THE COURT: Okay.

MR. FEINSTEIN: I'm sorry.

THE COURT: I'm here.

MR. FEINSTEIN: Thank you. Thank you.

So, in order to bring a claim, you have to rely on

operative facts that form the basis for the cause of action from and after March of 2009. Does it mean that evidence about things that happened before then is inadmissible? No. My colleague has -- Elissa has put up on the screen, Your Honor, a portion of the Appellate Division's ruling in 2011. And it couldn't be clearer, Your Honor. It says, "Here, to the extent that claims against Highland in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies."

Okay? So, for that decision to have meaning, and that decision has never been appealed, that means that operative facts that support causes of action from and after February of 2009 are fair game. But if any claim is based on operative facts that occurred before then, it's barred.

And based on that, Your Honor, and that alone, there is no liability here, under contract or any other theory, for implied covenant or alter ego, for the breach of contract, which occurred in 2008, before the first complaint was filed.

So it is a difficult, if not impossible, path for Mr. Clubok to try to conjure up a claim that fits within the res judicata bar by the Appellate Division that tries to go back in time and hold the Debtor liable for a breach of contract that happened in 2008. It just doesn't work.

So, let me address, Your Honor, there are three claims that they assert --

Elissa, will you put on Slide 2, please? Thank you.

There are three claims that --

THE COURT: Now, are you trying to share the content with me and others of what Elissa is putting up?

MR. FEINSTEIN: Yes.

THE COURT: Okay. It's not --

MR. FEINSTEIN: I hope you're seeing it.

THE COURT: It's not working. I just see you. I don't see the shared content.

MR. FEINSTEIN: Ah, okay. All right. Well, it's no matter, Your Honor. I'm going to plow through and we'll make like the slides don't exist.

THE COURT: Okay.

MR. FEINSTEIN: Sorry.

THE COURT: If you want me to look at one of the exhibits as you talk, I can do that.

MR. FEINSTEIN: Your Honor, oh, no. It's okay, Your Honor.

THE COURT: Okay.

MR. FEINSTEIN: (garbled) document. It's -- technology in the last few months has been a challenge for counsel and the Court.

THE COURT: For all of us, uh-huh.

MR. FEINSTEIN: It really has.

So, Your Honor, there are two pleaded claims and one

unpleaded claim by UBS against the Debtor, and we want to consider them one by one.

So, one of them is the breach of the implied covenant of good faith and fair dealing. That's been pleaded.

Another is fraudulent conveyance. That's been pleaded.

And as I noted, Your Honor, the last theory is alter ego that Highland, the Debtor, is the alter ego of the Funds. That's never been pleaded. And Mr. Clubok's view is, I don't need to do that, I can do that later. The *Board of Managers* decision that we've cited shows that he had to do it already and he didn't.

So the implied covenant claim, Your Honor, I think I've addressed, but there are a couple other things I want to say about it. First of all, if Your Honor will allow us to move forward and brief this in the context of a claim objection, we think that very quickly we could impress upon Your Honor that this cause of action fails. Again, the only basis that this claim can be brought forward, because it was pleaded after the initial complaint, it has to rely on post-February of 2009 facts. Let's be clear that this claim was not brought in Phase I. And the only -- only breach of contract claim was litigated in Phase I. There was no judgment rendered against Highland, because, again, they weren't -- they were found not to be liable under the contract.

The implied covenant, as we, again, if you'll let us brief

this, Your Honor, the implied covenant theory can't be used to create obligations on a party that are inconsistent with the express terms of the party's contract. And the Appellate Division decision in 2010 that dismissed the contract claim made it very clear that the contracts contain, quote, no promise by the Debtor to undertake liability with respect to UBS's losses.

So you can't, under applicable law, Your Honor, use an implied covenant theory to contradict a contract, to create an obligation that's not in the contract. But that's precisely what's being done here. So, and to be clear, Your Honor, the -- well, let me move on.

The next thing that they asserted is alter ego. And as I said, Your Honor, that has never been pleaded. The *Board of Managers v. Hudson Condo* case -- excuse me. The *Board of Managers v. Jeffrey Brown Associates*, which we cited in our brief, is directly on point, that res judicata bars the assertion of an alter ego claim against a party that was initially named in the lawsuit. So that the -- while you may be able under New York law -- and I've practiced here for 40 years -- you may be able to use a supplementary proceeding to assert a judgment against a party who was not named in the lawsuit as the alter ego, but if that party was named in the lawsuit, you needed to assert this at the outset. And they didn't, for whatever reason. But that means that this claim

is also barred by res judicata.

So then we get to fraudulent transfer, Your Honor. And on fraudulent transfer, there are -- the issue really is one of simply acknowledgment that the *ad damnum* has to be reduced because there were settlements. So, the initial fraudulent transfer claims -- which did occur, by the way, after February of 2009, so those are fair game under the time bar -- they assert that HFP transferred approximately $440 million of assets to a bunch of Highland funds and to the Debtor in March of 2009.

In 2015, UBS settled with two -- on two of those counts. It settled with Crusader and Credit Strategies. Those were 80 percent of the amounts that were the subject of the fraudulent transfers, again, under -- there are two ways to look at the settlement, Your Honor. One is that there should be a credit for the Defendants on account of the dollars that were paid to settle the claims. But here, the dollars that were paid were for far less than the face amount of the *ad damnum*. Out of the $240 million of *ad damnum*, oh, $180-or-so million were the subject of the two claims that were settled.

So it just does not pass the straight-face test or any kind of logic for UBS to argue that it could still sue Highland, the Debtor, for $240 million, when it settled claims that Highland was named on or Highland signed the settlement agreement, like UBS did, leaving only $50 million worth of

transfers out there.

So, even with post-petition interest, you would get to maybe $90 million on those claims. That is a far cry than a billion-dollar claim. And it's a game-changer in the context of a bankruptcy where parties need to negotiate with one another and the Debtor to try to come up with a consensual plan. That's impossible when there is a chasm between what the estate and other creditors think UBS's claim is worth and UBS running around telling the world, I've got a billion-dollar claim.

We need to bridge this gap, and we need to bridge it quickly or this Debtor is going to languish in bankruptcy for an indefinite period of time.

And Your Honor, the -- Mr. Clubok, on the one hand, said, well, Justice Friedman is very familiar with this. These -- Phase I was a prelude to Phase II. That's not true. That's not true. They're very different claims. Phase I was just a breach of contract liability. Phase II has got all sorts of theories and operative facts that occurred -- or, based on operative facts that occurred well after the breach of contract claim for fraudulent transfer.

So it's a fallacy to say that another judge other than Justice Friedman couldn't decide these issues, because these facts have not been presented to Justice Friedman. The legal theories have not been adjudicated by Justice Friedman. We'll

guess at how long it might take to get in front of Justice Friedman in a moment. But the point is, they are very different. And in fact, as we've noted in our brief, UBS counsel said in state court that the remaining claims, quote, have little to do with the breach of contract claims. They present new parties, new factual issues that were not addressed in Phase I.

So, you know, we think that there is no efficiency in going to state court. In fact, just the opposite.

And let me just stop and talk about that, Your Honor. I may be the only attorney on the phone who practices in New York. I haven't been in my office in over three months because it's -- because of the shutdown order. Lawyers are not essential services in New York City. Probably a lot of people would agree. So I haven't been able to go to my office. And you can't go in the courthouse.

Your Honor, I want to just cite to Your Honor the website of the New York court system: www.newyorkcourts.gov/crest. The court, and this is the court administrator, issued a press release with regard to the status of the New York City court system. So, the New York court system is now entering Phase I. And again, this is all a matter of public record. Phase I allows the judges and the clerk and security to go into the courthouse, but not the general public. There are no hearings going on, as you -- as we would normally expect. I mean, the

New York City courthouse is a very busy, bustling place that usually is overrun with people. I saw a picture online this morning where the building was empty. Why? Because there are no proceedings going on. The justices are now going to try to get up and running and maybe start doing video hearings. But the idea of a jury trial in that courthouse this year is unimaginable for me, Your Honor. Unimaginable. Because before you get out of Phase I, you've got to go to Phase II. And Upstate New York, some of the courts have now gone into Phase II, where they're hearing only essential family matters: adoptions, child custody, things like that. They're not hearing commercial cases. That's Phase II.

I don't know whether Phase III encompasses jury trials, but we're two phases off of that in New York City.

So, I, you know, I continue to believe, Your Honor -- again, this is my opinion -- that this case will not be tried this year, and I think there is a chance that it won't be tried next year. And in his presentation, Mr. Clubok said, oh, this is going to happen in three months. I wish. I don't think it's going to happen in six months. But then he says, And once the courthouse doors are open, we're going to be first in line. There is no evidence. I mean, this is one of those areas where Mr. Clubok is testifying with no basis at all. Okay? There's no basis to believe that the UBS-Highland case is first in line when the courthouse opens for a jury

trial. The courts have -- even in a non-pandemic situation, Your Honor, I've been in practice here a long time, it takes a long time to try a case in New York. And you can see that the 11-year history of this case was a function of there being several lengthy delays, like the year and a half delay in having the Phase I trial decided.

So, you know, there's just -- it's delay upon delay. When are the courts going to open? When are they going to open for jury trials, and where will this case be in the queue? And then how long will it take to decide? Your Honor, I submit to you that it's -- if it's not months, it could be years.

And here's the problem. This puts a freeze on Highland's bankruptcy case. Highland wants to get out of bankruptcy. Highland wants to distribute its assets to creditors. If the case is going to be held in suspense indefinitely while we wait for the court system in New York to reopen or the UBS-Highland case to make its way to the front of the queue, to pick a jury -- I don't know how you're going to conduct a jury trial in the age of pandemics, how people are going to evaluate the credibility of witnesses who are wearing face masks. I mean, just a host of problems, Your Honor, conducting a jury trial, even in a system like New York's that wasn't already bogged down with delays and just a massive, massive caseload. And the backlog could have only gotten worse during the shutdown.

So, having taking that personal privilege, Your Honor, as a New Yorker, let me just proceed with the argument on the merits in terms of stay relief.

All right. So, the burden is on UBS to show cause. And UBS has argued in its papers, citing 362(g)(2), I think it is, that somehow the burden shifts to Highland. Counsel just misreads the statute. He's pointing to a provision that talks about lifting the stay where a secured creditor wants to foreclose, and the issue is who -- where there's a burden of showing equity in the property, which is a factor to deny stay relief. Obviously, that has nothing to do with our situation. The burden is on UBS to show cause, and they haven't established it.

So, what's the standard for the Court to apply? Lifting the stay is up to the Court's discretion. There is no mandate here that you must allow UBS to go to state court to litigate their claim in front of a jury whenever. They're -- they have a claim against the Debtor. Your Honor has the ability and jurisdiction to adjudicate claims as part of the ordinary bankruptcy process.

And here, Your Honor should exercise the discretion to hear this claim and to see if these threshold issues carry weight, because the claim is so large that its disposition is really essential to the success or failure of Highland's plan. And to relegate this case to a freeze of unknown length,

months, years, before creditors can ever see recovery from the case is not judicial economy. It's inflicting unnecessary delay and expense on the parties.

And we're talking about claims, Your Honor, that are well within the expertise of this Court because they involve fraudulent transfer claims and typical things that bankruptcy courts resolve all the time.

So, you know, we think that the hardship on the parties of being held in suspense while UBS goes on its jihad in state court for months, if not years, that the balance of hardships really tips in the favor of the estate and the other creditors in the estate to try to see this claim resolved through Your Honor's proceedings, rather than be subjected to indefinite delay.

One moment, Your Honor, while I check my notes.

(Pause.)

I'm just going through my notes, Your Honor, because I went a little out of order, but I covered a lot of what I wanted to say.

So, Your Honor, let me make a suggestion. We -- the issues that we want to tee up in terms of these dispositive issues, one is whether or not there could be an alter ego claim against Highland. It's never been alleged before. We think that the state court rulings on res judicata as well as some very persuasive authority like *Board of Managers* means

that that claim can't be brought.

That's something that has not been litigated in state court before. I think Your Honor could very easily address it.

The other issue is the impact of the settlements on the fraudulent transfers, because, again, it's very different if UBS has a $50 million claim on a good day as opposed to a billion-dollar claim. And again, very straightforward. It will involve the interpretation of the settlement agreements. We think it's very straightforward. It's something that's well within Your Honor's experience, jurisdiction, to decide. It's a proof of claim. And we think that that could really break the logjam in this case.

And if those two issues are decided favorably for the estate, that the asserted claim of UBS will now be within a ballpark that other creditors and the Debtor can deal with, as opposed to the continued threat that there's a billion-dollar claim out there.

That ruling, Your Honor, really could make the difference between whether or not this Debtor confirms a plan with you or not and whether creditors can get distributions or not.

So -- and I would hasten to add, Your Honor, that I think that, while the matters are complex, I think the specific issues are not, and that they can be presented to Your Honor and that Your Honor could decide them before the New York

court system even opens up, let alone before a jury trial can be scheduled in this matter. So we think that that is really the way to go, Your Honor, and that will avoid the prejudice to all the parties, not just the Debtor, but all the other creditors who'd like to see their distribution.

So, Your Honor, I'm not going to address the agreement for stay relief based on Your Honor's comments.

I just want to address, lastly, that if Your Honor does deny the motion, that Your Honor -- for stay relief, that Your Honor also deny the request by UBS for a further extension of its proof of claim. There was an agreement between the parties that extended the bar date already for UBS and that provided that we would have this stay relief that (inaudible). There was never any discussion that, if stay relief was denied, that there would be further time for UBS to file a proof of claim.

While this is cloaked in the desire to preserve a jury trial that we never had, the reality here, Your Honor, is that this is just more delay and posturing and trying to keep the notion that there's a big claim out there and a big trial in the future for leverage purposes, for UBS to be able to say to the other creditors, you know, I'm in control here, I've got a billion-dollar claim, I'm still going to pursue a jury trial. It is gumming up the case. It is freezing the case. And the only way to break the logjam, Your Honor, is for Your Honor to

do that. It's for Your Honor to deny stay relief, to require, as they agreed, to require UBS to file a proof of claim within five days of Your Honor's ruling. We will then proceed with an objection to claim that will lay out the issues, we think, very clearly, the (inaudible) very clearly. And UBS will have their opportunity to be heard, and then Your Honor can decide.

And if Your Honor sustains the objections based on the issues we've presented to the Court, like I said, that's going to clear a path for this case to move to confirmation.

If Your Honor overrules the objection, then I guess what have we lost but a couple months' time trying to adjudicate that and spare the estate of being stuck in suspense for an indefinite period of time?

So, on that basis, Your Honor, we would ask that you deny the stay relief motion and deny the extension on the proof of claim. I'd be happy to answer any questions that Your Honor has and then I'd yield to the parties.

THE COURT: I have a question unrelated to the arguments. Exclusivity in this case, I know there was an agreement regarding the most recent extension, and I can't remember what the deadline is. I feel like it's late July, maybe. Can someone remind me of that?

MR. POMERANTZ: Your Honor? Yes, Your Honor. This is Jeff Pomerantz. So, the current exclusivity expires on July 13th. We have since filed, I believe it was last Friday

night, a further motion to extend for an additional 30 days. We are in discussions with the Committee about various structures, about a plan and whether -- and how we would ultimately emerge from Chapter 11. That matter will be heard, I believe, on July 8th. And it asks for 30 days and an additional two -- additional 30 days, subject to Committee consent.

THE COURT: All right. So you all are envisioning walking and chewing gum at the same time, basically going down a dual track if I deny the motion? You know, you're wanting me to set a deadline five days from now or whatever it would be for them to file a proof of claim, you would envision a prompt objection, and going down that path at the same time as proposing a plan in July or August?

MR. POMERANTZ: Your Honor, look, there's a couple of ways this case could end, right? We kick the can down the road, file some type of plan that shifts all the litigation post-confirmation. That may be what happens in this case. That is not what the Debtor wants to happen in this case.

THE COURT: Uh-huh.

MR. POMERANTZ: The Debtor has been moving very quickly to try to engage with the various creditors. Mr. Clubok said we spent a lot of time. Yes, the Debtor and the independent directors did spend a lot of time dealing with this claim, dealing with the Acis claim, and dealing with the

Redeemer claim. It's those three claims that are the primary obstacles towards being able to distribute money to creditors.

So if, Your Honor, we are either litigating where we think we should in this Court on UBS's matter and the Acis matter, if we can't resolve it, Redeemer's matter, or elsewhere, we are going to try to move things forward. But at the end of the day, unless these claims can be resolved, and UBS is the largest one, there will not be any distributions to creditors, which is what the Court wants to have happen as quickly as possible.

THE COURT: Okay. Thank you. All right. I have no other questions for Debtor's counsel at this time, so how about we go to Committee counsel now. Mr. Clemente?

OPENING STATEMENT ON BEHALF OF THE CREDITORS' COMMITTEE

MR. CLEMENTE: Yes. Thank you, Your Honor. Matthew Clemente, Sidley Austin, on behalf of the Official Committee of Unsecured Creditors.

Your Honor, as an initial matter, when I refer to the Committee, as we did in our papers, I am referring to the three non-UBS Committee members: --

THE COURT: Uh-huh.

MR. CLEMENTE: -- Acis, Meta (inaudible) and Redeemer. UBS obviously did not participate in Committee discussions regarding this objection. I just wanted to make sure that Your Honor understood that.

With that, Your Honor, the Committee does oppose the motion to lift stay. I've been listening to Mr. Clubok and to the Debtor, and the merits, I think, you know, are probably very interesting, but I'm not sure they are necessarily terribly relevant to the determination that Your Honor has to make today.

The issue is whether to lift the stay based on a showing of cause and after taking into consideration whether lifting the stay is in the best interest of the estate and the creditors. I don't think it's whether, you know, one party or another is likely to prevail. I think that's the consideration that Your Honor instead must look at, cause and the impact on the estate.

The Committee submits lifting the stay is not in the best interests of the estate. The Committee's focus remains on the efficient and quick resolution of these cases that provides for maximum recovery to its constituency, the general unsecured creditors.

And while Mr. Pomerantz referred briefly to the plan, obviously, Your Honor, we have just seen the exclusivity extension motion. I have not had an opportunity to discuss it with the Committee, you know, so I don't know what position we may take on that. But as a general matter, we do believe it's imperative to push forward as quickly as possible with a plan.

The asserted UBS claim, as Your Honor as heard, would

dwarf all other claims against the estate by far. Resolution of that claim will therefore impact the size and timing of any distributions to the other general unsecured creditors. That's just, I think, a plain fact of math.

Thus, the Committee believes having the UBS claim quickly resolved is in the best interest of the estate and the creditors.

And the Committee further believes that this Court is the best forum and is in the best position to allow for the quickest resolution of the claim.

Although I do not presume to speak for this Court's time or its calendar, I do know that this Court is used to hearing complicated matters and rendering decisions in a quick but fulsome fashion that allows for all parties to fully present their cases.

Additionally, Your Honor, bankruptcy proceedings are designed for inclusion and public scrutiny, which will ensure that any creditors or other parties in interest will be able to participate in a process and forum that's accessible and that they can participate in. This is particularly important, Your Honor, given the magnitude of the asserted UBS claim.

Your Honor, the speed and efficiency is balanced against lifting the stay to allow the UBS claim to proceed forward in New York state court. There is no visibility by creditors in terms of what the calendar looks like or when New York state

courts will resume in-person trials, let alone when they will have a jury trial, to the extent UBS is entitled to one.

What information we do have clearly suggests that trials will not resume anytime soon and that there logically would be a backlog that would need to be worked through.

I am not a New York state court litigator, Your Honor. I am a bankruptcy attorney from the Midwest. But I do know, from looking at the history of the UBS claim that it does have against the non-debtor affiliates, that the New York state court process previously took a long time, and therefore it can reasonably be expected to again take quite some time.

And given the vagaries of a state court process, it will not provide for the level of transparency and participation and speed that I submit this Court can provide, and frankly, should provide, given the magnitude of the asserted claim, while also, and importantly, giving UBS a full and fair opportunity to advance its claim, Your Honor.

Additionally, the sheer magnitude of the claim asserted by UBS dictates this Court should resist the motion to lift stay. While it is complex -- or excuse me -- while it is clearly not the only issue in this very complicated and very complex and very difficult case, it will perhaps have the most meaningful and material impact on creditor recoveries of any of those other issues.

Given its central importance, Your Honor, the Committee

believes it is appropriate that the claim be adjudicated in this collective forum through an established process with which all other various stakeholders are familiar and provide for the appropriate transparency and participation in the adjudication of what is clearly the largest claim asserted against the estate.

Finally, but not least, Your Honor, as I understand the UBS claim, and we heard the Debtor speak to it, and Mr. Clubok as well, it presents itself as the type of claim that is in this Court's wheelhouse -- namely, fraudulent transfer claims and other similar claims. Although from reading the papers, as with all things Highland, there's obviously an overwhelming and significant degree of complexity, at bottom, it appears that Your Honor would simply be required to call balls and strikes on the kinds of claims which this Court has undoubtedly addressed many times before: namely, fraudulent transfer and similar claims.

To sum up, Your Honor, the Committee's position is simple and I think the analysis is simple. It wants the UBS claim resolved as quickly as possible in a forum that provides for the appropriate level of transparency and participation, given the asserted size of the claim and its impact on creditor recoveries and therefore its centrality to this case. Bankruptcy courts in general and this Court in particular are designed to, and, frankly, are set up to efficiently yet

fairly adjudicate material claims in an expeditious and transparent fashion, which is in the best interest of the estate and its creditors.

Your Honor, for these reasons, the Committee believes the lift stay motion should be denied.

THE COURT: Okay.

MR. CLEMENTE: With that, Your Honor, unless you have questions for me, those are my remarks.

THE COURT: Not at this time. All right. The Redeemer Committee filed a very lengthy objection. Who will be presenting that objection today?

MS. MASCHERIN: Your Honor, I will. This is Terri Mascherin on behalf of the Crusader Redeemer Committee.

THE COURT: All right. Thank you. You may proceed.

OPENING STATEMENT ON BEHALF OF THE CRUSADER REDEEMER COMMITTEE

MS. MASCHERIN: Thank you, Your Honor. Your Honor, the Redeemer Committee submits that there is -- there's similar showing for cause to lift the stay when lifting the stay would prejudice not only the estate but all other creditors in this bankruptcy proceeding and would substantially delay administration of the Debtor's estate and any meaningful distributions to creditors.

I'd like to give Your Honor, if I may, just a couple words of background on who the Redeemer Committee is and why we believe we have some unique knowledge and -- that we'd -- that

we'd like to bring with respect to this objection.

The Redeemer Committee is a committee consisting of nine individuals who serve as designated representatives of major investors in the Highland Crusader Fund. The Highland Crusader Fund was Highland's flagship investment fund before the last recession. It went into redemption in 2008, followed by an involuntary insolvency proceeding in Bermuda. That court proceeding, the insolvency proceeding in Bermuda, was resolved by way of a scheme and plan of liquidation that was negotiated between Highland Capital Management, the Debtor here, and the two classes of redeeming investors. And that scheme and plan was approved by the Bermuda court.

The governance that is set up in the scheme and the plan provided for the election of an oversight Committee -- that is, the Redeemer Committee.

The Redeemer Committee members were elected from amongst the consenting as opposed to the redeemers of the Crusader Fund.

The scheme and plan permitted the Debtor, Highland, to remain as manager of the Crusader Fund to complete the liquidation of the fund, but the Redeemer Committee was given, among other powers, the power to remove Highland as manager for cause, or not for cause, and also to bring claims against Highland Capital Management under the plan and the scheme.

The Redeemer Committee determined in July 2016 to remove

Highland as manager of the fund and simultaneously commence an arbitration before the International Center for Dispute Resolution. That proceeding resulted in an arbitration award against the Debtor for $490 million in damages, inclusive of pre-judgment interest as of the petition date.

Since the -- since Highland -- Highland filed, by the way, filed this proceeding, this bankruptcy proceeding, literally as we were on the steps of the courthouse in the Delaware Chancery Court for the hearing on the motion to confirm the arbitration award that was issued in favored of the Redeemer Committee.

So UBS is not the only party who was denied access to its preferred court, shall we say, but the Redeemer Committee is cooperating in this bankruptcy. The Redeemer Committee, like UBS, has been appointed a member of the Unsecured Creditors' Committee. And the Redeemer Committee, we would submit, Your Honor, has a unique perspective to bring on this motion for two reasons.

First of all, the Redeemer Committee is the holder of a very large liquidated though not-yet-allowed claim in this bankruptcy by virtue of the arbitration award. We've essentially concluded our litigation against the Debtor.

Second, the Redeemer Committee is uniquely knowledgeable about the litigation and the work between UBS and the Debtor because the Crusader Fund was a party to that suit. In fact,

the settlement agreement, which contains a release provision which we submit and the Debtor submits ought to have a significant impact upon the size of the claims that the Debtor can -- or that UBS can prosecute now with respect to the fraudulent transfers and the breach of implied covenant, that was negotiated by my clients, the Redeemer Committee, and you will see their signatures at the very end of Exhibit H, which is -- to our objection, which is that settlement agreement.

Your Honor, we submit there has been no showing of cause to lift the stay here. I'd like to mention a couple of court decisions which I think bring important principles that the Court should consider in considering whether UBS has met its burden here to show cause.

Courts have recognized, when relief from the automatic stay is sought, the party seeking the relief has an initial burden to demonstrate cause for the relief. And where, as here, the movant seeking to lift the stay is an unsecured creditor, the burden on a movant is -- has been recognized as being especially heavy. That's recognized in the Southern District Bankruptcy Court decision in the *(inaudible) Energy Partners* case, for example, which we cited in our papers.

In fact, in the *Residential Capital, LLC* bankruptcy proceedings in the Southern District, the Court said, and I quote, "When the movant is an unsecured creditor, the policies of the automatic stay weigh against granting the relief

requested."

And in *In re Leibowitz*, another Southern District bankruptcy decision, the Court said, and I quote, "The general rule is that claims that are not viewed as secured in the context of 362(d)(1) should not be granted relief from the stay unless extraordinary circumstances are established to justify such relief."

We would submit, Your Honor, that UBS failed even to make a *prima facie* showing of cause here. They point to prejudice, they say, to themselves if they can't go to New York and have a jury trial, and they point to judicial economy. We would submit those factors actually argue very strongly against a finding of cause in this case.

There would be substantial prejudice to other creditors in this proceeding if UBS is permitted to essentially get cause on large parts of this bankruptcy proceeding and go off to New York to litigate. UBS barely acknowledges that the lifting of the stay to allow it to proceed in New York would have any impact on creditors. We submit that the impact would be quite (inaudible).

It can't seriously be disputed, we submit, Your Honor, that this Court could determine the validity and the amount of UBS's claim more expeditiously than UBS could get relief for a jury trial and the subsequent proceedings in New York.

We agree with the Debtor's counsel that there is no

prospect of jury trials and hearings in the courts in Manhattan anytime certainly this year, and perhaps well into next year, and we've cited some commentators who've written pieces that have been published to that effect.

Meanwhile, the sheer size of the claim that UBS is purporting to submit here -- of course, they haven't filed a claim -- but the sheer size of the claim as it has been described in this proceeding makes it central to these proceedings. And for -- for a fact, in the *Choice ATM Enterprises* case, which was decided by Judge Lynn, Judge Lynn denied a motion to lift stay that was brought by a creditor where the creditor's claim at issue "would be the largest claim against the estate and thus critical to the reorganization." That's very much the case here, and it's appropriate for you to consider that this claim, if allowed at the amount of roughly one billion dollars, which UBS is asserting is the value of its claim, would dwarf the rest of the estate.

Bankruptcy, of course, is designed to provide an orderly liquidation procedure under which all creditors are treated equally. Given those policies, the bankruptcy court ought to try to preserve a level playing field for all creditors. And we cited in our papers the decision in *In re Canejo Enterprises*, which was a Ninth Circuit case from 1986, where the Court denied a motion to lift stay for that reason,

because the -- because the Court found that lifting the stay as to one large creditor in that case would in effect give that creditor oversized leverage with respect to resolution of the proceedings.

The same is true here. As both Committee counsel and Debtor counsel have pointed out, with the overhang of what we think is an oversized one billion dollar claim, it's very difficult to negotiate the way to see clear to a plan of reorganization here, where other creditors, like my clients, for example, don't know whether they stand to receive a quarter of the estate's proceeds or something much less than that.

And we submit, Your Honor, that that is, in fact, what UBS wants to preserve here, is that leverage, that negotiating leverage, which thus far has really stymied efforts to move forward.

As both Mr. Pomerantz and Mr. Clemente alluded to, the Creditors' Committee has been working hard on trying to get to a plan of reorganization. That's what we want. We want some certainty of how this proceeding will conclude, and it's just, as a practical matter, very difficult to come to anything close to certainty of a practical resolution with that one billion dollar gorilla sitting in the room.

This Court, we would submit, as counsel for the Debtor argued, can resolve the claims that UBS has pending against

the Debtor quite efficiently and quite expeditiously under the rules that you have available to you under the Bankruptcy Court Rules. So we submit the New York court really has no appreciable advantage in resolving these claims.

As counsel for the Debtor pointed out, there are essentially -- there are two claims that are pending in the New York action against the Debtor. One is a fraudulent transfer claim; the other is a claim for breach of the implied covenant of good faith and fair dealing.

I won't get into whatever defenses the Debtor may have against that good faith and fair dealing claim, but I will say this much: All of the claims, all of those claims arise from the fraudulent transfers that were alleged to have taken place in March of 2009. So they essentially all stem from the fraudulent transfer claims. Those claims are based upon entirely different facts, different witnesses, different legal issues, than the claims that were tried back in 2018 that resulted in that judgment that was entered against the CLO warehouse counterparty that was entered last fall.

But you don't have to take my word for it that the fraudulent transfer-based claims are premised on an entirely different set of facts. We can look at UBS's own words to establish that. When it suited UBS's strategy, when UBS persuaded the Court to bifurcate the proceedings into what it now refers to as two phases of the same trial -- and this is

going back to the spring of 2018, Your Honor -- UBS persuaded the Court to bifurcate the proceedings, and UBS conceded at that time that the claims against the Debtor that remained to be adjudicated -- and I'm quoting from Exhibit J to our objection here, which is UBS's brief in support of bifurcation -- those claims, UBS argued, quote, "have minimal overlap in evidence and issues" with the claims that Judge Friedman has -- Justice Friedman has already tried in New York.

UBS went on to say, and I quote, "The second trial, which will relate to new parties and different claims, will involve new factual issues that will not be addressed at all in the first trial."

And in that same pleading, UBS argued, "The issues and evidence will be largely separate, and certainly will not be inextricably interwoven and intertwined" with the issues from the first case.

I would submit, Your Honor, that Your Honor could resolve fraudulent transfer-based claims quite expeditiously. Those -- fraudulent transfers are the bread and butter, are the kinds of claims that bankruptcy courts resolve every day. And to the extent that it was necessary for you to look to any of the factual findings that Justice Friedman made, they're laid out in her judgment, which is a very lengthy opinion that was entered last fall and this Court could very easily find them there.

Now, a couple of moments about the -- what we've talked to about -- what we've talked -- what we've referred to as the threshold issues. And I'll preface this by saying that, over the years, the Redeemer Committee and Highland Capital Management have not agreed on very many things, but we do agree that there are two threshold legal issues which we submit would seriously materially impact the amount of any claim that the -- that UBS can pursue in this bankruptcy against the Debtor.

The first of those is the res judicata issue. Mr. Clubok, I think, has been a little less than precise about exactly what the basis -- in his argument today about exactly what the basis is for the $1 billion claim that he referred to. But if we look at UBS's motion to lift the stay at Page 10, UBS stated, "If found liable, the Debtor will be responsible for the judgment awarded to UBS in Phase I, in addition to any other amounts awarded to UBS in Phase II."

So I think UBS stated quite clearly in its motion to lift the stay at Page 10 that what it intends to pursue in this bankruptcy court and what it purports to be intending to pursue in the New York court, at least in large part, is to hold the Debtor responsible for that $1 billion judgment that was entered on the warehouse transactions.

It is that articulation of its claim which leads the Redeemer Committee and leads the Debtor to raise the issue of

res judicata. And I won't go through again all of the analysis of the decisions, but I would direct Your Honor to the *UBS Securities, LLC v. Highland Capital Management* decision, which is cited in our papers. It's found at 86 A.D.3d 469 or 927 New York Supplement 2nd at 59.

In that decision, when UBS first sought to bring the claims that are part of the lawsuit that's now become known as Phase II of the UBS proceedings, the Court ruled as follows, and I quote: "To the extent the claims against Highland in the new complaint implicate events alleged to have taken place before the filing of the original complaint" -- that date was February 24th of 2009 -- "res judicata applies."

The Court went on to explain that any claims against the Debtor arising from the restructured warehouse transaction are barred by res judicata. Quote, "That is because UBS's claims against Highland in the original action and in this action all arise out of the restructured warehousing transaction, while the claim against Highland in the original action was based on Highland's alleged obligation to indemnify UBS for actions taken by the affiliate Fund, and the claims against Highland in the second action arose out of Highland's alleged manipulation of those Funds, *i.e.*, alter ego. They form a single factual grouping. Both are related to the same business deal and to the diminution of the value of securities placed with UBS as a result of that deal."

So the Court held that to the extent that UBS in that second proceeding, which is now being referred to as Phase II, was asserting claims against Highland Capital Management that were based upon the warehouse transaction or any other conduct that occurred prior to February 24, 2009, those claims were barred by res judicata because they were not raised as part of the original action, which was a separate lawsuit, as we explain in our papers.

So while we're not here to argue the merits of the res judicata issue right now, it comes to the fore because of the way UBS described its claim, because of the fact that UBS asserted in its motion that it intends to seek to hold the Debtor liable for that $1 billion judgment that was entered for breach of the warehouse facility. And we submit that when the time comes for the Court to consider objections to UBS's claim, that the res judicata -- that res judicata as a result of the Appellate Division's decisions in New York will make quick action of any effort by UBS to hold the Debtor responsible for that $1 billion judgment.

Now, in its reply, UBS makes an interesting statement with respect to this alter ego argument, this claim to hold the Debtor responsible for the $1 billion judgment. And we think that the statement in the reply, Your Honor, is quite telling. It's found on Page 6 in a footnote, Footnote 5.

In that footnote, UBS seems to try to preserve the right

to bring that $1 billion alter ego claim, to hold the Debtor responsible for the judgment that was entered last fall. And this is the reply brief at Page 6, Footnote 5. In that footnote, UBS stated as follows, quote -- and this is at the very end of the footnote, Your Honor -- that UBS, of course, reserves all rights to pursue any post-trial relief, including holding the Debtor liable as an alter ego.

So, Your Honor, we would submit what that suggests is that what UBS wants to do here is to go to New York to get a jury trial on its pleaded claims against the Debtor, which are only fraudulent transfer and breach of the implied covenant of good faith and fair dealing claims, and then to initiate even further proceedings in New York, seeking to hold the Debtor liable for the 2018 $1 billion judgment.

Your Honor, how long must all of the other creditors of this estate wait for that, for UBS to finish adjudicating its claims against Highland? The delay, I submit, would be crippling.

A few words about the issue of the release, and this is an issue that the Redeemer Committee is quite familiar with because the Redeemer Committee negotiated that settlement agreement. The -- again, this isn't the time to argue the merits of the issue, but I raise the issue just to impress upon Your Honor that it is a serious gating issue, we believe, and an issue which ought to be addressed, because it could

have a material impact on the Debtor's exposure on any claims from UBS.

Now, as I've said, the claims that UBS has stated in New York against the Debtor are claims for fraudulent transfers which were brought against the Debtor and certain of its affiliates, and a claim against the Debtor for breach of an implied covenant on fair dealing. In its briefing with respect to bifurcation, UBS made clear that both of those claims against the Debtor relate to the fraudulent conveyances which -- by which UBS contends the Debtor's affiliate, which is a company called HLC, transferred certain assets to the Crusader Fund, to the Credit Strategy Fund, to the Debtor itself, and to other affiliates, including the fund that's currently known as the Multi-Strategy Fund.

And again, you don't have to believe me when I say that those claims all arise out of the fraudulent transfers. We can look at UBS's own arguments. And this, again, is in Exhibit J to the Redeemer Committee's objection, where UBS described the implied covenant claim as follows: "The implied covenant claim which involved Highland Capital Management's role in the March 2009 fraudulent conveyances overlaps factually with the fraudulent conveyance claim."

Your Honor, as we've shown in Exhibits H and I, in 2015 the Highland Crusader Fund and the Highland Credit Strategy Fund, which together were the recipient of over 80 percent of

the assets that comprised those claimed fraudulent transfers, those two funds entered into settlements with UBS. Those two funds paid a total of approximately $70 million to settle the fraudulent transfer claim. The value of the fraudulent transfer claims, as Mr. -- or as Debtor's counsel has pointed out, the value of the fraudulent transfers to those two funds was somewhere in the neighborhood of $180 to $200 million out of the $240 million of fraudulent transfers that UBS is seeking to recover from.

As part of the settlement agreement, UBS agreed to release Highland Capital Management from any claim arising out of the fraudulent transfers that took place either to the Crusader Fund or the Credit Strategy Fund. And I would direct Your Honor to Exhibits H and I. The language of the two settlement agreements is quite similar. If we look, for example, just at Exhibit H, Section 5.3, of the Highland Crusader Fund settlement, you will see that UBS released Highland Capital Management for "losses or other relief specifically arising from the fraudulent transfers to Crusader alleged in the UBS litigation."

As we explained in our papers, the term that's used there, I believe, is HCM Released Parties, or something similar to that. If you go back through the definitions, you'll see that Highland Capital Management was specifically released with respect to claims arising from the fraudulent transfers to

Crusader.

The same language appears in Exhibit I, which is the settlement agreement between the Highland Credit Strategy Fund and UBS.

So this is a threshold legal issue, Your Honor, which we submit has the potential to significantly reduce the amount of any allowable claims to UBS. And because the Crusader Fund is a party to that settlement -- and the Crusader Fund's counsel, Mr. Rosenthal, I believe is listening to the proceedings today -- because the Redeemer Committee members were signatories to that settlement agreement, the Crusader Fund and Redeemer Committee ought to have an opportunity to be heard with respect to an objection to UBS's claim that is premised upon the settlement agreement involving those two parties.

We submit, Your Honor, that you are well suited to deciding the res judicata and release issues. They're issues that rely only upon what we think are very clear court decisions on the res judicata -- outlining the bounds of res judicata with respect to UBS's claim, and what we would submit is unambiguous settlement language.

One final word I would like to express, Your Honor. With regard to the last-ditch argument that UBS made, their argument that if you don't lift the stay you should at least extend the bar date indefinitely only for UBS or enter some sort of an order preserving UBS's right to jury trial: Your

Honor, this case has been pending since October, this bankruptcy case. UBS waited until May to file a motion to lift stay. And I know they've made some arguments about why they waited, but we've been sitting around for quite some time, trying to make progress in this case.

UBS has already had the benefit of a special delay in the bar date. Everyone else filed their claims in April. They agreed to a stipulation, which this Court entered as an order, which provides that UBS would file its claim within five business days after the Court's ruling in the event that the Court denies the motion to lift stay.

They've had their delay. They asked for extra time, in fact, to bring their motion to lift stay. What UBS is suggesting now is that they should get yet even more delay, indefinite in length. Your Honor, we're trying to get moving with this proceeding. We'd like to see the Debtor submit a plan. The Committee is trying to work with the Debtor on a plan. I tell you, my clients, Redeemer Committee, are in serious discussions with the Debtor about resolving the allowable amount of their claim. And this case ought to move forward. But if Your Honor grants UBS's motion, what will happen is this case will stall, to the prejudice of the estate and to the prejudice of all other creditors.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Ms. Patel, will you be making the argument for Acis?

MR. SHAW: Your Honor, Brian Shaw on behalf of Acis. I'll be very, very brief.

THE COURT: Okay.

OPENING STATEMENT ON BEHALF OF ACIS CAPITAL MANAGEMENT

MR. SHAW: Judge, one of the foundational principals of the Bankruptcy Code is the policy of equal treatments of -- treatment of creditors. Granting stay relief here would be to prefer UBS over all other creditors. And UBS is not unique. We have plenty of litigation creditors in this case. We have Acis. We have Mr. Daugherty. We have the Redeemer Committee. We have UBS. So, granting relief from stay treats UBS differently, makes them a super-creditor, and violates that fundamental foundational principle of bankruptcy law.

The second and final point I'll make, Judge, is I think I heard Mr. Clubok, in reference to your question about mediation, say something like he did not expect to have to ultimately try this case. And if I misquote him, I'm sure he'll let us know. I think that tells you everything about the motivations here. I think that tells us everything about the fact that this is about leverage and not about all of the parties in interest here.

This is not a case just about UBS. It's a case, a bankruptcy case about all the parties in interest, including the Debtor and creditors and other parties in interest.

That's all I have, Your Honor.

THE COURT: Thank you. All right. Mr. Clubok, you're the movant so you get the last word.

MR. CLUBOK: I appreciate that, Your Honor. A lot to cover here. Let me say, make this brief observation at the outset, and then I'm going to talk about some of the specific things that were said.

Number one, this really proves the old adage, the enemy of my enemy is my friend. I did hear Ms. Mascherin say, oh, gee, we've never agreed with Highland before in years and years; all of a sudden now we agree with them. There is a reason why we're like the skunk at a picnic here, we're getting ganged up, and it's not, Your Honor, because the parties are trying to get to a speedier resolution. It's because they think they can substantively impact our claim and get more -- each of the creditors think they get more amongst themselves if they can knock down our claim.

I heard over and over again Ms. Mascherin and others say, oh, I'm not going to argue about the merits here, and then they went on in great detail to try to argue about the merits of our claim.

So my second point, overall point that I want to make is -- and this is one where I've got to say at least one thing was said by all the objectors. Mr. Clemente -- I agree with this. What Mr. Clemente said was the merits aren't relevant

today. And to Mr. Clemente's credit, I think he less than everyone else went on to then argue the merits, regardless of the fact that they're not relevant today.

The merits aren't relevant to today, Your Honor. What's relevant to today is who is going to be deciding those merits. Okay. And it is so crystal clear from hearing the argument and how they lived with these arguments for years and years and years that what I'm hearing today is the same argument I heard in the I think third appeal, the fourth appeal, the summary judgment, and the fifth appeal.

So much of what you were told today, Your Honor, dates back to some language, some stray language that was used in a 2011 decision. Okay? And ever since that language was used in that 2011 decision that Mr. Feinstein cited and Ms. Mascherin cited, ever since that 2011 decision, Highland has argued over and over again, essentially, ha ha, this means you lose the bulk of your claim.

That 2011 decision, they argued it, and we went up and down to the appellate court multiple times to demonstrate that's not true.

And Your Honor, we lay out a little snippet of that on Page 5 of our reply brief. I'm not going to get into all of the substance of decisions that happened since 2011, because that's what you were told matters here, but I'll just briefly quote that in rejecting summary judgment, denying summary

judgment that Highland had right before the trial, when they said, hey, there's no breach of duty of an implied good faith and fair dealing, hey, this 2011 decision kills your case, hey, most of your damages can't be asserted, the Court said -- the district court rejected it. And the appellate court said, talking about the district -- the trial court, I mean, the appellate court said, The Court correctly rejected Defendant's argument because neither our prior decisions nor the doctrine of res judicata bars Plaintiffs from introducing evidence of pre-February 24, 2009 conduct, to the extent necessary to prove with respect to post-[February] 24, 2009 conduct their alter ego, fraudulent conveyance, and breach of implied covenant claims. That is, all three of those claims, the alter ego claims that actually exist, not that we're being told that -- and we've been supposedly -- with this, the fraudulent conveyance claims that are directly against Highland, and most importantly, because this will give up the cap, if we win, to the entirety of that $500 million in damages we suffered, a breach of implied duty of good faith and fair dealing.

You just heard some terrific new arguments from Mr. Feinstein and then a little bit from Ms. Mascherin as to why we're going to probably supposedly lose that.

And again, going back to what Mr. Clemente said, without getting into the merits, I'll just say we have defeated that

several times already in New York courts since 2011, that language they claim -- they tell you means what it doesn't mean.

They just want a new forum. They lost in front of Justice Friedman. They lost in the appellate court in New York. We defeated summary judgment, and we're in the middle of a trial where we are pursuing these claims. And now they see this as a possibility to relitigate in a new forum those exact same claims. That's what this comes down to. We talk about motivations. It's clear the motivation is to do what this Court should not do, which is use Chapter 11 to let them relitigate cases, not reorganize.

And the third big-picture -- that brings me to my third big-picture point, Your Honor. Your Honor, you were told by Mr. Feinstein the progress of confirming a plan is just stymied by this one debtor. And then you were told many other things. The success or failure of the plan all -- is all dependent on UBS's claim. Ms. Mascherin asserted that she's having discussions. And you're sort of being led to believe that if we just could resolve UBS's claims, if that were somehow possible in the next month or two, even though it's enormously complex and it's going to take months, whether they try and move it here or we finish up in New York City or -- but you're told that, oh, that's just the one thing holding up the plan. Your Honor, I can't get into the settlement

discussions we've had, although you were -- you know, maybe I can, because I have to rebut the false impression you've been given. But I'll say this: There was a motion filed by Debtor's counsel a couple days ago, I think maybe Friday, where they asked for further extensions for the exclusivity period so that they can continue with their plan. And in that, they reference a term sheet that they had signed. They said, hey, we've signed this term sheet, and because of that we're pretty close, give us another 30 days. And by the way, that can be extended by two more 30 days.

I can -- let's just leave it at this: It's Highland's burden of proof. They could not satisfy their burden of proof to honestly tell you that agreeing to that term sheet is dependent upon how we divvy up the proceeds from liquidating assets among the creditors.

What I think is clear is that Highland has lots of non-liquid assets that I believe we're going to be told are going to take a year or two to turn into anything that would be available to creditors. Okay? It's not like the plan is all ready to go, they're ready to distribute all the money, and all the proceeds are getting taken care of, including all the claims. That's kind of the impression they led you to believe. I mean, Mr. Feinstein basically said it directly.

It's just not true. If it were true, let them show you the term sheet. Let them satisfy what is, by the way, their

burden of proof. The cases make it clear that it's our burden to come forward but then their burden of proof.

They can't do it because it's not true. And to sit here and listen to them try to tell you, oh, this is the one thing holding things up, it's just -- it's on its face -- I don't know how to characterize it other than to say -- let's just say politely they've not met their burden of proof to show you that they're all ready to go with a plan and the one thing holding it back is whether -- the value of UBS's claim.

So those are the three big-picture things. And then I'd just like to respond to some very specific things that were said and I believe misstated.

Most importantly, I would ask you to look at, please, Page 5 -- 4, 5, and 6 of our reply brief. People kept saying, Don't get into the merits. This is not about the merits. But they just want you -- they want to ask you to relitigate the res judicata issues that have already been decided.

And I say they've been decided. They get up here and they tell you, oh, no, they're new issues, or we haven't been decided, or decided a different way. Let's just go to Justice Freidman. She will have -- she will be able to handle that in a week, like she did the last one, is my guess.

By the way, Mr. Feinstein bragged that he's the -- supposedly the only New York lawyer here. That's not true. I'm barred in New York. I practice in New York. I'm barred

in Ohio. But I litigate -- and New York and Washington, D.C. And I daresay I'm the only lawyer here, other than Ms. Mascherin, I imagine, who has practiced in front of Justice Friedman. I practiced in front of Justice Friedman for years in not just in this case but in other cases, and the notion that she can't handle this very quickly and effectively and wouldn't do it very quickly and effectively, for people to start representing, gee, what it's like to be a New York lawyer or what happens in New York state court, I think there's a -- let's just say a difference of opinion.

Certainly, my client -- my client, who is on the phone, Suzanne Forster, she's also a part of New York. We're familiar with the New York courts. We litigate there quite a bit. And the dispar... I mean, it's easy to hit on New Yorkers, I guess even if you're a New Yorker you can claim to hit on it, but I'm confident that Justice Friedman will do as she promised and move this case along. I can't guarantee you the trial date, because six months ago, when she -- we were ready to try the case and we agreed to the delay. She said, Great, I'll work on that schedule for you.

Now, COVID happened, right, and that's a crazy, unforeseen circumstance. And so I can't predict that COVID will allow a trial to start back up in September or in January. Some people have said different things.

But when you're talking about a matter of months to

resolve a claim that is so complex that you've heard four different lawyers tell you totally different things than what the New York appellate courts have told us, and different from what Justice Friedman told us, and different than what Highland's last set of lawyers argued to Justice Friedman, all of those are the things that we'd get into and not on the merits if we actually had to deal with the merits of these so-called threshold issues, which aren't threshold issues, but that's again why that should be quickly resolved by Justice Friedman, who would not even let them proceed, I imagine, as opposed to asking for you to give them another bite at that apple.

Now, I just want to make sure I address the other things that they say.

You know, I never heard a single word, of all those objectors, Your Honor, we filed our reply brief to make sure that our position was clear. I argued. I just heard five other folks argue. Not a single one of them told you what's going to happen to UBS to the extent that it is entitled to try these same claims against the other defendants that are still in the case that aren't in bankruptcy court. I mean, might say some of the claims are exactly the same. Fraudulent conveyance against Multi-Strat, for example, a nondebtor in New York that we have a $60 to $90 million claim against. Same facts. Also, Highland is responsible just for that part

of the case. And that's not affected in any way, shape, or form by any settlement agreement with anyone.

So you've got the exact same claim, basically, the same facts. That particular fraudulent transfer, transfer just to Multi-Strat, we can go after the transferee and we can go after the transferor. We have the right to punitives. All of it's a jury trial. That's pending right now in New York. And how are we not going to be prejudiced if we're going to argue -- we're going to have to try that case in two separate courts? That case is not affected in any way by these so-called threshold issues. Not in any way, shape, or form. Not by the settlement agreement, not by the res judicata argument. So, right there, that chunk of, you know, $60 to $90 million, just that one claim alone.

There are other fraudulent transfers by Highland to itself and to other entities that also were not subject to the settlement. We think there's something like $150 million, at least, in fraudulent transfers, even if you credited this settlement wipes out the rest of our fraudulent transfer claims, an argument that, by the way, is inconsistent with Highland's previous argument, and we'd be arguing that to you if we're forced to get to the merits, which, of course, we're not supposed to do today, even though many of the other lawyers argued on the merits.

But then we get to breach of duty of good faith and fair

dealing. And here is where, Your Honor, I agree, our language, that one sentence that they jump on in the opening brief was looser than it should have been. We said something like, in the second phase, we'll find out if Highland is responsible for the $500 million judgment. And they jumped on that and they're trying to tell you, aha, that means these guys have a secret plan to pursue a brand new alter ego theory and that's the whole plan and that's really what's going on here.

Your Honor, all that means is, as a practical matter, Phase I, assess how much money, $500 million, was owed to UBS as of February 24, 2009, when we filed suit. Every action that Highland took after that to ensure that those payments would not be made -- and there were hundreds of millions of dollars left after February 24th, 2009 where Highland could have paid UBS or caused UBS to be paid -- when Highland chose not to -- and by the way, not only did they choose not to, but we gave you a little taste of the kind of things they did. There's an email, I think it's Exhibit 5 to our opening. I'm sorry. Exhibit H. It -- anyway, there's a -- as you'll see, there's a brief email chain where they talk about how they're going to (inaudible) court and then they're going to stymy all of our opportunity to recover the money.

So the $500 million just is the amount that two of the Highland entities owed us under a contract that Highland had

signed. We have already won, defeated summary judgment and many appellate decisions that say that every single thing that Highland did after February 2009 to not cause us to get paid is potentially a breach of implied duty of good faith and fair dealing. That part of our claim is going forward. That's not something that Your Honor can -- unless you want to overturn summary judgment and the appellate -- New York appellate courts on an issue of New York state law, no matter how much Mr. Feinstein or Ms. Mascherin would have liked that to be changed, that's just asking to relitigate a decision that's already been handed down by the appellate court in New York. Okay?

And that's why this whole exercise is so terribly misguided and wrong and why we would suffer terrific prejudice to (a) have to relitigate those claims. Assume we win, then we're going to litigate the rest of our claim, I guess, in their mind, here against Highland, while litigating a very similar claim, on similar facts, with the same witnesses, in front of a jury in New York. They've apparently abandoned or were going to remove it and you're going to survive abstention, or because they didn't say it, maybe they're just hoping that you agree with them. But for all the reasons we cite in our brief, mandatory abstention, leave permissive abstention, will apply to those claims against the non-debtors.

Turning to what Mr. Pomerantz said. And I think it was Mr. Pomerantz. I apologize if it was Mr. Feinstein. But I think at one point Mr. Pomerantz jumped in and answered a question you asked, and that answer was pretty revealing to what's really going on here. Okay?

What's really going on here is this isn't just about how much gets paid to each creditor. It's not about delaying the total plan. It's not about not being able to -- it's not about getting people paid much faster, because it's going to take a year or two to liquidate the assets in order to pay any of the creditors a sufficient amount of money. It's just about short-circuiting our right to get a fair determination of our claim when we're literally in the middle of a trial.

And I daresay none of the cases they've cited to you where bankruptcy courts have decided to refuse to lift the automatic stay are ones like this, where a party, after 11 years of litigation, was in the middle of trial. We cited those timeliness cases. That's something else I didn't hear any response to by any of the Objectors. We cite them on -- in our opening brief, I think on Page 5 of our opening brief. We cite several cases that stand for the proposition that timeliness just means is there going to be a timely adjudication. And in those cases, cases that were still in the summary judgment stage or in the middle of discovery, the Court said no. In one case, it was a case that had just been

filed. At the same time the bankruptcy was filed, in the state court, filed in bankruptcy about the same time, the Court said the bankruptcy -- that's going to move things along.

Those cases specifically say things like -- we're talking, talking about a matter of months and not years with an S. It easily satisfies the timely requirement. And for us to be able -- Page 43 was -- Ms. Tomkowiak reminded me of the opening brief, we think our cases on timeliness.

Ms. Mascherin. Ms. Mascherin, by the way, throws out as an aside that she has a $190 million claim, that the Redeemer Committee has a $190 million claim. Frankly, that's not -- we don't believe that's true. That claim is not a secured claim. That claim is subject to many setoffs. As an economic matter, frankly, that claim is worth about $90 million maybe at most, maybe even less.

Now, that's going to be the subject of either a negotiation, which would be great if Ms. Mascherin is correct and Highland is working with her in good faith to come to a resolution of that claim. If it's a fair number, then that will be great. And if not, I guess people will object.

Acis's claim, you know, it needs to be adjudicated or resolved. Mr. Daugherty's claim needs to be adjudicated or resolved.

There's a lot of things that need to happen in this Court,

along with seeing a plan. And by the way, the plan that we expect to see is not going to be dependent on exactly which of the creditors gets which, based on what we understand as of this point. Certainly, it hasn't been demonstrated to be the case by Highland in its argument.

And so when you talk about doing two things at the same time, or walking and chewing gum at the same time, there's a lot of gum and a lot of walking to be chewed by all the other creditors in this estate and the directors in terms of figuring out how they're going to liquidate some of these long-term assets and how money is going to show up not a year or two years from now but hopefully sooner.

Meanwhile, if you lift the stay, we can go to Judge Friedman. We can say to her, hey, remember when you promised that we'd have a trial in six months? We realized there's COVID, but let's do everything else to be all ready to be on the -- the first in your queue. And by the way, I'm not guaranteeing. I never -- if I -- if you thought I said it, I didn't, but I certainly would not guarantee we're going to be first in the queue, but I predict that if we tell Judge Friedman what's happened here and we ask her if we can be first in the queue, I suspect we'll have a pretty good shot at that. We certainly should be entitled to give it a shot and to see before we just immediately lose all of our rights in these cases.

Your Honor, there are extraordinary circumstances here. You know, Ms. Mascherin said we have some kind of burden of proof to show extraordinary circumstances. That's not the test. You know, the test is cause, and then the burden shifts, as we know from cases. But there are some pretty extraordinary circumstances.

THE COURT: What -- what --

MR. CLUBOK: We're in the middle of a fight.

THE COURT: I just -- I can't resist chiming in on that one, the burden shifting. I mean, does the burden really ever shift in this context if we're not talking about assets, collateral, and equity/no equity? I'm a little stumped on the burden shifting that you've argued here.

MR. CLUBOK: Well, Your Honor, Page 2 and 3 of our brief sets it out. Under Section 362(d)(1) of the Bankruptcy Code, we have the initial burden of producing evidence establishing a *prima facie* case that cause exists. That's the (inaudible) *Self* case. Once that burden is met, however, the debtor "has the ultimate burden of persuasion or the risk of non-persuasion as to all stay issues under Section 362(d)(1)." That's that same case. And we cite that on Page 2 and 3, and we also say *See also* a case from the Fifth Circuit.

So that is the law that we've cited. The Defendants -- the Objectors, I should say, just hand-wave and just tell you it's not true, but that's the case law that we've cited that I

think will stand on the Fifth Circuit and the bankruptcy court decision that we cited. But look. So that will -- that is the case. But in any event, we -- there is an inescapable fact here that we're in the middle of a trial, that there are non-debtor defendants in that trial, that there's a lot of overlapping facts. And by the way, there's a level of complexity that is so great that the stuff you've heard today will take us a long, long time for us to explain to you why it's not true, it's rehashed, it's incorrect, it's already been decided, or it's been waived. But it's not, as they say, in all of these snippet and out-of-context arguments you've heard while you hear lawyers telling you, hey, we're not getting into the merits, but now let's just give you a little preview of the merits, that's all the kind of stuff that Justice Friedman could deal with so quickly and easily, and they know it, and that's what's really going on here.

In terms of, you know, what Mr. Shaw said, and I'll just briefly say, you know, it's not that you get -- you've got to have a -- you've got -- put it this way. Because of the stage of the proceeding, Acis's claim, for example, which I had heard might be $5 million, but now I hear it might be $100 million, I don't think that's even out of the gate in terms of litigating. And if Acis thinks that Your Honor can handle that more quickly and efficiently, that's why it'll be here. Or they're happier with you making decisions about that case

than, you know, the judge behind door number two. That's terrific. That will move along the resolution of what their claim is, or maybe they'll settle it, ideally, with the Debtor.

But that claim is so differently-situated than our claim, which is, after 11 years of litigation, literally in the middle of a trial, where the judge has already made credibility determinations, and she was the fact-finder under part of the case and is going to be the fact-finder under the second part of the case as well for some of the claims. So that's why that's very different.

The last thing I just want to say is we talk about motivation. We talk about leverage. I mean, we haven't been litigating with Highland for 11 years because it's fun. I mean, it's not fun. I promise you. Litigating with anyone -- and I will -- I think all the -- I think Ms. Mascherin even would agree with me that it's not super-fun always litigating with Highland. Probably Acis would agree as well.

We've done that not to -- as an ultimate plan to have leverage in the bankruptcy court. We pursued that for 11 years because they owed us $500 million in 2009 after we sued. They had hundreds of millions dollars that they controlled, and they breached their duty of good faith and fair dealing and caused fraudulent transfers, such that we've been paid not one penny, not one penny from Highland, even though this Court

has -- the New York court has already found that they were liable to us for $500 million as of that date.

So that's why we've been pursuing them. It wasn't some master plan so that one day we could be here in bankruptcy court and somehow get an unfair shake. It was so that we could get a fair resolution of our claim. And we fought through all the same arguments I heard today. I have been in the New York Court of Appeals five times. Or four times, I guess.

By the way -- yeah, four times in the New York Court of Appeals. At least three of them since 2011. I've lost track of which ones came before or after. But I've heard these same arguments over and over again. I heard them at summary judgment briefing. I heard them in the state court at the trial. They've been rejected.

To ask Your Honor to give them a new bite at the apple and to ask you to make an interpretation of these issues that are surely New York state law, that have been well resolved in New York state law, that Justice Friedman could decide in her sleep, and she proved the last time they did it she could decide in about a week, that's not -- that's not appropriate, and we've certainly showed good cause and we showed the prejudice we would be suffering if the Objectors are given the chance to just relitigate in a new forum issues that have already been litigated.

THE COURT: All right.

MR. CLUBOK: Thank you.

THE COURT: Thank you. Well, I want you all to know that I thought all of the briefing was spectacular. It was extremely well done. And I want you to know that I spent all weekend looking at it. I'm telling you that both to compliment you and to let you know why I am going to go ahead and rule on this.

I, my law clerk, we've spent a lot of time looking at your very wonderfully-prepared pleadings. And if you saw me occasionally looking over at my computer when you were arguing, I was not drifting off, doing something else; I actually opened the email that Mr. Sosland sent my courtroom deputy earlier this afternoon with the unredacted UBS reply and attachments, to make sure I considered that, because that would have been the only thing that I hadn't reviewed before coming in here this afternoon. So I greatly appreciate the complexity of this 11-year litigation dispute. I guess the dispute started earlier than February 2009.

But 362 is obviously the governing statute here. I have subject matter jurisdiction, and I'm able to enter a final order on this motion of UBS. And applying 362 and the cause standard, I find that UBS has not established cause to lift the stay, and I'm going to deny the motion.

First, I will say that I believe the burden has been on

the Movant here, and the Movant never did get past the 50-yard line on showing cause.

As many of you noted, cause is a discretionary, highly discretionary standard that governs the bankruptcy judge's decision. Here, there are a number of factors that have made me decide there is just not cause to lift the stay here. Timing is, as you would guess, the most critical factor here. I don't believe UBS, as eloquent as its arguments were, met its burden of convincing me that things could more timely be resolved in the state court, or even timely be resolved.

While I certainly have the utmost respect for Justice Friedman and all of the many years of scaling the learning curve that she no doubt has here, we have this very uncomfortable, unpleasant fact, I think we would all agree, of the COVID pandemic. None of us can say when things will get back to normal in the New York state courts. And the likely prospects of delay here, we just cannot ignore. The judge will have a backlog for all of these months of not having court hearings, and then who knows when a jury trial can happen. So that unpleasant fact does not work to UBS's advantage here.

Also, the fact that this litigation has already been pending over 11 years and only very recently resulted in a written ruling in Phase I, I think is a very unpleasant fact here. While all of the prior rulings may set things up for

Phase II to go more rapidly, I'm just not convinced that a state court anywhere would have the rapid focus that any bankruptcy court will have, this one or any bankruptcy court would have in getting a proof of claim resolved, especially an allegedly $1 billion proof of claim that the whole reorganization strategy hinges on.

Here, this Court has the capacity to address even a very complicated proof of claim objection very fast. We have been up and running, doing evidentiary video hearings for a couple of months now. Even in this building in the past few months, there have been live in-person hearings on rare occasion in the bankruptcy court, but we have had a handful of them amongst the bankruptcy judges, and the criminal judges are still having live in-person hearings all through the pandemic, and I think our chief district judge is empaneling a jury for the first time this month.

So, while anything can change here for the worst as far as the pandemic, I feel like the timing issues heavily weigh in favor of us being able to resolve a UBS proof of claim faster here with a bench trial.

This Debtor cannot wait years for this UBS claim of liability of Highland to be resolved. I will vow to get through this promptly and give you thorough attention, just as I'm sure Justice Freidman has done. But we just cannot have the massive uncertainty of a potentially $1 billion proof of

claim delay this case.

Someone called UBS the one billion dollar gorilla in the room. That's, I think, an apt description. So, timing here is the biggest problem for UBS. I think a delay here that I believe would be inherent if the state court adjudicated Phase II would be very harmful to this Debtor's reorganization prospects and the other creditors.

Other factors that the Court is, of course, supposed to consider in this context -- judicial economy, judicial efficiency, burden on the parties, equities -- I do not think that any of these have been shown here to obviously favor lifting of the stay. So the motion is denied.

I do want to reiterate to people, I am not going to relitigate anything that Justice Friedman has decided. I will be careful not to do that. And so be careful what you ask me to do. I am going to respect the comity of the state court on matters that have already been decided by her.

I'm also not going to litigate UBS's claims against non-debtor affiliates, unless somehow there's mass movement for me to do that that I'm convinced I should do that. So this will just be UBS filing a proof of claim against the Debtor, Highland Capital Management, LP, and presumably the objection, and then the trial on the merits, a bench trial on the merits.

I guess I should just reiterate for the record what I hinted at early on, that I'm overruling UBS's argument that

the Debtor's alleged agreement a few months ago through Scott Ellington to lift the stay in favor of this litigation going forward in the New York state court is binding on the Debtor or other creditors. Waivers of the automatic stay are generally not enforceable unless there's an order of the Court on notice to all the creditors who are beneficiaries of the automatic stay. So, no matter what he said, he didn't have the power, and the other creditors cannot be held to that alleged agreement.

The last thing -- I mean, not the last thing, the next to the last thing I'm going to say is the proof of claim -- we'll say that UBS must file a proof of claim. Someone threw five days out there. We're already past the regular bar date. So UBS, any argument you want to make that that's not enough time, to say -- and Friday is the 19th.

MR. CLUBOK: Yes, Your Honor. We would like some more time on that.

You know, I will say a couple things. We are here six months later. There's one thing I didn't address. I know you're not giving us -- you're not going to credit us for the agreement that was made, but we did rely on that agreement and did not pursue preparing a proof of claim because we thought we were in a settlement posture. I would ask the Court to give us -- you know, given the nature of this claim and the size of this, I think it's ambitious now to do it in five

business days, or June 22nd. I know there was an original agreement with that, although I also will note that we were assured we'd get more time if we needed to for various reasons, if they were reasonable.

I also, frankly, Your Honor, I hate to raise this, but I do think we need to look at our appellate options, because this is going to put us in a situation where we're necessarily going to be trying this case in two different courts with two different decisions, and it is fairly -- you know, it is not the case that there's some plan that's ready to go, that it's just being held up by UBS's proof of claim. So I guess we would ask that we be given some period of time. You know, I think we have -- I think we have two weeks to decide whether or not -- sorry. Yeah, I think we have two weeks to decide whether to appeal. We would like to have at least that long. Maybe we won't appeal. That decision has not been made. I have to talk to my client. We'll see how it goes.

We appreciate your ruling, and we -- you know, not -- we're going to appeal, and we'll certainly talk to the Debtor and the other creditors about that and see if we can work something out. But we'd like a fair amount of time to consider that as an option. And then, if we do, we certainly don't want a situation being, which is so easy to fix, that to -- just like a proof of claim being filed, we lose our right to end up with a jury trial. You know, it ultimately makes

more sense to try all of this in front of one jury, which is what's going to be the nature of our appeal.

We can do other things like, you know, give the substance of what would be in a proof of claim, so we can keep moving things along in this court. There's other ways to deal with it. The Court can make decisions. But it's a pretty big hit if we're just forced to do that right away. And also, given the circumstances, and the reason we are six months later than we would be in dealing with all of this is because we did rely on that promise. And even if you're not going to hold them to it, it certainly is why we're here. We would ask that the Court issue a ruling that would help us out, given the circumstances.

MR. FEINSTEIN: Your Honor, may I be heard on this on behalf of the Debtor?

THE COURT: You may.

MR. FEINSTEIN: Thank you. For the record, Robert Feinstein.

Your Honor, there was a -- a briefing schedule that was fully negotiated with the Debtor and UBS, where it was agreed, and it's recited in the stipulation, that there would be an extension of the bar date until the later of June 22nd or five business days after resolution of this motion. And we worked out a briefing schedule on this motion.

So this was already embodied in the document submitted to

the Court. So -- and that was prepared well after any notion that the putative agreement to lift the stay was going to move forward.

We told Mr. Clubok months ago our position on that, and the stipulation -- the stipulation with the (garbled) bar date all came long after that. Your Honor, we can't rely on the supposed agreement to buy more time now. We negotiated with him to file a proof of claim five business days after Your Honor's ruling on the motion, if Your Honor denied the motion. And we think that that -- that we should stick to that.

MR. CLUBOK: If I may briefly respond. Of course, it's ironic that, that agreement, we're to be held to, but the other agreement that put us in this mess, that should be just ignored.

I also will say there was an oral assurance by Mr. Pomerantz toward many of my colleagues that, don't worry, we'll get more time if we need it, we'll work it out.

I don't even want to get into the circumstances of where we were when we reached that agreement. There were medical issues going on and everyone -- oh, and the other thing is, when we set that deadline, it was because we were assured by the Debtor that, well in advance of that, they would give us an actual offer of settlement that we could start negotiating settlement numbers. That was the whole idea. And they said, oh, putting it off to June 22nd will be plenty of time. You

guys will get -- I think at that time they promised us -- I can't remember if it was April or early May. You know, we've not even seen that.

So that was the whole reason we agreed to set those dates, was on the representation that we were going to be having settlement discussions. Instead, those were cut off, et cetera.

THE COURT: All right. All right.

MR. CLUBOK: I don't really want to get into the whole back-and-forth.

THE COURT: With respect, I've heard enough.

I do want to say, you know, we keep covering this ground again, but it is crystal clear that a debtor cannot enter into an agreement to lift the stay that is going to be binding on all of the creditors and other parties in interest. It's just I can't -- you know, I don't know of one case that would be supportive here of that argument. You know, maybe -- I don't know every case that gets decided, but it's -- I think it's crystal clear.

And it's quite a different thing, informal agreements to extend deadlines and have scheduling orders. That's a very different type of agreement.

But I am going to give the Debtor -- I mean, excuse me, UBS two weeks. Okay? So, well, I'm going to make it close of business Friday, the 26th. Okay. So that will be the

deadline for UBS to file a proof of claim. And that's just the way it's going to be here.

Now, I don't think I have any other housekeeping matters. I'll just ask Debtor's counsel to draft the form of order and obviously run it by Mr. Clubok and his team and give them a reasonable --

MR. FEINSTEIN: We'll do that.

THE COURT: -- a reasonable time to respond. But I can't imagine it's going to be a very lengthy order. I obviously reserve the right to supplement in a written form of order anything I said orally today that I think I might need to clarify or elaborate on.

Now, did anyone have any remaining housekeeping matters before I go into one last topic I want to address regarding mediation?

All right. Here's what I'm going to say. We obviously have two gorillas, actually, in the room. I've not studied the Redeemer Committee proof of claim. I just know that I heard from day one that they had approximately a $200 million proof of claims or claim resulting from an arbitration and all they lacked was a judgment confirming it. Okay? So, you know, we all know what the courts say about arbitration. You know, it's just pretty darn hard to set aside an arbitration award. Okay?

So the way I have been viewing this is Redeemer Committee

is a claim that has to be dealt with. You know, I don't know, I haven't studied the proof of claim, I don't know what arguments, I don't what setoffs may be. But my guess is there's not a lot of wiggle room with regard to that claim.

But then you have this one, which I didn't know until the last few days that UBS didn't actually have a judgment against Highland. I mean, at some point UBS comes in, we have a billion-dollar claim against Highland, and it was only in the last few days when I started looking at this I appreciated the fact that, oh, they have a billion-dollar claim against these two Funds, still, you know, contingent, unliquidated, unknown what liability Highland is going to have to UBS.

So we've got that gorilla in the room that's making me think about mediation. And then Acis. I well understand the Acis issues, but oh my goodness, we have this giant adversary with -- how many counts was it, Tom? 34 counts?

THE CLERK: Yes.

THE COURT: Thirty-four counts in the adversary that Acis -- Reorganized Acis is pursuing against Highland and HCOLF. And when the stay went into effect from the Highland bankruptcy, my law clerk and I had a giant report and recommendation to the district court that we were soon going to pull the trigger on, and, oh, well, this is all stayed.

So I don't think Acis has asserted anywhere close to a billion dollars. I don't know what the size of the Acis proof

of claim is.

Mr. Shaw, what is the size of the Acis proof of claim that's been filed?

MR. SHAW: At least $70 million, Your Honor.

THE COURT: Okay. I knew it made my eyes pop out a little. You know, obviously, there are 34 counts and multiple defendants and unclear dollar amounts associated with each. But what are we going to do here?

I'm going to start with you, Mr. Pomerantz. We have too many years of litigation, too, too many years of litigation. And I think I said early on it's time to stop litigating and figuring out how we're going to pay creditors. But obviously you have these two biggie unknown ones. I am thinking about, do I order mediation (echoing) of the UBS claim?

Someone may not have their phone on mute. Please put your phone on mute or your device on mute if you don't have it on mute.

Okay. Good.

Do I order mediation of the UBS proof of claim once it's filed? Do I order mediation of the Acis proof of claim and adversary? Do I get some sort of mediation czar to help with mediation of the plan? I hate to go that route, and, you know, that's a lot of intermeddling with the Debtor-in-Possession, especially when you've got this fine new board of directors and whatnot. But I'm just letting you know what's

going on in my head. I don't -- I want people to get off their litigation mentality and get focused on the end game here of a plan and everybody getting paid what they're entitled to sooner rather than later.

So, Mr. Pomerantz, what is your initial reaction to what's going through my brain?

MR. POMERANTZ: So, Your Honor, I think Your Honor is where the board was when it took over on January 9th. I think I've appeared before Your Honor on several occasions and told you that the strategy and the game plan of this board was to break the culture of Highland, which is litigating, and attempt to resolve the litigation.

Your Honor has mentioned the three large claims. There are others, but these are the three large claims. They're all people who sit on the Creditors' Committee. And as you can imagine, sitting from a standing start on January 9th, it's taken -- it took the board quite a while to be in a position to understand each of the claims.

They came to our firm. They asked us to do an extensive analysis of the UBS claim. We then started to engage UBS in negotiations. And they didn't go anywhere. And quite frankly, I think at least our side and other -- the Objectors felt that we needed to have this hearing, that Your Honor's determination of the relief from stay matter might be a catalyst to further discussions. And we are, of course, open

to further discussions. We obviously have a big difference in view of the UBS claim, as does UBS, but we're hoping that, as a result of this hearing, that that would spur on negotiations and allow the parties to sit down.

Acis, we are actually going to be meeting with Acis for the first time on Wednesday in order to discuss their claim. We've prepared an extensive objection to the claim, which, if it hasn't already been forwarded to Mr. Shaw and Ms. Patel in advance of that meeting, will be today. And we're hoping, after sitting down with them on Wednesday, that it will be the first time the board could let Acis know where the board believes are the concerns and issues with respect to the claim, that we could have meaningful settlement discussions.

And with Redeemer, we are perhaps the furthest along, partly because it's the least complex of the three, and we've had several discussions back and forth. We would not rule out mediation. That may be necessary. It is not the board's desire to spend the creditors' money litigating on multiple fronts with each of these creditors.

However, I think at this point it might be a little premature. It may be appropriate to set some kind of a status conference 30 days from now, where we can approach -- we could come back to the Court with a further thoughtful recommendation on whether we think mediation would be appropriate or whether it wouldn't be appropriate.

But we're hoping, with, again, this hearing, the meeting with Acis, and the discussions we had with Redeemer, that we will be able to make progress. And if not, litigation may be necessary, but it may very well mean that some form of mediation with each of these creditors on their claims is helpful.

But I would like the opportunity to sit down, talk to the board about that after the dust clears from this settlement -- this hearing, as well as the further discussions we intend to have over the next couple of weeks.

THE COURT: All right. Well, do you remember, or we can look it up, when our next hearing is in this case?

MR. POMERANTZ: I believe we have a hearing on July 8th, Your Honor.

THE COURT: Okay.

MR. POMERANTZ: Perhaps we could report to the Court at that point and have a status conference and be able to address Your Honor's comments in more detail based upon where we are then.

THE COURT: All right. So that's what we're going to do. July 8th, whatever time it is, we're going to add to the calendar a status conference. And just so you all know, we're going to talk about do we need mediation -- again, with regard to UBS or with regard to Acis or more globally? So I hope that you all will give that a lot of thought. I'm sure you

will.

Is there anything else, Mr. Pomerantz?

MR. POMERANTZ: Nothing else, Your Honor. Thanks for your time and effort and going through what was mounds of paper, and the time and effort you spent today as well as throughout the case. Thank you, Your Honor.

THE COURT: All right. Well, thank you all again. My compliments. It was all very well done, so that made it easier to get through. All right. We stand adjourned.

(Proceedings concluded at 4:43 p.m.)

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CERTIFICATE

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

/s/ Kathy Rehling **06/17/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBIT 17

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P.,	§	Adversary Proceeding No. 21-03000-sgj

[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.

HIGHLAND INCOME FUND, NEXPOINT STRATEGIC OPPORTUNITIES FUND, NEXPOINT CAPITAL, INC., AND CLO HOLDCO, LTD.,

Defendants.

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST CERTAIN ENTITIES OWNED AND/OR CONTROLLED BY MR. JAMES DONDERO

Highland Capital Management, L.P., the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), and the debtor and debtor-in-possession (the "Debtor" or "Highland") in the above-captioned chapter 11 case ("Bankruptcy Case"), submits this memorandum of law (the "Memorandum") in support of the *Debtor's Motion for a Temporary Restraining Order and Preliminary Injunction against Certain Entities Owned and/or Controlled by Mr. James Dondero* (the "Motion"), pursuant to sections 105(a) and 362(a) of title 11 of the United States Code (the "Bankruptcy Code"), and Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for a temporary restraining order ("TRO") and preliminary injunction enjoining defendants Highland Capital Management Fund Advisors, L.P. ("HCMFA"), NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Advisors"), Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc. (collectively, the "Funds"), and CLO Holdco, Ltd. ("CLO Holdco," and together with the Advisors and Funds, the "Defendants") from engaging in any Prohibited Conduct.[2] In support of its Motion, the Debtor states as follows:

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the *Declaration of Mr. James P. Seery, Jr. in Support of the Debtor's Motion for a Temporary Restraining Order Against Certain Entities Owned and Controlled by Mr. James Dondero*, being filed contemporaneously herewith (the "Seery Dec.").

I.
INTRODUCTION

1. Highland's immediate need for injunctive relief stems from Defendants' recent and repeated interference with the Debtor's operations and contractual rights. These actions include, in pertinent part, Defendants' interference with the sale of certain collateralized loan obligation ("CLO") assets and Defendants' threats to initiate a process to terminate the Debtor's CLO management agreements (the "CLO Management Agreements").

2. The Debtor assumed that the Defendants would have gotten the message on December 16, 2020, when this Court granted the Debtor's motion for a directed verdict dismissing their prior motion—characterized by the Court as, among other things, "frivolous"—on these very topics. The Debtor was wrong. With the support and encouragement of Mr. James Dondero, Defendants not only persist but have expanded their threats and refuse to back down.

3. Mr. Dondero directly or indirectly (a) owns and controls each of the Advisors, (b) owns and/or controls CLO Holdco, and (c) controls each of the Funds. In a recent deposition, Mr. Dondero candidly admitted that he supports all of the actions taken by the Defendants. But pursuant to the "corporate governance" settlement approved by the Court a year ago, Mr. Dondero is prohibited from causing Defendants to terminate any agreements with the Debtor, including the CLO Management Agreement. Moreover, pursuant to Temporary Restraining Order, Mr. Dondero is enjoined from, among other things, interfering with the Debtor's business, or from causing or encouraging any entity controlled by Mr. Dondero to interfere with the Debtor's business.

4. As discussed below, injunctive relief is necessary because if Defendants are not enjoined from interfering with the Debtor's ability to manage the Debtor's operations and sale of CLO assets, pursuant to the CLO Management Agreements—conduct which Defendants have no

legal or equitable right to engage in—the Debtor will be unable to fulfill its duties, and the Debtor's estate will be irreparably harmed.

5. The Debtor has, therefore, filed the Motion and commenced a separate adversary proceeding, (1) bringing a cause of action against Defendants for tortious interference with contract, and (2) seeking declaratory relief and an order to temporarily, preliminarily, and permanently enjoin Defendants from: (a) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's (i) management of the CLOs, (ii) decisions concerning the purchase or sale of any assets on behalf of the CLOs, or (iii) contractual right to serve as the portfolio manager (or other similar title) of the CLOs; (b) otherwise violating section 362(a) of the Bankruptcy Code; (c) seeking to terminate the portfolio Management Agreements and/or servicer agreements between the Debtor and the CLOs (collectively, (2)(a)-(c) constitute the "Prohibited Conduct"); (d) conspiring, colluding, or collaborating with (x) Mr. Dondero, (y) any entity owned and/or controlled by Mr. Dondero, and/or (z) any person or entity acting on behalf of Mr. Dondero or any entity owned and/or controlled by him, to, directly or indirectly, engage in any Prohibited Conduct; and (e) engaging in any Prohibited Conduct with respect to any of the Successor Parties (as that term is defined below).

II.
FACTUAL BACKGROUND

A. Mr. James Dondero Owns and/or Controls Each of the Defendants

6. There can be no genuine dispute that Mr. Dondero owns and/or controls each of the Defendants. (Seery Dec. ¶ 5).

The Advisors and the Funds

7. On December 16, 2020, Mr. Dustin Norris ("Mr. Norris") testified under oath in support of the *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [Docket No. 1528] that was brought by the Advisors and Funds (the "Restriction Motion").

8. Mr. Norris is the Executive Vice President of each the Advisors and each of the Funds. *See* Transcript of December 16, 2020, hearing on the Restriction Motion (the "Hearing"). Seery Dec. ¶ 7; Exhibit 1, at 38:15-39:2.

9. During the hearing, Mr. Norris testified that Mr. Dondero (a) owns and controls, directly or indirectly, each of the Advisors, and (b) is the portfolio manager of each of the Funds, each of which is advised by one of the Advisors. Seery Dec. ¶ 8; Exhibit 1, at 35:15-37:13.

10. In their public filings with the Securities and Exchange Commission, each of the Funds disclosed that the Advisors were owned and controlled by Mr. Dondero and that Mr. Dondero was the portfolio manager for each of the Funds. Seery Dec. ¶ 9.

CLO Holdco

11. CLO Holdco is a wholly-owned and controlled subsidiary of the DAF. On information and believe, the DAF is managed by the Charitable DAF Holdco, Ltd. ("DAF Holdco"), which is the managing member of the DAF. Seery Dec. ¶ 10.

12. DAF Holdco is owned by three different charitable foundations: Highland Dallas Foundation, Inc., Highland Santa Barbara Foundation, Inc., and Highland Kansas City Foundation, Inc. (collectively, the "Highland Foundations"). Mr. Dondero is the president and one of the three directors of each of the Highland Foundations. Mr. Grant Scott ("Mr. Scott") – Mr. Dondero's college roommate – is also an officer and director of each of the Highland Foundations. Seery Dec. ¶ 11.

13. Although the Debtor is the investment manager for the DAF, neither the Board nor Mr. Seery, as CEO and CRO of the Debtor, have any right or ability to control or direct the DAF or CLO Holdco. That control is exercised by Mr. Scott at the direction of Mr. Dondero. Seery Dec. ¶ 12.

B. This Court has Entered Three Orders that are Implicated by the Defendants' Actions and Threatened Actions

14. This Court has entered three Orders that are relevant to the Motion and the relief sought by the Debtor.

15. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). On January 9, 2019, this Court entered an Order granting the Settlement Motion [Docket No. 339] (the "Settlement Order"). Seery Dec. ¶ 14; Exhibit 2.

16. As part of the Settlement Order, this Court also approved a term sheet (the "Term Sheet") [Docket No. 354-1] between the Debtor and the Official Committee of Unsecured Creditors (the "Committee") pursuant to which Mr. John S. Dubel, Mr. Russell Nelms, and Mr. Seery were appointed to the Board. Seery Dec. ¶ 15; Exhibit 3.

17. As required by the Term Sheet, on January 9, 2020, Mr. James Dondero resigned from his roles as an officer and director of Strand and as the Debtor's President and Chief Executive Officer. Seery Dec. ¶ 16; Exhibit 4.

18. The Settlement Order directed Mr. Dondero not to "cause any Related Entity to terminate any agreements with the Debtor." Seery Dec. ¶ 17; Exhibit 2 ¶ 9.

19. Upon information and belief, each of the Defendants is a "Related Entity" as defined in the Term Sheet because each of the Defendants is directly or indirectly owned and/or

controlled by Mr. Dondero and/or Mr. Scott. Seery Dec. ¶ 18 Exhibit 3, Ex. D (Reporting Requirements) ¶ 1.D(A)(i) and (ii).

20. Defendants' actions and threatened actions also implicate the *Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero* [Adv. Pro. No. 20-03190-sgj, Docket No. 10], entered on December 10, 2020 (the "TRO" and together with the Settlement Order, the "Orders"). Seery Dec. ¶ 19; Exhibit 5.

21. Pursuant to the TRO, the Court temporarily enjoined and restrained Mr. Dondero from, among other things, "interfering with or otherwise impeding, directly or indirectly, the Debtor's business" and from "causing, encouraging, or conspiring with (a) any entity owned or controlled by [Mr. Dondero], and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct [as defined in the TRO]," including interfering or impeding the Debtor's business. *Id*. ¶¶ 2(d), 3.

22. Finally, on December 8, 2020, Defendants (except CLO Holdco) filed the Restriction Motion. The Restriction Motion sought to prevent the Debtor from fulfilling its duties as the portfolio manager of certain CLOs by impeding any attempted sale of assets. After hearing the testimony of Dustin Norris, the Court called the Defendants' Motion "frivolous," granted the Debtor's motion for a directed verdict, and subsequently entered an order denying the Restriction Motion.

C. Defendants Interfere with and Impede the Debtor's Business and Threaten to Terminate the Debtor's Management Agreements

23. In addition to filing the Restriction Motion, on recent three occasions, Defendants have either interfered with and impeded the Debtor's business or have threatened to do so by initiating the process for removing the Debtor as the portfolio manager of the CLOs. Such

conduct also violates the Orders and flouts the Court's decision on the Restriction Motion and the Court's observations made at the Hearing. Seery Dec. ¶ 21.

24. ***First***, on December 22, 2020, employees of NPA and HCMFA interfered with and impeded the Debtor's business by refusing to settle the CLOs' sale of AVYA and SKY securities that Mr. Seery had personally authorized. The Advisors engaged in this conduct notwithstanding (a) the denial of the Restriction Motion and the Court's pointed comments during that Hearing on the Restriction Motion, and (b) Mr. Norris's sworn acknowledgments on behalf of the Advisors and Funds during the Hearing that (i) the Debtor's management of the CLOs is governed by written contracts as to which none of the Advisors or Funds are parties, Seery Dec. ¶ 22; Exhibit 1 at 41:25-42-7; (ii) the Debtor has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs, *id.* at 42:17-43:3; and (iii) as the Advisors knew when they invested in the CLOs on behalf of the Funds, that holders of preference shares (such as the Funds) have no right to make investment decisions on behalf of the CLOs, *id.* at 43:4-11.

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

26. ***Second***, also on December 22, 2020, the Defendants wrote to the Debtor and renewed their "request" that the Debtor refrain from selling any assets on behalf of the CLOs until the confirmation hearing (the "December 22 Letter"). In support of their "request," the Debtor re-asserted almost verbatim the arguments advanced in connection with the Restriction Motion – all of which were soundly rejected by the Court. Seery Dec. ¶ 24.

27. The Debtor responded on December 24, 2020, demanding that Defendants withdraw their December 22 Letter and confirm that neither the Defendants nor anyone acting on their behalf will take any further steps to interfere with the Debtor's directions as the CLOs' portfolio manager by the close of business on December 28, 2020. Seery Dec. ¶ 25; Exhibit 6. The Defendants have not complied with (or even responded to) the Debtor's demands. *Id.*

28. ***Finally***, the Defendants recently threatened to seek to remove the Debtor as the portfolio manager of the CLOs. Specifically, in a letter dated December 23, 2020 (the "December 23 Letter" and together with the December 22 Letter, the "Defendants' Letters"), the Defendants informed the Debtor that one or more of them "intend to notify the relevant trustee and/or issuers that the process of removing the Debtor as fund manager should be initiated, subject to and with due deference for the applicable provisions of the United State Bankruptcy Code, including the automatic stay of Section 362." Seery Dec. ¶ 26.

29. The Debtor responded to the December 23 Letter the next day, and advised the Defendants that the Settlement Order prohibited the termination of the Debtor's Management Agreements with the CLOs, and that there was no factual, legal, or contractual basis to remove the Debtor as the CLOs' portfolio manager in any event. The Debtor demanded that the Defendants withdraw their December 23 Letter and commit not to take any actions, directly or indirectly, to terminate the CLO Management Agreements, by the close of business on December 28, 2020. The Defendants have not complied with (or even responded to) the Debtor's demands. Seery Dec. ¶ 27; Exhibit 7.

30. Because Mr. Dondero owns and/or controls the Defendants, the Debtor forwarded the correspondence between the Debtor and the Defendants, including the Defendant's Threatening Letters, to Mr. Dondero's counsel. In response, Mr. Dondero's counsel contended

that "[w]hile there are relationships between my client and some of the movants, I believe they are separate entities and should be treated as such." Seery Dec. ¶ 28; Exhibit 8.

31. Upon information and belief, Mr. Dondero has taken no steps to cause the Defendants – entities that he indisputably owns and/or controls and that are each a "Related Entity" under the Term Sheet – to comply with the Debtor's demands made in response to the Defendants' Letters. Seery Dec. ¶ 29.

III.
LEGAL STANDARD

32. Pursuant to section 105(a) of the Bankruptcy Code, bankruptcy courts are authorized to "issue any order, process, of judgment that is necessary or appropriate to carry out the provisions of the Code. *In re FiberTower Network Servs. Corp.*, 482 B.R. 169, 182 (Bankr. N.D. Tex. 2012) (quoting 11 U.S.C. § 105); *see also In re OGA Charters, LLC*, 554 B.R. 415, 424 (Bankr. S.D. Tex. 2016) ("The Court may issue injunctions as part of its equitable powers, pursuant to 11 U.S.C. § 105."). In other words, courts have broad authority to take actions necessary to "protect the integrity of the bankruptcy estate" and to "enjoin actions that 'might impede the reorganization process.'" *FiberTower*, 482 B.R. at 182 (quoting *MacArthur Co. v. Johns–Manville Corp. (In re Johns–Manville Corp.)*, 837 F.2d 89, 93 (2d Cir.1988)). "A preliminary injunction seeks to 'prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits.'" *OGA Charters*, 554 B.R. at 424 (quoting *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir.1985)).

33. Injunctive relief is warranted under section 105(a) where the movant shows: (1) a likelihood that it will prevail on the merits; (2) irreparable injury in the absence of injunctive relief; (3) that the balance of the equities favor the movant; and (4) that the injunction would serve the public interest. *See OGA Charters, 554 B.R. at 424*; *Green v. Wells Fargo Bank, N.A.*,

575 Fed.Appx. 322, 323 n. 3 (5th Cir. 2014) (stating the four prong test for a preliminary injunction as likelihood of success, irreparable harm, balance of the equities, and the public interest); *In re Commonwealth Oil Ref. Co., Inc.*, 805 F.2d 1175, 1189 (5th Cir. 1986) (same); *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir. 2010) (same).

34. A temporary restraining order should be granted pending a hearing for a preliminary injunction where it appears that "immediate and irreparable injury, loss or damage will result to the movant." *See* Fed. R. Bankr. P. 7065 (incorporating by reference Fed. R. Civ. P. 65); *see also In re Seatco, Inc.*, 259 B.R. 279, 285 (Bankr. N.D. Tex. 2001) (noting that Fed. R. Civ. P. 65 applies in adversary proceedings, "except that a temporary restraining order or preliminary injunction may be issued on application of a debtor, trustee, or debtor-in-possession without compliance with Rule 65(c)[.]"). The issuance of an injunction is within the broad discretion of the court. *See In re Compton Corp.*, 90 B.R. 798, 806 (Bankr.N.D.Tex. 1988) ("It is [] clear that the issuance of an injunction, as a general matter, is within the discretion of the court."); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986) (noting that the decision to issue or not to issue an injunction is subject to "considerable discretion" in the district court); *Moore v. Consol. Edison Co. of New York, Inc.*, 409 F.3d 506, 511 (2d Cir. 2005) ("The district court has wide discretion in determining whether to grant a preliminary injunction, and this Court reviews the district court's determination only for abuse of discretion.").

35. For the reasons that follow, the Debtor satisfies the standard for injunctive relief.

IV.
ARGUMENT

36. Injunctive relief is necessary to prevent the imminent and irreparable harm that would be caused to the Debtor if Defendants are permitted to engage in any of the Prohibited Conduct.

37. The Debtor is likely to succeed on the merits of its underlying claim for tortious interference with contractual relations because Defendants' interference with the Debtor's CLO Management Agreements cannot be disputed (they are in writing), and such interference is causing the Debtor's estate irreparable damages. Moreover, the relief sought—the protection of its bankruptcy estate during its chapter 11 proceedings—is precisely the type of relief authorized under sections 105 and 362 of the Bankruptcy Code. *See OGA Charters*, 554 B.R. at 432-33 (granting injunctive relief to protect the debtor's assets during chapter 11 proceedings, and noting that a "preliminary injunction, is, in essence, merely an extension of § 362's stay" of the debtor's bankruptcy estate asset).

38. The equities strongly (if not exclusively) favor the Debtor because the Debtor's ability to operate and comply with its obligations will be jeopardized if Defendants are permitted to engage in the Prohibited Conduct—conduct which Defendants have no legal or equitable right to engage in. Moreover, the Court has already considered and summarily denied the Restriction Motion, rendering the Defendants' conduct indefensible.

39. Finally, and for all these same reasons, granting injunctive relief serves the public interest because the Debtor's chances of a successful liquidation will be severely jeopardized if injunctive relief is not granted.

A. The Debtor will Suffer Irreparable Harm in the Absence of Injunctive Relief

40. The Debtor's estate will be severely injured if Defendants are not enjoined from engaging in the Prohibited Conduct. Irreparable harm is "a harm 'for which there is no adequate remedy at law.'" *OGA Charters,* 554 B.R. at 424 (quoting *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013)); *see also Compass Bank v. Veytia*, EP-11-CV-228-PRM, 2011 WL 13234883, at *2 (W.D. Tex. Sept. 21, 2011) ("The general rule in the Fifth Circuit is that 'harm is irreparable where there is no adequate remedy at law, such as monetary damages.'") (quoting *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2010)).

41. In the bankruptcy context, "irreparable harm" refers to either "irreparable harm to the interest of a creditor or irreparable harm to the bankruptcy estate." *In re Hunt*, 93 B.R. 484, 495 (Bankr. N.D. Tex. 1988) (internal quotations omitted). The element of irreparable injury to the debtor's estates is described as "irreparable harm to the creditors and estates from disruption of th[e] Court's exclusive authority to effectively manage the[] cases." *Id*. Moreover, "the mere fact that economic damages may be available does not always mean that a remedy at law is 'adequate.'" *Compass Bank*, 2011 WL 13234883, at *2 (citing *Janvey*, 647 F.3d at 600); (holding that "dissipation of assets ... would impair the court's ability to grant an effective remedy").

42. Here, in the absence of injunctive relief, both the Debtor's estate and its creditors will face imminent and irreparable harm that cannot be adequately remedied. If Defendants continue to engage in the Prohibited Conduct, the Debtor's ability to perform under the CLO management agreements will be severely impaired. Given the Defendants' threats and demands,

the harm is thus the not merely "speculative, theoretical, or remote," but imminent and irreparable. *FiberTower Network Services*, 482 B.R. at 187.

B. The Debtor Demonstrates Likelihood of Success on the Merits

43. The Debtor is likely to succeed on the merits of its underlying claim for tortious interference with contract. To satisfy the likelihood of success element, the movant need only present their "prima facie case but need not show that [they] are certain to win." *Janvey*, 647 F.3d at 595 (internal quotations omitted). Moreover, the relevant "merits" question in this case is not whether Debtor is likely to prevail on appeal, but rather "whether this [C]ourt is authorized and likely to grant the requested relief." *FiberTower*, 482 B.R. at 183–84 (citing COLLIER ON BANKRUPTCY ¶ 105.03[1][a] (16th ed. 2012) ("In connection with the 'likelihood' argument, many courts have looked to the purpose of the requested injunction ... the likelihood of success argument will track closely the bankruptcy right sought to be vindicated."); *see also Hunt*, 93 B.R. at 493 ("[t]he inquiry [for success on the merits] for a preliminary injunction necessarily focuses on the outcome of a later proceeding, at which time the merits giving rise to the litigation will be decided" rather than success on the merits "so that reorganization efforts mandated by the Bankruptcy Code will not be thwarted by the [enforcement] proceeding.") (internal quotations omitted).

44. Here, the Debtor demonstrates a likelihood of success on the merits of its underlying claim. To succeed on a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) the defendant willfully and intentionally interfered with the contract; (3) the interference was a proximate cause of the plaintiff's injuries; and (4) the plaintiff suffered actual damages or loss. *See In re Cantu*, 400 B.R. 104, 111 (Bankr. S.D. Tex. 2008). Proximate causation is shown where the defendant "interfered by actively persuading a party to breach a contract or otherwise causing the contract to be more difficult to

fulfill or of less or no value." *Weatherford Int'l, LLC v. Binstock*, 452 F. Supp. 3d 561, 576 (S.D. Tex. 2020). Here, there can be no dispute that the CLO Management Agreements constitute valid contracts. Defendants are willfully and intentionally interfering with the Management Agreements by, among other things, (1) threatening to initiate the process for removing the Debtor as the portfolio manager of the CLOs, (2) refusing to allow the sale of certain CLO assets and securities, in direct contravention of the Board's explicit business judgment and authorization to do so, and (3) otherwise attempting to influence and interfere with the Board's decisions concerning the purchase or sale of any assets on behalf of the CLOs. Such interferences are hindering the Board's ability to fulfill its duties and contractual rights under the CLO Management Agreements to manage the Debtor's assets and smoothly wind down the Debtor's business. Defendants' interferences, which include thwarting the Debtor's efforts to effectuate certain CLO trades, have damaged the Debtor's estate.

45. Moreover, the relief the Debtor seeks is precisely the type contemplated by the Bankruptcy Court's broad powers to grant injunctive relief under Section 105. *See* 11 U.S.C § 105(a) (authorizing the bankruptcy court to "issue any order, process, of judgment that is necessary or appropriate to carry out the provisions of the Code."); *see also* 11 U.S.C. § 362. The Debtor seeks to enjoin Defendants from attempting to control, manage, or otherwise influence the Debtor's management and sale of its CLO assets. Injunctive relief is, therefore, warranted for the purpose of protecting the Board's ability to manage the Debtor's assets, and in turn, to protect the integrity of the Debtor's bankruptcy estate. *See FiberTower*, 482 B.R. at 182. Furthermore, as noted above, there can be no credible dispute that Defendants engaged in the conduct complained of because it is reflected in contemporaneous, written communications.

C. The Equities Strongly Favor the Debtor

46. The balance of the equities also tip decisively in the Debtor's favor. In the absence of injunctive relief, the Debtor faces imminent and irreparable harm. If Defendants are not prevented from continuing to interfere with the Debtor's business, management of its assets, and ability to perform and fulfill its duties as portfolio manager to the CLOs under the CLO Management Agreements, the Debtor's ability to successfully liquidate and satisfy its claims will be threatened. By contrast, there are no equities that favor denying injunctive relief. Defendants have no legal or equitable right to engage in any of the Prohibited Conduct, all of which is adverse to the Debtor's interests, and all of which undermine this Court's Orders. Indeed, the Court already told them that less than a month ago when denying the Restriction Motion.

47. In sum, the potential harm to the Debtor in the absence of injunctive relief far outweighs any harm to Defendants if injunctive relief issues. *See FiberTower*, 482 B.R. at 189 (finding that the balance of equities favored the debtors where "[t]he potential harm to Debtors … far outweighs the possible harm to Defendant" if injunctive relief is granted "because, among other reasons, the Debtors "face the loss of cash collateral[.]").

D. Injunctive Relief Serves the Public Interest

48. Injunctive relief will further the public interest because it is necessary to protect the Debtor's ability to successfully liquidate its assets and satisfy its claims. "Courts have often held that injunctions that facilitate reorganizations serve the public interest." *FiberTower*, 482 B.R. at 189 (citing *SAS Overseas Consultants v. Benoit*, No. 99–1663, 2000 WL 140611, at *5 (E.D.La. Feb. 7, 2000); *Lazarus Burman Assocs. v. Nat'l Westminster Bank U.S.A. (In re Lazarus Burman Assocs.)*, 161 B.R. 891, 901 (Bankr.E.D.N.Y.1993)). In other words, "[i]n bankruptcy, the public policy is to have an orderly administration of the debtor's assets via their bankruptcy estate, such that the debtor may be able to gain a fresh start, by satisfying valid claims against

that estate." *OGA Charters*, 554 B.R. at 426; *see also In re Hunt*, 93 B.R. at 497 ("Chapter 11 expresses the public interest of preserving the going-concern values of businesses, protecting jobs, ensuring the equal treatment of and payment of creditors, and if possible saving something for the equity holders.").

49. To this end, "[t]he Bankruptcy Court is vested with management duties to further this interest and ensure a meaningful process for all of these competing entities." *Id.* (citing *In re Timbers of Inwood Forest Assocs., LTD.*, 808 F.2d 363, 373 (5th Cir.1987) ("Early and ongoing judicial management of Chapter 11 cases is essential if the Chapter 11 process is to survive and the goals of reorganizability on the one hand, and creditor protection, on the other, are to be achieved."). Thus, in general, preventing the dissipation of potential assets belonging to the debtor that, pursuant to 11 U.S.C. § 541, may be brought into the bankruptcy estate is in the public interest. *See OGA Charters*, 554 B.R. at 426 (finding that the "public interest may be served where the purpose of the preliminary injunction is such that it serves to" uphold a core "pillar of bankruptcy by preserving a debtor's … assets that can be potentially used to satisfy valid claims against the bankruptcy estate.").

50. Here, if Defendants are not enjoined from engaging in the Prohibited Conduct, the Debtor's liquidation process will be jeopardized at the expense of its creditors. *See FiberTower Network Services*, 482 B.R. at 189 (holding that an injunction would serve the public interest where, the "Debtors' chances of successfully reorganizing will be jeopardized unless injunctive relief is granted," further noting that "if the Debtors were to liquidate, their employees and customers would be adversely affected."). By contrast, the public interest would not be served by allowing Defendants to continue to interfere with the Debtor's CLO Management Agreements, and overall liquidation process. The Debtor's management must be able to fully

execute its duties of managing and selling its assets so that the Debtor can properly wind down, satisfy valid claims against the estate, and maximize the value of the Debtor's assets for the benefit of all stakeholders.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court grant the Motion and enter an Order in the form annexed thereto as Exhibit A, and grant any further relief as the Court deems just and proper.

Dated: January 6, 2021.

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EXHIBIT 18

December 22, 2020

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Dear Counsel:

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

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

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

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

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

- Liberty CLO, Ltd. 70.43%
- Stratford CLO, Ltd. 69.05%*[2]
- Aberdeen Loan Funding, Ltd. 64.58%
- Grayson CLO, Ltd. 61.65%*
- Westchester CLO, Ltd. 58.13%
- Rockwall CDO, Ltd. 55.75%
- Brentwood CLO, Ltd. 55.74%
- Greenbriar CLO, Ltd. 53.44%*

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

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

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

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

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

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

For the forgoing and other reasons, we request that no further CLO transactions occur at least until the issues raised by and addressed in the Debtor's plan are resolved at the confirmation hearing.

Sincerely,

A. Lee Hogewood, III

A. Lee Hogewood, III

December 23, 2020

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

T: 1-919-743-7306

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

Dear Counsel:

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

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

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

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

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

- Liberty CLO, Ltd. 70.43%
- Stratford CLO, Ltd. 69.05%*[2]
- Aberdeen Loan Funding, Ltd. 64.58%
- Grayson CLO, Ltd. 61.65%*
- Westchester CLO, Ltd. 58.13%
- Rockwall CDO, Ltd. 55.75%
- Brentwood CLO, Ltd. 55.74%
- Greenbriar CLO, Ltd. 53.44%*

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

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

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

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

Consequently, in addition to our request of yesterday, where appropriate and consistent with the underlying contractual provisions, one or more of the entities above intend to notify the relevant trustees and/or issuers that the process of removing the Debtor as fund manager should be initiated, subject to and with due deference for the applicable provisions of the United States Bankruptcy Code, including the automatic stay of Section 362. The basis for initiating the process for such removal includes, but is not limited to, the fact that HCMLP's duties, as set forth in the portfolio management agreements of the CLOs, are subject to the requirements of the Investment Advisers Act of 1940 ("Advisers Act"). HCMLP appears to be acting contrary to those duties under the agreements and where HCMLP is not fulfilling its duties under the portfolio management agreement it is therefore violating the Advisers Act. Thus, because HCMLP is (i) terminating employees on January 31, 2021, which will result in a loss of the employees that have traditionally serviced, including key investment professionals identified in the transactional documents for those CLOs (generally Mark Okada and Jim Dondero); (ii) ignoring the requests of the Advisors, Funds, and CLO Holdco, which together account for all or a majority of interests in certain CLOs, and selling assets of those CLOs prior to plan confirmation; (iii)

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

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

Because the process of removal is being initiated, subject to the applicable provisions of the Bankruptcy Code, we respectfully request that no further CLO transactions occur at least until the issues raised by and addressed in the Debtor's plan are resolved at the confirmation hearing. To the extent there are CLO transactions prior to the confirmation, we intend to fully explore the business justification for doing so, as we do not believe there is any rational business reason to liquidate securities prior to that time.

Sincerely,

A. Lee Hogewood, III

A. Lee Hogewood, III

PACHULSKI STANG ZIEHL & JONES

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Gregory Demo

212-561-7700
gdemo@pszjlaw.com

December 24, 2020

Via E-mail

James A. Wright III
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State Street Financial Center
One Lincoln Street
Boston, Massachusetts 02111

A. Lee Hogewood III
K&L Gates LLP
4350 Lassiter at North Hills Ave.
Suite 300
Raleigh, North Carolina 27609

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

Dear Counsel:

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

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

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

PACHULSKI STANG & ZIEHL JONES
LAW OFFICES

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

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

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

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

Please feel free to contact me with any questions.

Sincerely,

Gregory Demo

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

DOCS_NY:41827.7 36027/002

Exhibit A

December 22, 2020

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

T: 1-919-743-7306

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

Dear Counsel:

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

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

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

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

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

- Liberty CLO, Ltd. 70.43%
- Stratford CLO, Ltd. 69.05%*[2]
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Contractually, the Debtor is obligated to maximize value for the benefit of the preference shareholders. Accordingly, we respectfully request that no further dispositions of CLO interests occur pending the confirmation hearing. While we recognize the Court denied the Advisor and Funds motion on this subject, the Court did not require liquidations occur immediately, and we reserve all rights to and remedies against the Debtor should the Debtor continue to liquidate CLO interests in contravention of this joint request. Given the Advisor, Funds, and CLO Holdco's requests, it is difficult to understand the Debtor's rationale for continued liquidations, or the benefit to the Debtor from pursuing those sales.

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

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

For the forgoing and other reasons, we request that no further CLO transactions occur at least until the issues raised by and addressed in the Debtor's plan are resolved at the confirmation hearing.

Sincerely,

A. Lee Hogewood, III

A. Lee Hogewood, III

K&L GATES

December 28, 2020

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

T: 1-919-743-7306

Via Email

Gregory V. Demo
Pachulski Stang Ziehl & Jones, LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067

Dear Counsel:

Thank you for your letters of December 24, 2020, demanding a reply by the afternoon of the 28th. To cut to the chase, we decline to withdraw the letters of December 22 and 23, 2020. The letter dated December 22, 2020 was a request from counsel for the Funds and Advisors, as well as Holdco, to you as counsel for the Debtor, asking that the Debtor cease further trading in property you have acknowledged is not an asset of the Debtor's estate. The request is continuing. The letter dated December 23, 2020 was notification from counsel for the Funds and Advisors, as well as Holdco, to you as counsel for the Debtors that the process to remove the Debtor as manager of certain funds would be initiated, *subject to* applicable orders in the pending bankruptcy case, provisions of the Bankruptcy Code and, specifically the automatic stay.

Neither letter was presented to, or constituted a request for relief from, any court. Thus, your threat to seek sanctions under Rule 9011 would not seem to be actionable or otherwise warranted by existing law. That said, if you believe there is authority for seeking 9011 sanctions against a party or a lawyer based upon either a request or a notification exclusively between counsel, please provide and we will certainly consider it. I would add that the demand to respond within a single business day, over an intervening holiday, is not in compliance with Rule 9011 in any event. Given that the rule is inapplicable, the procedural infirmity of your demand is immaterial.

Substantively, please consider the following:

First, there is no confusion on the part of our Firm or our client that our motion was denied. Thus, the Debtor is not prohibited from engaging in sales of CLO assets. Because the Debtor is free to do so, however, does not mean that the Debtor must engage in such transactions. The Debtor has acknowledged that the assets it has sold and may sell are expressly not property of the estate. Thus, any benefits of such transactions to the estate are not evident. On the other hand, the parties holding a majority of the beneficial interests in the assets have requested, and continue to request, that the Debtor refrain from selling those assets for a short time. What is the harm in refraining?

Second, in order to pursue the trades over the last several days, the Debtor has initiated the trades, as we understand it, by giving instructions to a trading desk other than Highland Capital Management Fund Advisors ("HCMFA"). The Debtor has demanded that employees of HCMFA "book" or "settle" the trades. Having not initiated the trades and with the trades executed outside of compliance protocols including HCMLP's order management system, HCMFA employees have been reluctant to do so because, among other reasons, they did not initiate them and cannot be sure such trades were properly pre-cleared. The Debtor presently has adequate staff and resources to process and settle trades without requiring involvement of HCMFA employees. In short, if the Debtor wishes to make trades, it has the ability to make them without HCMFA's assistance. If the Debtor desires or requires the continued support of HCMFA to make such trades, we should discuss an appropriate protocol and payment for such support.

Third, the Debtor's view that the historic affiliate relationship between it, the Funds, the Advisors and Holdco precludes those entities from replacing management is misplaced. While Mr. Dondero was never a control person of Holdco, we acknowledge he was once a control person in connection with many of the relevant entities. There is no doubt that Mr. Dondero no longer has control over the activities of the Debtor as fund manager, and thus the affiliate status that might have precluded the Funds and Advisors from seeking the removal and replacement of the fund manager no longer exists. Indeed, in the transcript of the hearing of December 16, at which the Court denied my clients' motion, Debtor's counsel made crystal clear that the Debtor's board had no interest in speaking with Mr. Dondero and further that Mr. Seery viewed discussions with Mr. Dondero as "a waste of time." Once Mr. Dondero ceased to be a control person or employee of the Debtor, any affiliate status between the Debtor on the one hand and the Advisers and the Funds on the other also terminated. This termination was effective pursuant to both Investment Company Act of 1940 (the "1940 Act") and the Indentures governing the CLOs. Having reviewed these facts with the 1940 Act experts in our Firm, we are confident that affiliate status is no longer an impediment to removal.

In view of the foregoing, I suggest that the parties could benefit from a call this week to discuss our competing communications and perhaps broader questions as well. Please let me know your availability over the next few days and I will work to coordinate a call.

Warm regards,

A. Lee Hogewood, III

A. Lee Hogewood, III

308558666.5

Cc: (via email)

Jeffrey N. Pomerantz
Ira D. Kharasch
John A. Morris
Hayley R. Winograd

John J. Kane

George Zornado
R. Charles Miller

EXHIBIT 19

PACHULSKI STANG ZIEHL & JONES LLP
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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.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P. Defendants.	§	Adversary Proceeding No. 21-03010-sgj

[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.

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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

Highland Capital Management, L.P., the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), and the debtor and debtor-in-possession (the "Debtor" or "Highland") in the above-captioned chapter 11 case ("Bankruptcy Case"), submits this memorandum of law (the "Memorandum") in support of the *Debtor's Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* (the "Motion"), pursuant to sections 105(a), 362(a), 542, and 1107 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), against defendants Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Advisors").[2] In support of its Motion, the Debtor states as follows:

I.

INTRODUCTION

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] Capitalized terms not defined herein shall have the meanings ascribed to them in the *Declaration of Mr. James P. Seery, Jr. in Support of the Debtor's Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* (the "Seery Declaration") being filed contemporaneously herewith.

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 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]

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 it 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 its 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, the Debtor moves, on an emergency basis, 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.

[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 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.

II.

STATEMENT OF FACTS

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

10. 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

11. The Debtor and HCMFA are parties to that certain *Second Amended and Restated Shared Services Agreement*, effective as of February 8, 2013. Seery Dec. **Exhibit A**.

12. 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.

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

14. 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."

15. 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. Seery Dec. **Exhibit B**.

The Debtor's Shared Services Agreement with NPA

16. The Debtor and NPA are parties to that certain *Amended and Restated Shared Services Agreement*, effective as of January 1, 2018. Seery Dec. **Exhibit C**.

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

18. 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."

19. 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. Seery Dec. **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

20. 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].

21. 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.[4]

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

[4] 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.").

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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

29. 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.

30. 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.

31. 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. Seery Dec. **Exhibit E**.

32. During the following two weeks, 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.

33. 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.

34. 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.[5] Seery Dec. **Exhibits F, G and H,** respectively.

35. 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 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.

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

37. 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 that provided a reasonable transition plan. Seery Dec. **Exhibit J**. The Advisors refused to agree to the terms thereunder.

38. 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.

III.

LEGAL STANDARD

39. Pursuant to section 105(a) of the Bankruptcy Code, bankruptcy courts are authorized to "issue any order, process, of judgment that is necessary or appropriate to carry out the provisions of the Code. *In re FiberTower Network Servs. Corp.*, 482 B.R. 169, 182 (Bankr.

[5] 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.

N.D. Tex. 2012) (quoting 11 U.S.C. § 105); *see also In re OGA Charters, LLC*, 554 B.R. 415, 424 (Bankr. S.D. Tex. 2016) ("The Court may issue injunctions as part of its equitable powers, pursuant to 11 U.S.C. § 105."). In other words, courts have broad authority to take actions necessary to "protect the integrity of the bankruptcy estate" and to "enjoin actions that 'might impede the reorganization process.'" *FiberTower*, 482 B.R. at 182 (quoting *MacArthur Co. v. Johns–Manville Corp. (In re Johns–Manville Corp.)*, 837 F.2d 89, 93 (2d Cir.1988)). "A preliminary injunction seeks to 'prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits.'" *OGA Charters*, 554 B.R. at 424 (quoting *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir.1985)).

40. Injunctive relief is warranted under section 105(a) where the movant shows: (1) a likelihood that it will prevail on the merits; (2) irreparable injury in the absence of injunctive relief; (3) that the balance of the equities favor the movant; and (4) that the injunction would serve the public interest. *See OGA Charters*, 554 B.R. at 424; *Green v. Wells Fargo Bank, N.A.*, 575 Fed. Appx. 322, 323 n. 3 (5th Cir. 2014) (stating the four-prong test for a preliminary injunction as likelihood of success, irreparable harm, balance of the equities, and the public interest); *In re Commonwealth Oil Ref. Co., Inc.*, 805 F.2d 1175, 1189 (5th Cir. 1986) (same); *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir. 2010) (same).

41. A mandatory preliminary injunction—that is, a preliminary injunction that orders a party to "take action" or perform, as opposed to a prohibitory preliminary injunction—seeks to alter the *status quo* prior to litigation rather than maintain it. *See Davis v. Angelina College Board of Trustees*, No. 9:17-CV-179, 2018 WL 1755392 (E.D. Tex. 2018); *Texas v. Ysleta Del Sur Pueblo*, No. EP-17-CV-179-PRM, 2018 WL 1566866, at *9 (W.D. Tex. March 29, 2018).

42. The factors for assessing a mandatory or prohibitory injunction are the same, although a plaintiff seeking a mandatory injunction must show a "clear entitlement" to the relief sought. *Texas,* 2018 WL 1566866, at *9 (citing *Justin Indus., Inc. v. Choctaw Sec., L.P.*, 920 F.2d 262, 268 (5th Cir. 1990) ("[B]ecause [the plaintiff] is seeking a mandatory injunction, it bears the burden of showing a clear entitlement to the relief under the facts and the law."); *see also Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (noting that in order for mandatory injunctions to issue, plaintiff must show that the "facts and the law clearly favors" them).

43. Although there is a heavier burden on the plaintiff to establish that a mandatory injunction is warranted, the Fifth Circuit has cautioned that the focus must be on the prevention of injury rather than preserving the "status quo":

> It must not be thought, however, that there is any particular magic in the phrase 'status quo.' *The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits*. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. *The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo*.

Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974) (emphases added); *see also Rush v. Nat'l Bd. of Med. Examiners*, 268 F. Supp. 2d 673, 678 (N.D. Tex. 2003) ("An indispensable prerequisite to issuance of a preliminary injunction is prevention of irreparable injury."); *In re Life Partners Holdings, Inc.*, 15-40289-RFN-11, 2017 WL 11517832, at *2 (N.D. Tex. Dec. 12, 2017) (noting that "mandatory preliminary injunctions 'that goes beyond the status

quo' … may be appropriate to 'keep[] in effect a contractual relationship' to maintain the status quo." (quoting *Lake Charles Diesel, Inc. v. Gen. Motors*, 328 F.3d 192, 196 (5th Cir. 2003)).[6]

44. For the reasons set forth above and below, the facts and the law show that the Debtor has a "clear entitlement" to the mandatory injunctive relief requested.

IV.

ARGUMENT

45. A mandatory injunction requiring the Advisors to adopt and implement a plan for the transition of back office and middle office services from the Debtor is necessary to prevent imminent and irreparable harm to the Funds, their investors, and the Debtor that would be caused by the Advisors' continued failure to adopt and implement such a plan.

A. The Funds, their Investors, and the Debtor will Suffer Imminent and Irreparable Harm in the Absence of a Mandatory Injunction

46. The Funds, their investors, and the Debtor's estate will be severely injured if Defendants are not mandated to adopt and implement a transition plan. Irreparable harm is "a harm 'for which there is no adequate remedy at law.'" *OGA Charters,* 554 B.R. at 424 (quoting *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013)); *see also Compass Bank v. Veytia*, EP-11-CV-228-PRM, 2011 WL 13234883, at *2 (W.D. Tex. Sept. 21, 2011) ("The general rule in the Fifth Circuit is that 'harm is irreparable where there is no adequate remedy at law, such as monetary damages.'") (quoting *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2010)).

[6] *See also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) ("While we recognize that mandatory preliminary injunctions are traditionally disfavored … when the moving party demonstrates that the 'exigencies of the case require extraordinary interim relief,' the district court may grant the motion upon satisfaction of the heightened burden.") (internal citations omitted); *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017) ("Mandatory injunctions are most likely to be appropriate when 'the status quo ... is exactly what will inflict the irreparable injury upon complainant.'" (citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 830 n.21 (D.C. Cir. 1984)).

47. In the bankruptcy context, "irreparable harm" refers to either "irreparable harm to the interest of a creditor or irreparable harm to the bankruptcy estate." *In re Hunt*, 93 B.R. 484, 495 (Bankr. N.D. Tex. 1988) (internal quotations omitted). The element of irreparable injury to the debtor's estate is described as "irreparable harm to the creditors and estates from disruption of th[e] Court's exclusive authority to effectively manage the[] cases." *Id.*; *see also Pipkin v. JVM Operating, L.C.*, 197 B.R. 47, 51 (E.D. Tex. 1996) (noting that "[a]n injury is irreparable if it cannot be undone through monetary remedies[,]" and where, for instance, "there is injury to a party's operations, reputation, and goodwill.") (internal quotations omitted). Moreover, "the mere fact that economic damages may be available does not always mean that a remedy at law is 'adequate.'" *Compass Bank*, 2011 WL 13234883, at *2 (citing *Janvey*, 647 F.3d at 600); (holding that "dissipation of assets ... would impair the court's ability to grant an effective remedy").

48. Here, 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's operations, goodwill, estate, and ability to implement the Plan. *See Pipkin*, 197 B.R. at 56 (affirming mandatory injunction where trustee showed that absent such relief, he would "be unable to fulfill his fiduciary duties to expeditiously liquidate the estate" and where such relief was proper "after confirmation of a plan to protect the debtor and the administration of the bankruptcy estate") (internal quotations omitted).

49. In the absence of a mandatory injunction, the Debtor will be forced to 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 caused by 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.

50. Either way, the ability of the Funds to function – and thus the ability of the Funds' retail and other investors to buy and sell interests in the Funds – will be at risk of substantial disruption, thereby creating the potential for catastrophic, unforeseeable, and incalculable consequences for investors, the Funds, the Debtor – and especially the Advisors. Any such disruption will be at best a distraction for the Debtor and, at worst, cause the Debtor to incur substantial costs and litigation risk. Regardless, there will be a significant impact on the Debtor's ability to implement its Plan and manage its estate.

B. The Debtor Will Demonstrate a Likelihood of Success on the Merits

51. To satisfy the likelihood of success element, the movant need only present their "prima facie case but need not show that [they] are certain to win." *Janvey*, 647 F.3d at 595 (internal quotations omitted). Moreover, the relevant "merits" question in this case is not whether the Debtor is likely to prevail on appeal, but rather "whether this [C]ourt is authorized and likely to grant the requested relief." *FiberTower*, 482 B.R. at 183–84 (citing COLLIER ON BANKRUPTCY ¶ 105.03[1][a] (16th ed. 2012) ("In connection with the 'likelihood' argument, many courts have looked to the purpose of the requested injunction ... the likelihood of success argument will track closely the bankruptcy right sought to be vindicated."); *see also Hunt*, 93 B.R. at 493 ("[t]he inquiry [for success on the merits] for a preliminary injunction necessarily focuses on the outcome of a later proceeding, at which time the merits giving rise to the litigation will be decided" rather than success on the merits "so that reorganization efforts mandated by the Bankruptcy Code will not be thwarted by the [enforcement] proceeding.") (internal quotations omitted).

52. Here, 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 by February 28, 2021.

53. The terms of the Shared Services Agreements are unambiguous and give the Debtor the unfettered right to terminate services upon prior written notice. There will be no dispute that the Debtor timely and properly provided such written notice in conformity with the provisions of the Shared Services Agreements.

54. Moreover, the relief the Debtor seeks is precisely the type contemplated by the Bankruptcy Court's broad powers to grant injunctive relief under Section 105. *See* 11 U.S.C § 105 (a) (authorizing the bankruptcy court to "issue any order, process, of judgment that is necessary or appropriate to carry out the provisions of the Code."); *see also* 11 U.S.C. §§ 362, 542, 1107. The Debtor seeks to require the Advisors to fulfill their duty to the Funds by ensuring that they have services necessary to manage the Funds. The injunction will also allow the Debtor to focus on its own business, including the implementation of its Plan, and avoid the substantial costs and disruption inherent in being forced to continue its relationship with the Advisors and Funds. Injunctive relief is, therefore, warranted for the purpose of protecting the integrity of the markets in which the Funds' shares are traded, the Funds' investors, and the Debtor's reorganization process. *See FiberTower*, 482 B.R. at 182.

C. The Equities Strongly Favor the Debtor

55. The equities strongly favor the Debtor. The evidence will show 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.

56. Based on these facts, the balance of the equities strongly favors the Debtor.

D. Injunctive Relief Serves the Public Interest

57. Injunctive relief will further the public interest because it is necessary to protect public markets and thousands of retail investors who currently have no knowledge of the risks they face, as well as the Debtor in its efforts to timely implement the Plan that was recently approved by the Court. "Courts have often held that injunctions that facilitate reorganizations serve the public interest." *FiberTower*, 482 B.R. at 189 (citing *SAS Overseas Consultants v. Benoit*, No. 99–1663, 2000 WL 140611, at *5 (E.D. La. Feb. 7, 2000); *Lazarus Burman Assocs. v. Nat'l Westminster Bank U.S.A. (In re Lazarus Burman Assocs.)*, 161 B.R. 891, 901 (Bankr. E.D.N.Y.1993)). In other words, "[i]n bankruptcy, the public policy is to have an orderly administration of the debtor's assets via their bankruptcy estate, such that the debtor may be able to gain a fresh start, by satisfying valid claims against that estate." *OGA Charters*, 554 B.R. at 426; *see also In re Hunt*, 93 B.R. at 497 ("Chapter 11 expresses the public interest of preserving the going-concern values of businesses, protecting jobs, ensuring the equal treatment of and payment of creditors, and if possible saving something for the equity holders.").

58. Indeed, 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. Each of these events will likely cause the Debtor substantial harm and interfere with the Debtor's ability to implement its Plan.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court (i) grant its Motion and enter an Order in the form annexed hereto as Exhibit A, and (ii) grant the Debtor any further relief as the Court deems just and proper.

Dated: February 17, 2021.

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EXHIBIT 20

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

Signed February 24, 2021

United States Bankruptcy Judge

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P., Defendants.	§	Adversary Proceeding No. Case No. 21-03010-sgj11

ORDER

[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.

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 proceeding[3] 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.

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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 21

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

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

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

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THE COURT: This is Judge Jernigan, and we have Highland settings this morning. We have a couple of settings in adversary proceedings, one in Adversary 21-3010, Debtor's Emergency Motion for a Mandatory Injunction Requiring the So-Called Advisors to Adopt and Implement a Plan for Transition of Services; and then, second, in Adversary 20-3190, a Motion to Hold James Dondero in Contempt for Violating a Previous TRO, allegedly.

So, let's go ahead and get our lawyer appearances. First, for the Debtor, Highland, who is appearing this morning?

MR. POMERANTZ: Good morning, Your Honor. It's Jeff Pomerantz and John Morris of Pachulski Stang Ziehl & Jones. Mr. Morris will be handling the hearings today.

THE COURT: All right. Thank you.

All right. For the Advisors, who do we have appearing?

MR. RUKAVINA: Davor Rukavina and my co-counsel, Lee Hogewood. We are appearing for the two Defendants in Adversary Proceeding 21-03010. We are not appearing in the other adversary and contempt matter.

THE COURT: All right. For Mr. Dondero, who do we have appearing this morning?

MR. WILSON: Your Honor, John Wilson with the law firm of Bonds Ellis Eppich Schafer Jones. And with me is Bryan Assink.

(Interruption.)

THE COURT: All right. I didn't hear what you said, Mr. Wilson, after appearing for yourself and Mr. Assink. Would you repeat that?

MR. WILSON: That was all I said, Your Honor. I don't know what that other noise was.

THE COURT: Oh, okay.

(Court confers with Clerk.)

THE COURT: Okay. Someone came in as a PC user, is what my court reporter said.

All right. Well, do we have the Committee appearing today?

MR. CLEMENTE: Yes. Good morning, Your Honor. Matthew Clemente; Sidley Austin; on behalf of the Committee.

THE COURT: All right. Thank you.

All right. Well, that's all the appearances I will ask for right now. I know we have interested observers, parties in interest observing today.

Mr. Morris, how did you want to proceed this morning?

MR. MORRIS: John Morris; Pachulski Stang Ziehl & Jones.

What I thought we'd do, Your Honor, is begin with the Debtor's Motion for the Mandatory Injunction. I thought it would -- may make sense to begin with some opening statements and proceed right to the evidence. The Debtor has two

witnesses to call, Mr. Seery and then Mr. Dondero. And then we would rest after the admission into evidence of our exhibits. The Advisors, you know, can certainly cross-examine Mr. Seery. You know, and then we'll have closing statements and hopefully finish that part of the proceeding up.

And then we'll move on to the contempt proceeding. Mr. Dondero has a motion *in limine* to exclude certain evidence. The Debtor has agreed -- I don't know if I've seen an order from the Court -- but the Debtor has agreed to have that heard today, if Your Honor would like to do that. The Debtor is certainly prepared to argue that motion prior to the commencement of the contempt proceeding. And then after that motion is decided, we could just do the same drill: Some opening statements, hopefully hear from a few witnesses, put in our evidence, and finish up.

THE COURT: All right. Well, that was the sequence I had envisioned. Since you're looking for an injunction, you know, immediately, you're wanting to transition services by February 28th, I thought that it made sense to take that one up first. So, with that, I'll hear your opening statement.

MR. MORRIS: Okay. Thank you, Your Honor.

MR. RUKAVINA: Your Honor, Davor Rukavina, briefly. I just would like for the record to be clear. Are we having a combined record for both adversaries, or is the -- first the one and then the other, which would be my strong preference?

THE COURT: No, I did not envision a combined record.

MR. RUKAVINA: Okay.

THE COURT: Mr. Morris, was that what you were suggesting and I didn't understand?

MR. MORRIS: No.

THE COURT: No, he was not.

MR. MORRIS: Not at all.

THE COURT: Okay. So we're just --

MR. RUKAVINA: Okay. Thank you.

THE COURT: -- focusing on the Advisor-Debtor dispute this morning with the evidence. Okay.

Mr. Morris, go ahead.

MR. RUKAVINA: Thank you, Your Honor.

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

MR. MORRIS: Okay. Thank you, Your Honor. John Morris; Pachulski Stang Ziehl & Jones.

Before I begin, I just want to tell the Court that the lawyers -- this has been a very difficult week. We had three depositions yesterday. And I just, I think it's important for the Court to know that the lawyers have cooperated really quite well. It's difficult circumstances. Not every conversation is polite and perfect. But for Your Honor's purposes, I do appreciate everybody's cooperation getting to this point.

THE COURT: Well, I'm glad you told me that, because

I was wrongly thinking I might hear this morning that you all worked it out overnight.

MR. MORRIS: No.

THE COURT: I will let you know, I cannot for the life of me figure out why this couldn't be worked out, but I'm going to hear the evidence and argument and better understand that, I guess.

MR. MORRIS: You are. And let me try to explain that. And what I'd like to do in my opening is just give you some background as to how we got here, what the Debtor's interest was in bringing the motion, and what the Debtor is seeking from the Court today. And I think, with that, perhaps we'll fill in any of the blanks that may be appearing on your page.

THE COURT: Okay.

MR. MORRIS: And I think the best place to start, Your Honor, is just -- I know that the Court is familiar with the relationship of the parties, but for the record in this particular case I think that it's important to just put that out there. I've got a small demonstrative deck that I think would be helpful, and I would just ask that we put up on the screen --

THE COURT: All right.

MR. MORRIS: -- the first slide of the deck.

THE COURT: Okay.

MR. MORRIS: And this slide, Your Honor, you'll hear testimony and I don't think there will be any dispute about the substance of this particular slide. But as Your Honor is aware, HCMLP, the Debtor, has certain shared services agreements with the two Defendants here that are the two Advisors. That's HCM Fund Advisors, NexPoint Advisors. Pursuant to those shared services agreements, the Debtor provided certain back- and middle-office services. And the shared services for purposes of this hearing contain some very important termination clauses.

The evidence will show that the Advisors provide advisory services to certain investment funds. There's about ten or twelve investment funds to which they provide advisory services pursuant to these advisory service agreements. Some of those funds are publicly traded. As Your Honor has heard previously, some of those funds have thousands of individual investors, mom-and-pop investors and retail investors. So that is the -- kind of the -- how this all fits together, and we'd just like to keep that in context.

The agreements themselves, as I mentioned, have certain termination clauses.

If we could just go to the next slide, please.

The agreement between the Debtor and Highland Capital Management Fund Advisors had their shared services agreement, and you can see in the footnote where I cite to the exhibit.

This is Debtor's Exhibit 2 that appears at the adversary proceeding Docket No. 10. It's a very straightforward termination clause. It's a clause that says the agreement is for a period of a year, with automatic renewals. And then Section 7.02 provides that either party may terminate this agreement with or without cause upon at least 60 days' written notice.

If we could go to the next slide, you'll see that this is the excerpt from the NexPoint Advisors shared services agreement. And this provision is slightly different because it requires only 30-day written notice. That -- and that particular agreement can be found at Debtor's Exhibit No. 4.

So that's kind of the nature of the parties and that's the important part of the agreement, at least from the Debtor's perspective.

And how does this -- how is this all particularly relevant today? The Debtor filed for bankruptcy back in October of 2019. As the Court is aware, Mr. Dondero was in control of both the Debtor and the Advisors at that time. The Advisors had certainly prior notice that the Debtor would be filing for bankruptcy. And indeed, I think you'll hear some testimony today from Dustin Norris that the Advisors had begun to think about what would happen to the shared services agreements, you know, a year and a half ago, prior to the bankruptcy filing.

Fast forward to August, August of 2020. The Debtor had

been in bankruptcy at that point for about ten months. And if Your Honor will recall, at around that time the Debtor filed its first plan of reorganization.

And if we could just go to the next slide, please.

This was an important event for the Debtor at the time, because while the Debtor did not yet have the support of any meaningful constituency, it did make a public statement for the first time that unless executory contracts were assumed or otherwise treated in the manner provided in Article 5 of the plan, they would be deemed rejected. So, as of August 2020, this was the marker that the Debtor laid.

And certainly, discussions continued about a potential grand bargain. You've heard a lot about that. They morphed later on into discussions about a pot plan. But for purposes of, you know, public disclosure, there is no question that by August 2020 everybody should have been on notice that, in the absence of an assumption of the executory contracts, they would be deemed to be rejected.

You'll hear from Mr. Seery today. Mr. Seery will testify as to the events that took place in the weeks following the filing of this document. He'll -- he will describe for you at a high level but just in general how the parties began discussing the possibility of a transition of services agreement, the form of which was not certain at the time. There were a couple of possibilities, including a Dondero-

related entity taking it over. There was the possibility of a -- what's been referred to and what will be referred to as Newco, which was going to be a new entity formed by some of the Debtor's employees upon consummation of the plan. I think there was discussion about the possibility of just leaving things in place if somehow a grand bargain could be achieved. But discussions ensued in the fall.

And as Your Honor will also recall, you know, we had the mediation. The mediation wasn't successful in resolving the grand bargain. The mediation did result in the agreement with Acis, and that's when, you know, tensions began to increase with Mr. Dondero and the board.

Mr. Seery will testify that through the fall, while discussions continued, you know, it became a little bit more -- it became a little bit more difficult. And Your Honor will recall that in October the board asked for Mr. Dondero's resignation, which he complied with, pursuant to the corporate governance provisions.

But it was in this time that Mr. Seery will also testify that Mr. Dondero made it clear, in a call that there were numerous people on, that if, you know, we could get to a grand bargain, that would be great, but if that we couldn't, nobody should assume that the transition of services would be easy.

Now, you know, Mr. Seery will testify that he found that interesting because the transition of services really should

have been more of the Advisors' concern than the Debtor's, but it was a point that Mr. Seery noted, and he'll tell you about.

By November, the Debtor had reached a consensus with the Creditors' Committee on the formulation of a plan. If you'll recall, in late October, there was a contested disclosure statement hearing during which the Committee objected to the releases and to certain corporate governance provisions. And those -- those objections led to negotiations, and those negotiations led to an amended plan, which was the Third Amended Plan.

And if we could go to the next slide, this is also, from our perspective, an important marker in the narrative here, because in mid-November, we'd gone beyond just saying that if the contracts aren't assumed they would be deemed rejected to making a public statement that shared services agreements are not going to be assumed. And they're not going to be assumed because they're not cost-effective. And Mr. Seery will testify as to why the contracts were not cost-effective. But there was no doubt by mid-November that the contracts weren't going to be assumed by the Debtor.

A couple of weeks later, to remove any doubt, the Debtor exercised its right under the shared services agreement and gave notice of termination.

If we can go to the next slide, please. You'll see in this, in this slide, you've got -- yeah, there you go.

There's a letter dated November 30th. And this can be found, this is Debtor's Exhibit 3. There is a letter notifying the Fund Advisors that the Debtor intended to terminate the shared services agreement on January 31, 2021. In other words, the Debtor gave the 60-day notice that we just looked at under the shared services agreement of its intention to terminate the shared services agreement.

Can we go to the next slide, please?

On the same day, the Debtor also gave notice of its intention to terminate the shared services agreement with NexPoint Advisors. And I would note that, notwithstanding the fact that the shared services agreement with NexPoint Advisors only required a 30-day notice period, the Debtor, in fact, gave 60 days' notice, just to keep them on the same track.

And as Your Honor knows, in the subsequent weeks, the Debtors pushed ahead with their plan of reorganization. They amended it a couple of times. Those amendments didn't have anything -- have any impact on the termination notices. You'll hear no evidence today that the Debtor rescinded the termination notices. You'll hear no evidence today that the Debtor ever considered rescinding the termination notices.

And so we fast-forward now a couple of months later to January, and what's happening? Mr. Seery will testify that, you know, the Debtor really was using its best efforts to try to engage, to try to finish this up. And he'll tell you what

the Debtor's motivations were here. While the Debtor doesn't owe any obligations directly to the Funds, while the Debtor doesn't owe any obligations directly to the retail fund investors, the Debtor was very, very concerned that it be able to implement its plan of reorganization. And that plan of reorganization, which Your Honor just approved very recently, and in fact entered the order yesterday, pursuant to that plan the Debtor is going to and has begun the process of downsizing substantially. And they were going to eliminate a lot of the employees, and they knew in January that there was no way the Debtor was ever going to have the ability to provide any services at any time after February 28th. I mean, they gave notice of January 31st.

So, the Debtor wanted to make sure that it could proceed in the future without any obligation, without any claim that there's obligations. So the Debtor was really focused on trying to try to finish up this transition services agreement. And the negotiations picked up a little bit in late January, but here we were, with a January 31st deadline, and the Debtor -- the Debtor [sic] asked for an extension of time. And the Debtor [sic] asked for an extension of time presumably because they weren't prepared to assume the back-office and the middle-office services that the Debtor was providing.

And so the Debtor agreed and the parties agreed, pursuant to a written agreement, to extend the deadline by two more

weeks. And the parties continued to negotiate during those two weeks, but there were difficulties. And threats were made. And Mr. Seery will testify that those threats caused the Debtor to insist that the negotiations basically be chaperoned by outside counsel.

It didn't last long. It was really just for the purpose of trying to get the temperatures down to a degree where people could engage in a more cooperative fashion. But that's what we were dealing with in late January and early February. We couldn't get to yes.

And parties negotiated. Terms sheets went back and forth. You're going to hear this testimony, not from Mr. Seery, but you'll hear it, ironically, from the Advisors, that last week an agreement was reached. The only sticking point was Mr. Dondero's insistence that he be permitted access to the Debtor's offices. It is the only thing that prevented the parties from reaching an agreement.

And they say that the Debtor was unreasonable in not allowing him into their offices. And Mr. Seery will testify that we'd already been through this process, that we'd already obtained a TRO, that we'd already obtained a preliminary injunction that bars him from the offices, and we just, admittedly, we would not agree to that provision. But we would not be here today if the Advisors simply said, we'll leave that for another day, we've been operating for two

months without Mr. Dondero in the offices, we've otherwise got an agreement that accomplishes everything we need to do. Instead, they said no.

And here's another interesting point. You're going to hear the testimony from Mr. Norris, and he's going to tell you that the so-called independent boards of the funds, they were fully supportive of the Advisors' position. They thought that it was a really smart idea to walk away from a fully-negotiated transition services agreement because the Debtor wouldn't let Mr. Dondero into the office. They thought that was a great idea and they fully supported it. Nobody -- none of the board members are going to be here today to testify to that, but Mr. Norris is going to -- I'm going to make sure that Mr. Norris informs the Court that that was the boards' view.

And so, instead of saying yes, they said no. And we had told them last Tuesday, if you don't agree to this, we're going to commence the lawsuit. So they didn't agree to it, so we commenced the lawsuit.

But negotiations continued. And you know, I think the lawyers for the Advisors acted in very good faith here, Your Honor. They did the best they could. We continued to negotiate. On Friday, they presented to the Debtor two options, Option A and Option B. And at one point, they said, we're not -- we may have to tweak Option B, so hold off for

now. And you're going to see this in the emails. It was just black and white. And we said okay, fine. And then they came back and they said no, no, no, Option B is good, Option B is good, so tell us what you want to do. And at 1:00 o'clock on Friday, there was a phone call. The Debtor informed the Advisors' lawyers that they choose Option B. We're done. And we started talking about wire transfers. We started talking about documenting this for the Court in a consensual order. And we would be done.

And we had a call scheduled, I think at first at 3:30. Again, this will be -- this will all be in the evidence. This is what the evidence is going to show. We had a call at 3:30. They asked for an extension of time. Then they told us they were trying to get the consent of the person whose consent they needed. They pushed it off further. And then, you know, then we got the bad email from Mr. Hogewood that said, we're not going to have a group call, I'm just going to call by myself. And we knew what that meant.

And so he called up. He informed the Debtor that Plan B was off the table, the one that we had just accepted like for the second time. So Plan B was now off the table, and we said, we're done. I mean, we can't continue to negotiate this.

A couple of hours later, they send an email and they say, Plan B is back now on the table, but we're taking back the

million dollars that we had previously agreed to. And we said, no, thank you.

They continued to make offers over the weekend, Mr. Seery will testify, offers pursuant to which they were seeking I think what they called the *a la carte* services from the Debtor. And we weren't able to reach that agreement. And, again, I think what Mr. Dondero is going to tell you, Your Honor, is that -- well, you're going to hear two different stories, actually. Mr. Dondero is going to tell you that when we wouldn't let him back in the office on Tuesday, he disengaged. So he didn't -- he didn't really care. He didn't really have anything to do with it. He doesn't know what plan the Debtor has today. He doesn't know how the services are being transitioned. He really doesn't know anything after last Wednesday as regards to this matter.

But Mr. Norris will tell you that it was, in fact, Mr. Dondero who pulled Plan B on Friday afternoon because he didn't understand it. There was a misunderstanding, they said, even though Mr. Dondero will tell you that he specifically authorized Mr. Norris and D.C. Sauter to negotiate the agreement. Okay? That's a -- it's not a pretty story. I don't know that there's going to be a lot of dispute about the facts, to be honest with you, because they're reflected in documents. This is as much a document case as it is anything else.

So, you know, where does that leave us? Because there are certain developments that have happened in the last 24 hours, you know, that I'll -- that guess I'll share with you now. We did take discovery yesterday. As I mentioned, we did have a number of depositions. And during one of those depositions, Mr. Norris disclosed that the Advisors do, in fact, have a plan, or at least they assert that they have a plan. And the plan has, I think, what I would characterize as four legs to it.

Number one is they hired yesterday on a contract basis somebody to perform audit and accounting services. I think his name is Mr. Palmer. And he started yesterday.

They took in-house the payroll issues and are utilizing -- to supplement that, they're now going to utilize a firm called Paylocity. And Paylocity is a firm that the parties use regularly now. So that's the second leg of their plan.

The third leg is an IT company called Siepe. I think Siepe is run by a former Highland employee. And Siepe will provide -- and I think Mr. Norris is going to testify -- has been providing for a couple of weeks on a shadow basis certain IT functions.

And, finally, they're still trying to negotiate with Newco. Newco would be the entity that would be formed with some of the Highland employees. But those negotiations aren't finished.

So, I appreciated the objection that was filed yesterday. They basically said that this is moot, that they've got a plan, so there is nothing for the Court to do. We still have concerns. I think Mr. Seery will testify as to those concerns.

But it does -- it does go, you know, much further than we thought, even though it was just adopted. I mean, I guess the lawsuit had its intended effect, and in the last 24, 48, 72 hours, they're -- they're engaging in the process of transition.

So, you know, why are we here and what are we hoping to accomplish now that we've gotten news of that development? I think it's pretty simple, Your Honor. We simply want the Court to make sure that the Debtor is protected here, that the Debtor -- that there is a plan in place pursuant to which the Debtor will not be obligated to provide any services and it will be allowed to implement its plan in a way that not only protects the Debtor but really will protect the public marketplace, it will protect the funds and the investors, and, frankly, the Advisors as well.

We wanted this to be a smooth transition. We tried very hard to make it a smooth transition. Unfortunately, that didn't come to pass. But we do believe that the Debtor needs the comfort of an order.

And the Advisors are simply wrong in their papers when

they say we're asking the Court to dictate terms. I don't care if they have an agreement with the Debtor. I don't care who they have an agreement with. I don't care what the agreement says. I don't think the Court has to order any particular terms. We just want to make sure that they have a plan in place and that plan is implemented before the end of the month, because we will not be able to do anything for them after that time.

Thank you very much, Your Honor.

THE COURT: Thank you. Mr. Rukavina?

MR. HOGEWOOD: Good morning, Your Honor. Lee Hogewood. I'm going to take on the opening statement, if the Court please.

THE COURT: All right. Thank you.

OPENING STATEMENT ON BEHALF OF THE ADVISOR DEFENDANTS

MR. HOGEWOOD: And let me, let me begin by saying that I agree with Mr. Morris that counsel, I think, have cooperated throughout this process. And I also -- and in particular thank them for asking that the hearing be pushed back for 30 minutes, which was at my request, as an earlier start.

One other housekeeping matter that I would like to request is I will not have a further speaking role after the opening statement, and if it would be permissible for me to listen to the rest of the hearing by telephone, that would be much

appreciated, if there's not an objection to that.

THE COURT: All right. I assume there's no objection.

MR. MORRIS: No.

THE COURT: All right. Permission granted.

MR. HOGEWOOD: Thank you, Your Honor.

I think the theme of perhaps this hearing is a theme of divorce. It's a divorce that is long overdue. The lawsuit filed last week, it seems to be an effort of one of the divorcing parties, the Debtor, to employ the power of this Court to be sure that the Debtor is absolved of all consequences of the divorce.

Divorces are often messy. This one is particularly so. Presently, I think there are three or four other adversary proceedings among these parties that will have to be sorted out over the coming many months.

But on the issue before the Court today, the Advisors need very little from the Debtor in this divorce in the final analysis, other than access to data and books and records that the Advisors own and which will remain on formerly-shared systems.

To carry the divorce analogy further, like many divorcing couples, there are so-called children at risk. In this case, the children are the employees of the Debtor, the Advisors, the funds and their investors.

The Debtor's other purpose seems to be that they -- to be absolved of responsibility for the children. And just to be clear, the Advisors need no child support from the Debtor for the funds or others beyond the access to data, books and records that belong to our client and remain comingled with the Debtor's data.

But we didn't seek any relief. We are merely defending ourselves in this action. And I think what I say about what the evidence will show is not going to be altogether that different from what Mr. Morris has said. There's absolutely no dispute that the parties failed to reach an agreement. I also think there's no dispute that the parties worked diligently to reach one. They overcame very -- a large number of very difficult business issues to make the orderly transition happen. But in the end, they could not complete a deal.

And for the Debtor, you know, the question of who drew the hard line in the sand about no, I think we see it a little bit differently. For the Debtor, it would not agree for Mr. Dondero to have access, even if and only after the Advisors paid for the construction of a wall to segregate the remaining Debtor employees from Advisor employees and even if the Debtor employees had separate access to the Debtor's section of the premises, where the Advisors would be essentially subleasing the remainder of the space.

For the Advisors, the prospect of its leader, the leader of the enterprise, being prohibited from working in the same office as the employees of the Advisors made no business sense and was likely to become an ongoing logistical nightmare.

The gap could not be bridged in time, and so the Advisors moved out on the 19th, as directed by the Debtor.

As the Court knows, there's no provision in the Bankruptcy Code or any other statute that required these parties to agree on a transition of shared services. There's no legal obligation on either party to reach an agreement on how to divorce and separate. Neither can be compelled to reach an agreement if an agreement is not ultimately in their mutual respective business interests, as determined by each of them.

The Debtor claims to have terminated the contract pursuant to its terms. It amended the termination date twice in exchange for agreed advance payments to try to reach a deal.

In the meantime, the Advisors had to be aware of the possibility that a deal might not be reached, and so they began working in earnest on an alternative plan to be able to continue to service their clients, their funds and investors, as needed after the services were terminated.

So it is not clear exactly what the Debtors really seek here. A mandatory injunction to do what? To have a plan? The evidence will show, I think as Mr. Morris suggested, that our clients have a plan. It was implemented -- it began to be

implemented this past weekend, but it had been worked on for some time in advance. It's -- based on this, there's no jurisdiction for or purpose in a court order directing us to do that which we are determined to do anyway and have -- and have already done.

The evidence will show that there's no meaningful irreparable harm to the Debtor based on the current circumstances. Mr. Seery would be expected to testify, based on yesterday's deposition, of some vague notion of confusion among the employees, but there was no meaningful discussion of irreparable harm to the Debtor.

So the -- and, indeed, the confusion of the employees, in the context of a Chapter 11 debtor that has just confirmed a plan of liquidation, I think confusion could be -- the source of confusion could be a large number of things, not merely the transition issues.

To carry the divorce analogy further, the requested mandatory injunction is somewhat like requiring a divorcing spouse who has left the home to explain the details of his or her post-divorce life. And there's -- there's no purpose in that. In our papers, we've explained the lack of jurisdiction over this matter as a core proceeding, and certainly even under the related-to jurisdiction of the Court, as well as a constitutional -- lack of a constitutional basis for jurisdiction under *Stern v. Marshall*. And I know Mr. Rukavina

will take those issues up in his closing arguments.

We've also indicated -- made an arbitration demand, which is provided for under one of the two advisory agreements. And in the context of seeking, in this case, seeking a permanent injunction, as we stated in our papers, there's really no -- there's no proper exception from the arbitration demand.

So there's really, as we sit here today, there's really no case or controversy, and the timeline that Mr. Morris described is pretty much not in dispute. The evidence is going to show that there was a developing consensus among the business teams in January to meet a January 31 deadline with a transition. On January 27th, the -- 27, the Debtor demanded as a condition of transition nearly $5 million in what they allege to be postpetition underpayments under the shared services agreement. This was a new and difficult issue. The amounts, we're disputing. And the Debtor had not circulated a term sheet, only a proposed schedule of services. The term sheet came on the 28th.

On the 29th, we were able to agree to the first two-week extension to allow these discussions over a 13- or 14-page term sheet to be continued and discussed. That extension required the advance payment of an agreed amount to cover that two-week period of extension of services. Negotiations continued, as discussed, and a further extension through the 19th was granted.

Negotiations broke down at the time a suit was filed, and were renewed and ultimately broke down again, as Mr. Morris described.

In the end, the Court should dismiss the proceeding for lack of jurisdiction. The bankruptcy court is not a divorce court, nor is it a place where every perceived ill that the Debtor may incur may be resolved by injunction. The Court is, after all, a court of limited jurisdiction. If the Court does proceed, we simply ask that the claims be rejected and dismissed on the facts.

The Defendants have asked for nothing from the Debtor other than continued access to data, books and records to which they're entitled. We've moved out of the house. We have plans that will allow us to continue to serve our clients. And we would ask that you not order us to do so. Thank you.

THE COURT: All right. Well, I realize, you know, legal arguments have been hinted at here, and of course were briefed. I want to hear the evidence, and then we'll talk more about legal arguments at the close of the evidence.

All right. Mr. Morris, you may call your witness.

MR. MORRIS: All right. Your Honor, before I call my witness, I think just for efficiency purposes I would like to move my documents into evidence so that we don't have to do that on a document-by-document basis.

THE COURT: All right.

MR. MORRIS: And the Court will find -- unlike some of the prior proceedings, there actually aren't an overwhelming number. But the Court will find Exhibits 1 through 16 at the adversary proceeding docket, Docket No. 10, --

THE COURT: Uh-huh.

MR. MORRIS: -- the original witness and exhibit list that the Debtors filed. And then we added a few more documents I think late yesterday. There was a supplement that included Exhibits 17 through 21, and that can be found at the adversary proceeding Docket No. 19.

So the Debtor would respectfully move into evidence Exhibits 1 through 21 on those lists.

THE COURT: All right. Any objection?

MR. RUKAVINA: Your Honor, I believe Mr. -- well, not necessarily an objection, Your Honor. I believe Mr. Morris and I have an agreement that my Exhibits A through N as in Nancy will also be admitted. And if that agreement holds, then I have no objection to his exhibits.

MR. MORRIS: And it does, Your Honor.

THE COURT: Okay. And --

MR. RUKAVINA: Then I would -- I would move for admission at this time as well, Your Honor.

THE COURT: All right. And let's make sure I know

where A through N appear. It looks like they are -- are they all at 18, Docket Entry 18?

MR. VASEK: Correct, Your Honor.

THE COURT: All right. So I will admit 1 through 21 of the Debtor, which appear at Docket Entry No. 10 and 19, and Exhibits A through N of the Advisors, which appear at Docket Entry No. 18. All right.

(Debtor's Exhibits 1 through 21 are received into evidence. Advisors' Exhibits A through N are received into evidence.)

MR. MORRIS: Okay. And with that, the Debtor calls James Seery as its first witness.

THE COURT: All right. Mr. Seery, I think I saw you earlier on the video. If you could --

MR. SEERY: Good morning, Your Honor.

THE COURT: Good morning. All right. Please raise your right hand.

(The witness is sworn.)

THE COURT: All right. Thank you. Mr. Morris?

MR. MORRIS: Thank you, Your Honor.

JAMES P. SEERY, JR., DEBTOR'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MORRIS:

Q Can you hear me okay, Mr. Seery?

A I can. Yes, sir.

Q Okay. Let's just cut right to the chase. Was the Debtor party to certain shared services agreements with Highland Capital Management Fund Advisors and NexPoint Fund Advisors?
A Yes.
Q And I'm going to refer to those two entities as the Advisors; is that okay?
A That's fine. Thank you.
Q And pursuant to the shared services agreements, did the Debtor historically provide back- and middle-office services to the Advisors?
A Yes.
Q Okay. And is it your understanding that the Advisors provide advisory services to certain investment funds?
A That's my understanding, yes.
Q Okay. Do you have any understanding as to whether or not the Advisors provide those services to the funds pursuant to written agreements?
A I believe they have agreements with each of the funds.
Q Okay. And do you understand that some of those investment funds are publicly traded?
A I believe most of those are, the -- those '40 Act funds are retail funds, yes.
Q And what does it mean, you know, in your -- in your world, what does it mean to be a retail fund?
A There are institutional-type investments which are only

available to institutional investors or credit investors, depending on the type of investment it is, and there's particular rules around what types of investors can engage in certain types of investing activity, designed to, really, have more sophisticated investors engage, if they desire, in more risky endeavors and less who's believed to be sophisticated investors engage in more what are referred to as retail activities.

That's not saying that the retail activities aren't sophisticated and risky. They can be. But there's a division in how certain types of investors are able to access certain types of investments, and retail funds typically are open to any investor that wants to invest, and they can buy those on a -- or sell them on a regular basis.

Q Are you aware of any agreement of any kind between the Debtor and any of the funds that are advised by the Advisors?

A No, there are no -- no such agreements.

Q Okay. Let's turn our attention to August 2020. Did there come a time in August when the Debtor filed its initial plan of reorganization?

A Yes.

Q And can you just describe generally for the Court what the structure of that plan was?

A As we've discussed before, that was the monetization plan. It was at this point that the Debtor determined that it had to

file a monetization plan to effectively distribute the assets to the stakeholders, depending on how their claims were ultimately resolved. And the monetization plan was the plan we came up with.

Q Okay. And do you recall that that initial plan provided for the treatment of certain executory contracts?

A Yes.

MR. MORRIS: Can we just put up on the screen Exhibit 12, please? And if we could focus in on that first paragraph.

BY MR. MORRIS:

Q Is it your understanding that the initial plan filed by the Debtors provided that unless an executory contract was subject to one of those provisions in the first paragraph, that it would be deemed rejected?

A Yes. It was a pretty integral part of the plan, that we were going to downsize the operations of the business considerably, and many of the operating businesses, the servicing of shared service counterparties, were going to be eliminated, and we would either terminate those agreements pursuant to their terms or they would be deemed rejected.

Q Okay. And what were the consequences for the shared services agreements for a provision such as this?

A Well, the counterparties would no longer have those services and have to seek them, to the extent they needed them, elsewhere.

Q Okay. Was this the only plan that the Debtor was pursuing at this time?
A It was the only plan that we filed. We were considering other options, which at that point was the so-called grand bargain, which we were attempting to negotiate alongside the monetization plan.
Q Did the Debtor engage in any discussions with the Advisors after filing this plan about a possible transition of services?
A Yes.
Q Can you describe for the Court your recollection about those discussions in the fall of 2020?
A Well, initially, it started in the summer. And knowing that this was a significant possibility, I gathered the Highland operating team, many of whom are responsible for servicing the counterparties under the shared service arrangements, and they knew that they were not going to be part of the continuing Debtor if the monetization plan was confirmed. And I described that there's a corporate carve-out, that there would be significant work that had to be done, that that team would have to accomplish, you'd have to allocate responsibilities and know exactly how you're going to perform these services, indeed, if the counterparties wanted those services performed post-confirmation.
And we started with a Zoom meeting in August and tried to

replicate a similar meeting each week so that we stayed on a timetable.

By the early fall, or mid-fall, I'm sorry, I guess it was November 24th, I had a conversation directly with Mr. Dondero by phone. And on that phone call, I described very much to him the same situation.

It was Mr. Dondero, Mr. Ellington, Mr. Lynn, Mr. Pomerantz, Mr. Demo, and Mr. James Romey from DSI on the call. And on that call, I know we went through several issues, and some of them were becoming particularly heated, especially the settlement with Acis, because that was problematic for Mr. Dondero.

We advised Mr. Dondero that he would have to resign from the board if he was going to take antagonistic -- not the board, the portfolio manager position -- if he was going to take antagonistic positions versus the Debtor.

Mr. Lynn indicated that he was going to depose me with respect to the 9019 settlements and was -- wanted to be able to object to those, as well as the Acis settlement as well as the Redeemer settlement.

We also talked about the potential of the grand bargain plan, and we talked very specifically about the filed plan, the monetization plan, and the transition that would have to be accomplished. And I walked through, again, my comparison to a corporate carve-out and the difficulty of achieving those

kind of transactions even if all parties were working hard to get them done and wanted to get them done.

And I recall very specifically Mr. Dondero telling me that I should be prepared, if his grand bargain plan wasn't accepted, that my transition plan wouldn't be very easy and he would make it difficult. And I recall very specifically saying that I was a Boy Scout for a long time and that the Debtor would, in fact, be prepared. While we thought it was going to be in his economic best interest to come to agreement, that we would not be left unprepared and the Debtor would move forward even if he didn't agree.

Q During the negotiations that you're talking about, was the form of -- just to focus on the transition part, was a form or structure of a successor to the Debtor, at least in terms of a provider of the back- and middle-office services, discussed?

A Yes.

Q And what was the -- what was the substance of those discussions concerning the form of the successor?

A The initial substance was that it would be some subsidiary of NPA or a Dondero related-party entity. I picked NPA just as a -- because it was a registered investment advisor, it would be an easy transition over, and that's where the employees could go, that's where the services could be provided from, it would be rather seamless, and they were sharing certain services already -- for example, HR services

like medical insurance, health insurance, et cetera. And so I thought that that would be the easiest entity. It would obviously require Mr. Dondero's agreement.

Subsequently, the idea of a Newco became an idea that was developed originally by Mr. Ellington. At least, his representation to me was that the -- he and other employees didn't want to work directly for Mr. Dondero because he's already retraded them on the compensation. Deferred compensation.

Q As time moved on, by November, was the Debtor gaining any momentum with respect to its asset monetization plan?

A Well, the asset monetization plan began to gain considerable traction as the possibility of either a grand bargain or a pot plan fell away. There were significant negotiations that we had already discussed in respect -- or, at the confirmation hearing in respect of the terms of that plan, and it began to gain significant momentum towards the voting and the confirmation deadlines.

Q And did the Debtor make a decision in November to specifically disclose that it intended to reject all of the shared services agreements?

A Well, prior to that time, I had been in front of the retail boards by phone a couple times and explained basically the overview of the bankruptcy, what was happening. Initially, the attempts at a grand bargain, then the filing of

the monetization plan, and the -- and the possibility of a grand bargain and the competition between the two and the likely scenarios for each.

In addition, we talked about, if there wasn't a grand bargain, what the transition would look like and my expectation, as I described earlier, that it was in everyone's economic best interest -- meaning NPA's, HCMFA's, as well as the funds -- to transition these services from the Debtor, because we weren't going to continue them, to a Dondero-related entity to perform those services for the funds.

There were -- there came a time when the disputes with Mr. Dondero became significant enough where the Advisors and the funds were actually objecting to certain things that I and the Debtor were doing in the case, and I told one of the retail board members that I would no longer participate in any of their calls. And he understood why, and I was very specific that it had to do with their antagonistic actions versus the estate.

So, as we moved forward towards November, the monetization plan became clear, it became more and more clear that the monetization plan was the only plan on the table. And by mid- to late November, we had settled on terminating the shared service agreements and send out termination notices at the end of November.

Q Before you send out the termination notices, do you recall

the Debtor filed their Third Amended Plan --

A Yes.

Q -- in particular?

MR. MORRIS: And can we just put up on the screen, please, Exhibit 13?

BY MR. MORRIS:

Q Do you recall if that's the plan that provided the notice that the shared services agreements would be terminated?

A That -- that -- well, the plan continued the position that if agreements weren't specifically assumed they would be deemed rejected.

It also made clear that we weren't going to continue to provide any services for the Advisors and their managed funds.

And then we actually sent specific termination notices under the agreements. So those agreements were terminated pursuant to their terms. They didn't need to wait for the confirmation of a plan to be deemed rejected.

Q Okay.

MR. MORRIS: Can we scroll down just a little bit? Okay. Keep going. Yeah, right there.

BY MR. MORRIS:

Q Do you see the provision beginning on the bottom of Page 24? Again, this is Exhibit 13. Continuing to the top of the next page. That's the provision that put the world on notice that the Debtor was not going to assume or assume and assign

the shared services agreements, right?
A Well, this is another one of the provisions. The original plan made clear that that's what we were going to do, the original filing that we did in August.
Q Okay.
A We were very clear that we would not be assuming these agreements.
This filing made clear that we were, again, but with even more specificity, not going to continue to provide these services, and then subsequently we filed or delivered the termination notices.
Q Okay. And I see the last sentence of the paragraph ending at the top of Page 25 states that the contracts "will not be cost-effective." Do you see that?
A Yes.
Q What is that a reference to?
A Well, I think we've had discussions before, around confirmation and prior to that, those hearings, that the Debtor was run at a loss. And the more work we do, the more losses we find.
Basically, the Debtor ran at an operating loss, and then had to sell assets to pay deferred compensation or other expenses. The Debtor has been run that -- it appears the Debtor has been run that way for a long time, and many of the services that the Debtor provides to the shared services, the

cost of those services exceed the amount that we receive under those contracts.

In addition, there's other entities that services -- and persons for whom significant services are provided and nobody pays anything. They're not even contracts.

So, these contracts, the Debtor as an operating entity was run at a loss. These contracts were negative. And that doesn't even deal with the fact that many times these entities didn't pay what they did, in fact, owe under the contract. So there are significant receivables that are owed by these entities that haven't been paid.

In addition, the Debtor advances funds on a regular basis for effectively the operating expenses of the Advisors and is often not repaid timely.

Q Okay. A couple of weeks -- I think you referred to termination notices. Did the Debtor send termination notices to the Advisors shortly after filing this Third Amended Plan?

A Yes. They were sent at the end of November.

Q Okay. Let's just look at the termination provisions, and then we'll quickly at the termination notices.

MR. MORRIS: Can we put on the screen Trial Exhibit 2, which was part of the deck of my opening?

BY MR. MORRIS:

Q Are you generally familiar, Mr. Seery, with the shared services agreements with the Advisors?

A I am.
Q And are you aware that the shared services agreements contain termination clauses?
A Yes.
Q All right. So this is -- what I've put on the screen is the Debtor's Exhibit No. 2, and it's the shared services agreement with Highland Capital Management Fund Advisors. Do you see that?
A I do.
MR. MORRIS: Can we just focus in on Section 7, please?
BY MR. MORRIS:
Q Okay. And is it your understanding that's the termination clause?
A Yes. There's the term. It's in 7.01. And the termination provision is in 7.02.
Q Okay. And can you just describe for the Court your understanding of how Article 7 works?
A Article 7 works that the agreement will automatically renew on an annual basis unless one or the other parties terminates the agreement. And so each party is entitled to terminate the agreement on 60 days' advance written notice.
Q All right.
MR. MORRIS: If we can take that down and put up Debtor's Exhibit No. 4, please.

BY MR. MORRIS:
Q And do you see this is the shared services agreement between the Debtor and NexPoint Advisors, LP?
A Yes.
Q And are you generally familiar with this document?
A I am.
MR. MORRIS: Can we go to Article 7, please? Thank you.
BY MR. MORRIS:
Q Can you tell the Court your understanding of what Article 7 provides?
A It's a little bit different than the last one. This is a later agreement. The other one was a document that was clearly cribbed from another agreement that wasn't exactly a shared service arrangement. But this one doesn't have the automatic renewal. It just puts the agreement into operation, and then either party may terminate it at any time on 30 days' written notice.
Q And did the Debtor rely on the two Article 7 provisions that we just looked at to give notice of termination of the shared services agreements?
A I'm sorry. Somebody clicked in. Did you say did the Debtor rely on?
Q Yes.
A Yeah, those are the governing provisions that we relied

on, yes.
Q Okay.
MR. MORRIS: So can we put up on the screen Exhibit 3, please?
BY MR. MORRIS:
Q And is this the Debtor's written notice to Highland Capital Management Fund Advisors of its termination of the shared services agreement effective as of January 31, 2021?
A Yes. That's our notice of termination.
Q Did the Debtor ever rescind this notice?
A No.
Q Okay. Did the Debtor ever tell the Advisors, to the best of your knowledge, that the Debtor was considering rescinding this notice?
A No.
MR. MORRIS: Thank you. Can you take that down and put up Trial Exhibit No. 5, please?
BY MR. MORRIS:
Q And is this the Debtor's written notice to NexPoint Advisors dated November 30, 2020 that it was terminating the shared services agreement as of January 31, 2021?
A Yes. That's the Debtor's termination notice to NPA.
Q Did the Debtor ever rescind this notice?
A No.
Q To the best of your knowledge, did the Debtor ever tell

anybody at the Advisors that it was considering rescinding this notice?

A No.

Q Okay. The Debtor --

MR. MORRIS: We can take that down now. Thank you.

BY MR. MORRIS:

Q The Debtor amended their plan of reorganization after November; is that right?

A Yes. There were a couple of different amendments.

Q To the best of your knowledge, did any amendment ever have any impact at all on the Debtor's statement that it would not be assuming or assuming and assigning the shared services agreements?

A No. It goes beyond the best of my knowledge: It didn't happen, because it was an integral part of the plan.

Q Okay. And can you describe the Debtor's overall view of the plan and the impact that it had or was expected to have on the shared services agreements?

A The basic nature of the plan, as I discussed earlier, going back to August, but as refined, is that the Debtor will no longer be in the business of providing shared services to these Advisors.

Q Okay. So the notices are sent on November 30th. They're 60-day notices. What do you recall happening in December with respect to negotiations over the transition of services, if

anything?

A The short answer is not much. So, we did, as I said, start the transition analysis and discussions and put together detailed spreadsheets with the various agreements that might be necessary for each side. And some agreements would be required for the Debtor to go forward, some contracts. Other contracts were not necessary for the Debtor but were deemed to be necessary for the Advisors. And we were working through that analysis continually through the fall and through December. But there weren't -- at that point, there wasn't very much going on with direct negotiations as to how this was going to happen. And my analogy for the Debtor was like pushing on a string.

Frank Waterhouse in particular had been told by Jim Dondero that he did not have authority to negotiate for him. So once we had laid out what the contracts were, and we had an original structure that the rent would be divided 75/25 and paid by the Advisors, and then the costs of the contracts would be divided 60/40, with the majority paid by the Advisors, we really didn't get much traction other than trying to put together that term -- that schedule so we knew what those costs were, and then also to figure out what was unpaid by the counterparties.

In addition, at that time, because it was pretty clear that the monetization plan was going to go forward and go into

the confirmation, right around that time, and it may have been the beginning of January, the Advisors stopped paying on certain of the notes, and then we accelerated those notes.

Q And do you have an understanding as to who was the -- who was the negotiating leader on behalf of the Advisors in the December-January time period, if anybody?

A Well, for the Advisors, it was a combination of the Highland team that would transition over and their counsel. And the -- meaning the counsel for the Advisors.

Q So now, moving into -- withdrawn. Were the Debtor's professionals engaged in this process, not just you?

A Oh. Oh, yes. Very deeply. We spent literally hundreds of hours with both DSI and your firm, the Pachulski firm, negotiating provisions, the structure, how this would work, what the transition would look like.

As I said earlier, corporate carve-out is very complicated, and there are -- there are often transition services that have to be carried through for a period of time where both sides will use certain services. And then there are shared services which will be carried through for a longer period of time.

We came up with a structure that we think worked really well in light of the term of the lease or the tenor of the lease, so that we knew how that would work between the parties, as well as certain IT contracts specifically that

were required for both parties to function and when their renewals would come up and then how those businesses -- how those functions would transition or be subject to renewal of additional contracts.

Q As the calendar turns into January and January 31st is approaching, do you recall the tenor of discussions or what's happening in the last two weeks of January, if anything, with respect to --

A Well, --

Q -- the negotiations?

A Yeah. I mean, we started really pushing it, particularly after confirmation, to try to get this done, because either the funds and the Advisors had alternative arrangements or they didn't. And if they didn't, we thought that would be very difficult for, obviously, for them and their funds, but also for the Debtor, because we had kept their records previously, we had done the work previously, we had sent in terminations, and these are SEC-regulated funds. So we became very concerned that there was not going to be a responsible transition. And in fact, we had gotten very little feedback -- no feedback, frankly, from the boards -- but very little feedback from anybody as to whether they were going to accept the terms that we had put forth or whether they were going to find an alternative arrangement.

Q As the calendar got closer to January 31st, was there a

request by the Advisors for an extension of the termination deadline?

A It became clear that they did not and had not done virtually anything. I sent, I think, three or four letters and emails directly to board members imploring them to pay attention, to take action, and if they had an alternative plan, to tell us. By the end of January, it was clear that they didn't have any alternative plan and needed more time.

MR. RUKAVINA: Your Honor, I'll move to strike that. Clear that they had no alternative plan. There's no foundation for him to make that statement.

THE COURT: I overrule.

BY MR. MORRIS:

Q You mentioned the SEC. Was the Debtor concerned about the SEC's position if the Debtor had simply terminated services under the contracts as of January 31st?

A Very much so. So, my own personal experience, as well as the experience of our fund counsel, is that while the SEC keeps a close eye on a number of issues related to investing and fund management, retail funds get particular focus because of the individuals who can invest in those and at least the perception that they may not be as able to defend their rights as others. So the SEC does keep a particularly close watch on those kinds of funds.

We were concerned that, even though we had done everything

we believe correctly to terminate the agreements pursuant to their terms, and in fact had negotiated for months in good faith and spent millions of dollars trying to get a transition, that if the funds were to simply stop providing information to their investors or were to stop being able to service their investors, that a SEC investigation would ensue and that it would cost the Debtor time and considerable money to deal with those issues.

Notwithstanding that, we felt it was important to notify the SEC, and so we reached out through our counsel and advised them of what we believed was going on and our view, based upon the actual discussions and the request from the Advisors for an extension, that nothing had been done up into the first weeks of February.

Q Thank you. And ultimately, the Debtor and the Advisors agreed to a two-week extension of time; do I have that right?

A We agreed to a two-week extension in the first extension.

Q Uh-huh.

A And during that time, we tried to get, in particular, the employees that would be transitioning and become the Newco to really focus on trying to get an agreement nailed down. And so we had our -- our advisors take the agreement that was largely structured in terms of knowing what the contracts were and the costs that -- and work on trying to nail down the final terms with respect to how the shared services would work

over a period of time, including working with third-party vendors.

Q I just want to follow up on a couple of things that were in your prior answer to make sure that the record is clear. Does the Debtor have special fund counsel?

A Yes.

Q And who is the Debtor's fund counsel?

A WilmerHale.

Q And is it your understanding that they have the expertise with respect to the securities and the management of funds of the type that are at issue in this case?

A Yes. They're one of the top firms in the country in this area.

Q Okay. And did -- well, I'll just leave it at that. Do you recall during this time if the Debtor informed the Advisors that it would participate in negotiations only if outside counsel were present?

A Not negotiations. I think we would always have been willing to engage ourselves in negotiations. What we were concerned with were the employees who were forming Newco being put in what we thought were untenable positions with respect to negotiations involving certain members of the Advisors' team and the board -- of the funds' boards of directors. And that came from very specific concerns that employees raised with us about threatening conduct and statements from some of

those folks.

There were a few employees that had shared service responsibilities that were actually deemed employees or deemed officers at some of the Advisors. And so there was what I will call a blame game going on, and the -- as soon as we came to the end of January and there wasn't an ability to get a deal done, certain members of the Advisor team or the fund boards took very strident positions vis-à-vis those Debtor employees. And we were very concerned that, if there wasn't someone there, counsel and taking notes, that those employees would be at a disadvantage.

We also recommended that those employees resign those positions because the negotiation and the positions of the parties had separated such that we thought that having the shared responsibility was untenable.

We made clear that we would have one of our counsel sit on the phone and they would be there to listen and take notes and nothing else. And so that was something that I put in place after advice of counsel that we were leaving our employees in a very untenable space.

Q And with respect to the notion of resigning, do you recall if you gave the employees the option of resigning from one entity or the other, or was it just from the Advisors?

A From the Advisors. But they obviously could have always resigned from the Debtor. We don't have any, with those

employees, any contracts, and certainly it was -- I think I've always made clear that if someone has a better opportunity, they should go take it.

Q And is it fair to say that during this two-week period, notwithstanding some of the things that you described, the parties did, in fact, make progress towards getting to a final transition services agreement?

A Yeah. I think -- I think we made -- we made good progress. And even on the resignation issue, my understanding -- and I didn't have these discussions directly -- was that the Advisors agreed and I think the funds agreed that those employees could resign, and if they ended up at Newco and Newco was providing services, they could reassume those positions post-termination from the Debtor.

So I think there was considerable progress around those items.

The operational items, there was considerable progress around.

There was already, I think, really good understanding and agreement on the cost split.

And then there was considerable discussion around the shared -- some of the shared items going forward, and then how the transition mechanics would work in the event that one party wanted to continue a contract and the other didn't.

So there was -- there was -- by the end of the two-week

period, we'd started to make enough progress that we -- we thought we'd actually get there. It really shouldn't have taken as long as it did. It was -- it was, you know, one step forward, one and a half steps back, quite often. But I think we had a -- largely had an idea that we were very close towards the end of that two-week period.

Q And was that the reason why the Debtor agreed to a short further extension of the termination deadline to February 19th?

A Yes. The original concept that I had come up with with one of the employees who was negotiating for the Newco was that there was no reason that we would have any -- we shouldn't be able to get it done in two weeks, particularly since the economics had largely been agreed to and deemed fair by the financial staff as well as the operators in the business. That we would use the next week to cross T's and dot I's and get in a position to transition the employee team.

We also at that time extended the time for the employees by a week, to make sure that, just in case we didn't get a deal done, we had the staff to be able to clean up, if you will, if negotiations completely fell apart.

But we did, we did agree to an extension at that point. The counterparties paid for that extension. They paid the costs, not fully loaded, but costs of the employees, to help defray the costs that we were carrying for them. And that we

hoped we'd have it completed by that final week.

Q Did you have concerns, as the CEO, that the employees have sufficient time to transition and wind down other aspects of the Debtor's business that were being adversely impacted by this process?

A Oh, absolutely. And if the deal was done, then we would have a shared service arrangement. And just to be clear, the way that typically works is that -- we'll use the actual parties -- the Debtor would still stay in its space, use its systems, have its contracts. The Newco or NPA entity would stay in its space and use its contracts, most of which are in the Debtor's name, but under the same arrangement that we had previously, and we would be sharing a lot of services, so that the transition issues that the Debtor has we would be able to accomplish because the team would still be with us but they would be part of the Newco or NPA as a shared resource.

In the event that we weren't able to reach agreement, I needed to make accommodation with those employees to continue to provide those services in order for the Debtor to complete its transition.

Q All right. So let's take -- let's take this back a week, to last Tuesday. As of that time, did the Debtor believe that it had reached an agreement on all material terms with the Advisors? With one exception?

A Cautiously, yes. I think at that point we felt that we

were -- we were close, but there was a material open issue that we had in terms of trying to get the final agreement done.

And frankly, we were very concerned -- and this is borne by history, not just of my own but the other folks on our team who've been around a lot longer -- that there was a considerable risk that the deal that was agreed to wouldn't actually be signed and it would be retraded as we went forward.

Q As of Tuesday, did the Debtor inform the lawyers for the Advisors that it was prepared to sign a fully-negotiated term sheet, or, in the absence of that, it would seek judicial relief?

A Well, I gave instruction to counsel -- and this was -- you know, we had reviewed this with both your firm and with Wilmer, the WilmerHale firm -- as to how we should go about making sure that the estate was protected in the event that there was either a retrade or we simply couldn't come to a final agreement. And we had -- I advised your firm to tell counsel on the other side that the agreement was done, that we were prepared to sign it, but if they were unwilling to sign it we were going to seek Court intervention to make sure that we had approval of what we had done to date, declaratory judgments setting forth or approving what we had done with respect to the negotiations.

Q Was there -- was -- was there one issue that was -- one meaningful issue that dividing the parties at that point in time?

A Well, the new -- the new issue that was surfaced, and it was a new issue, was this idea that, notwithstanding the preliminary injunction and notwithstanding how the business has been run for the last couple months, that Mr. Dondero would be able to come back into the office. It didn't seem, frankly, like a real business issue, but it became a significant sticking issue. Because for the Debtor, it's a very significant issue.

Q Why didn't the Debtor just agree to allow Mr. Dondero back into the offices?

A Well, as the Court has heard before in prior hearings, Mr. Dondero's conduct through the fall, once the monetization plan had been put in place, has been extremely difficult, to say the least. Threatening email or texts to me. Obstreperous litigation, I would say vexatious litigation, with respect to every aspect of the transition. Numerous retrading of provisions in this negotiation. And statements and effectively, I think, threats to other employees, including while he was on the stand, you know, in the court. And I found, from my seat, that that would be really difficult to bring employees back into the Debtor to help implement the plan while Mr. Dondero was in that space. There was really no

need for him to have to be in that space from an operational perspective, as the funds and the Advisors had proved for the prior two months.

Q Is it your understanding that, but for the issue of Mr. Dondero's access, the Advisors and the Debtor had otherwise agreed to all material terms of a transition services agreement as of last Tuesday evening?

A Yes.

Q Did the Advisors sign the term sheet that the Debtor had tendered that reflected what you just described?

A I don't recall if the Advisors did. I certainly did. But there were -- there were additional changes. So we -- we had reached that agreement earlier in the week. We didn't get agreement on the final point of Mr. Dondero's access. We filed our pleadings in the Court, and I believe that was Tuesday or Wednesday, and then moved forward towards this hearing.

And during that time, the negotiations continued. So there were a number of different changes, but we -- we were very clear that we had an arrangement, we had a deal that was fully negotiated, we had a deal that we thought was extremely beneficial to the Advisors, that it worked well for the Debtor, that it worked well for the Debtor's employees, who would then be Newco employees, or NPA employees, depending on how they ended up splitting it, and that the flexibility of

that agreement served all the parties' interests and we didn't intend to change it.

Q Did -- do you know whether the Debtor provided to the Advisors' counsel a copy of the complaint and the motion that it was intending to file prior to the time that it actually filed the documents?

A Yes, we did.

Q Okay. So the Debtor gave -- is it fair to say the Debtor gave the Advisors specific notice, and, indeed, copies of the documents before the action was commenced?

A Well, I think we -- part of the strategy we'd come up with with WilmerHale was that we should do everything we can to be accommodative, within the reason -- within what we thought was reasonable for the Debtor being able to implement its plan. And I believe we did that. And out of caution and frustration, both with respect to the inability to get TS, if you will, as well as the concern that you could have a retrade, based on past experience, we told him if we didn't have an agreement that was signed and that was binding, that we would move forward with the court hearing.

The reason this is structured, by the way, as a binding term sheet, it was a scramble in January to try to put it together. Otherwise, we would have had a binding agreement. It actually reads more like an agreement than a term sheet, and has a significant Schedule A on the back. But the amount

of time that's been spent on this, it's probably not fair to call it a term sheet. It's an agreement.

Q After the Debtor commenced the action, do you recall that last Friday the Advisors made a written proposal through their counsel with two options, an Option A and an Option B?

A Yes, I do.

Q Did the Debtor perceive at that time that the Advisors' attorneys were authorized to make that offer?

A Well, they represented that they were. We were at a -- we were at a crossroads. We had spent so much time on this agreement and trying to get to a final shared service arrangement that the last day for employees, which was scheduled to be the last day of the month, was coming on us very quickly. And if we weren't going to get this shared arrangement done, we had to make significant decisions with respect to how to transition, with whom to transition, and how to move forward to implement the plan. So we couldn't, frankly, waste any more time on this agreement. And I say "waste" with thought, because we thought it was productive, but the amount of time, literally months, is astounding for something that is not that complicated.

We got to Friday, and the new arrangement or proposal from the Debtor was -- was basically you can -- I mean, from the funds, Advisors, was you can take A or B. A was, in essence, the same arrangement we had prior in the week, but Mr. Dondero

could come in the office. We'd already told them that was untenable, it didn't work.

B was you could -- we could do the same arrangement except the Advisors would not be responsible for any of the rent. Recall that I mentioned that this was a 75/25 split on the rent. Roughly, that's about a million dollars to the estate.

We spent time Friday morning with the IT folks and with the operations folks on can this be done? Can we actually provide -- can you provide the services? Can these funds be run if they're not in the office? And the answer was so long as the operations people can have access to the office and so long as the IT people can have access to the office, we could largely run it. So this was just really a retrade on economics.

We determined that, fine, we'll take Option B, even though it cost the estate. We didn't have the luxury of being able to continue to waste time and negotiate this with the impending dates coming up. So we agreed to Option B on Friday. I, in fact, sent my term sheet to counsel to deliver, and it was scheduled, I think, as you mentioned earlier in your opening, for the afternoon of Friday for a call to go through wire transfers, which included an initial payment plus a deferred payment, a monthly payment, plus the cost payments that would be made under the agreement, and certain offsets that we had previously agreed to.

Q And are you aware, did the Debtor, through counsel, inform the Advisors, through counsel, that the Debtor had accepted Option B?
A Yes. My counsel told me that they had sent over notice to them, that the call to walk through the final points and to assure that wires were being sent and to engage in the exchange of signatures was set up and everything was agreed to.
Q And what happened later in the day?
A I would say shockingly, but it wasn't, we were told that the call was off. Mr. Hogewood advised that, through email, that there would no longer be a necessity of a call and he would be reaching out directly to Debtor's counsel.
Q And did you learn after -- after -- in the afternoon that the Advisors had withdrawn Option B, the one that the Debtor had accepted?
A Initially, it was withdraw Option B, and then it was accompanied I think with a basic statement that we don't really need you anymore, which was surprising, only because it --
(Interruption.)
A -- a transition like this, you would -- you would run systems side by side, make sure that your IT folks were heavily involved. You would assure that your -- your human resources and operations folks were involved. And none of

that had been done because it was assumed that the transition would happen.

Q Is it your understanding that the Advisors were still at that time willing to do Option A, the one that would allow Mr. Dondero back in the office?

A I believe they were, yes.

Q Do you know if the Advisors made any further offers in respect of a transition of services over the weekend?

A Well, that was one of the things that was odd and belied their statement that they could operate without any assistance from the Debtor, is that they left Option A on the table. If they had alternate arrangements, why was Option A still on the table? So that was puzzling, but counsel made the representation to us and we took it. And then other counsel over the weekend just started lobbing in proposals.

Q Did those proposals contemplate in any way the continued provision of services by the Debtor to the Advisors?

A That's -- that's what they were, yes.

Q Okay. All right. Why did the Debtor commence this lawsuit?

A Well, I -- as I explained earlier, we believe that we've done everything we were supposed to do or required to do under the contracts, the shared service arrangements, in terms of both operating under those agreements and terminating them according to their terms. We believe we've done everything

that we'd be required to do under the Bankruptcy Code with respect to filing a plan, making clear what the provisions are with respect to executory contracts, and making that plan -- making it even more clear what the provisions dealt with, how the provisions of the plan would impact executory contracts and how those contracts would be deemed rejected if they weren't explicitly accepted and assumed. And we made clear, we wanted to make clear that we'd properly terminated the agreements in accordance with their terms.

So we filed this action because of the, frankly, the back-and-forth negotiations as well as the accusations and threats from earlier in the negotiations that I previously described, where we're seeking now a declaration that the shared services were properly terminated in accordance with their terms, that the shared services were not assumed pursuant to the contract, and although they'd been terminated, even if they had not been terminated, they would -- they would be deemed rejected. That the Debtor is permitted, because of the terms of both the plan and the contracts, which have been terminated, to cease all access and support and has no further responsibility for providing any services to the shared service counterparties under those terminated agreements, and that the shared service parties, the Advisors, come forth and tell the Court, tell the world, tell the investors, and tell the SEC that they have an alternative arrangement.

And, again, our concern is while, yes, we are good corporate citizens and we want to make sure that we don't leave, if you will, a mess because of the actions that are happening in the court, we're very concerned that our counterparties may not be as concerned about the mess they leave.

And we -- one of the reasons we reached out to the SEC was to make sure that they were on notice of this proceeding and the potential impact on retail investors, and we think that it's something that the Court should require these Advisors, who have been in antagonistically fighting the case, knowing the specific provisions of the case, and not making arrangements until the last 24-48 hours, we do -- we do believe that, as corporate citizens and as responsible fiduciaries in a bankruptcy, we have some responsibility to make sure these terminations are handled correctly. While we may not be able to force them to do so, we should have them tell us how they're doing it.

Q Does -- did the Debtor have any concerns that the failure of the Advisors to adopt and implement a transition plan, that that might have negative impacts on the Debtor's ability to implement its plan of reorganization?

A Well, as I said earlier, the SEC, in our experience and our counsel's experience, takes a particular focus on retail funds. And where those funds have blown up for various

reasons, whether they are unable to make a redemption or they're caught in some kind of security that doesn't match the investment parameters of the fund or whatever those are, the SEC takes a particular focus, and investigations can take significant time and have significant cost for all parties who are anywhere near the retail funds. And, clearly, as the provider of shared services to the Advisors, while we didn't have any agreement with the funds, if the SEC came in to investigate or if they do come in to investigate what's gone on here, there will be a significant cost, and it will, if not derail, it will certainly slow down our implementation of our plan.

Q What exactly does the Debtor want the Court to -- what relief is the Debtor seeking now that the Debtor has learned of the four-legged plan that was described yesterday in the deposition?

A The declaratory relief that I just stated would be essential for the Debtor. One, that the contracts were properly terminated, in accordance with their terms. Two, that they were not assumed pursuant to the plan. And three, that the Debtor is permitted to cease all services and all access to the shared service counterparties.

To the extent that they need assistance, we'll help them out, we'll give them information. If they have third-party professionals that they want to send over, we'll help them

with data retrieval. But we do have a plan to implement, and we don't have necessarily the full staff to provide services that they were otherwise receiving from us. So we would like a declaration that we do not owe them any of those prior services from the terminated contracts.

Q Did you hear in the opening Mr. Hogewood mention that the Advisors do want continued access to the Debtor's books and records? Or to their, I guess, to their own books and records?

A They'll be able to get access, but that doesn't mean that it's access 24 hours a day. That doesn't mean they get to continue to use the systems without paying for them. That doesn't mean they get to use employees without paying for them. If they have data requests, we would certainly get to them, but we have to maintain and employ people to do that.

Q And is part of the injunction that the Debtor seeks here is to have the Court direct the Advisors to implement and adopt a transition plan that would include taking -- taking their books and records so that the Debtor isn't in that position for a long-term -- on a long-term basis?

A Well, we certainly don't want to be in that position for a long-term basis. We -- we're certainly not going to be the party that has to maintain their records. If they can lift them off, we will do that.

The challenge has been, according to our IT professionals,

who are quite good, separating the data is difficult.

Now, we know that the Advisors' employees were extracting a lot of data off the system over the last week. And whether it was on thumb drives or direct transfers, we know that a lot of data has been taken, which is fine. We just don't -- we don't know what else they might need and we're not in a position to provide a full level of service to them at -- after today.

Q Is the Debtor asking the Court to force the Advisors to adopt any particular plan?

A Not at all. If they -- if their plan works, that's great. If they went to a third-party service, some other fund -- outside fund advisors or shared service providers that can do the job, that's fine. We would like to just have the least amount of burden on our estate going forward, and a declaration that we have no responsibility to provide any particular services, I think, is essential.

Q And would the mandatory injunction that required the Advisors to adopt and implement a transition services plan, would that -- how does that advance the Debtor's goals?

A Well, it sets forth exactly what the Advisors and the funds think they need. And if it's something other than that, then they're going to have to come talk to us, and we'll figure out whether we can provide it and then how it gets paid for.

MR. MORRIS: Your Honor, I have no further questions of Mr. Seery right now.

THE COURT: All right. Pass the witness. Mr. Rukavina?

MR. MORRIS: Your Honor, may I just ask for a short break?

THE COURT: All right. Does everyone need a break?

MR. RUKAVINA: Your Honor, I won't -- Your Honor, I won't have much for this witness, so I might suggest if Mr. Morris can wait five or ten minutes. But whatever is good for the Court.

MR. MORRIS: Go right ahead, sir.

THE COURT: All right.

MR. MORRIS: Thank you.

THE COURT: Ten minutes. If you take more than ten, we're going to break. Thank you.

MR. RUKAVINA: Yes.

CROSS-EXAMINATION

BY MR. RUKAVINA:

Q Mr. Seery, very quickly, I just want to make sure that the record here is complete. You were discussing Option A and B that was put on the table on Friday, and you were discussing then how Option B was taken off. Do you recall that?

A Yes.

Q And you did mention to the judge that Option A was that my

clients would take all of the leasehold space, correct?
A I don't think I mentioned that, no.
Q Okay. Well, I just want to make sure the judge understands that Option A, my clients would have paid for a hundred percent of the rent going forward. Correct?
A I don't believe that's how Option A worked, no. I believe that Option A was structured that, in essence, the Debtor would get out and the shared -- the Advisors would keep all of the space as well as all of the systems and all of the records.
Q Correct. But the Advisors would pay a hundred percent -- okay.
MR. RUKAVINA: Let's just pull up Exhibit 19, Mr. Vasek, please.
BY MR. RUKAVINA:
q And I just want the -- I just the record to be clear here, Mr. Seery.
MR. RUKAVINA: Mr. Vasek, are you there? (Pause.) And then scroll down to Page 5 of 7. Okay. Stop there.
BY MR. RUKAVINA:
Q Mr. Seery, can you see this to refresh your memory?
A Yes. I didn't need it to be refreshed. That's what I said.
Q Well, doesn't Option -- doesn't Option A here say NexPoint parties take one hundred percent of the leased premises and

one hundred percent of the rental cost?
A It does, but the key part of it is that the Debtor gets out.
Q I understand that.
A It gives up control of that stuff.
Q I understand that. I was just trying to clarify for the record, because you didn't mention it before, that NexPoint would pay a hundred percent of the rent. And I am correct about that, right?
A That's correct.
Q Okay. And Option B, you mentioned in your direct testimony that in Option B my clients would pay no rent. Do you recall that?
A Yes.
Q But do you also recall that under Option B my clients would vacate the premises?
A I believe -- yes. I think I said that, yes.
Q Okay. I believe you also mentioned that the Dondero access issue was a last-second issue. In fact, that had been a lingering issue for weeks, had it not?
A I don't believe so. I don't think it came in until after January 31st.
Q Are you not aware that with each turn of the draft agreement your lawyers would change it to make it clear that Dondero couldn't have access while the Advisors' lawyers would

change it to make clear that Dondero could have access?
A I'm aware that those went on, but I believe that was after January 31st.
Q Okay. I think I have very few questions, since Mr. Morris really, I think, went over it in quite some detail. Please confirm for the Court that my clients' employees have vacated the premises as of last Friday?
A That's my understanding, but they still are accessing services.
Q Okay. And please confirm for the Court that the Debtor has not and will not provide any transition services after last Friday, February 19th.
A We actually have provided assistance, and certain of the employees of the Debtor are doing things for the -- your clients.

So, for example, trades were conducted yesterday by clients of HCMLP for your clients. Data was accessed by your clients. Equipment was taken from the office and used by your clients. The systems were maintained by the Debtor and accessed by your clients. It's a pretty extensive list.
Q But that's because you have decided to allow that to facilitate the transition, correct?
A That's correct.
Q Yeah. You're not doing that because there's an agreement in place; you're doing it out of good faith but not because

there's any kind of requirement to do that, correct?
A That's correct.
Q Okay. As of February 19th, the Debtor is no longer required to provide any of the shared services, and it will not, unless you on a one-by-one basis agree to permit it, correct?
A I haven't been doing it on a one-by-one basis. We did it on a blanket basis.
Q Okay. And as of the end of today, that's over, right?
A I hope so. We'll have an order that will give us the declarations we desire and we can move forward.
Q Well, let me clarify my question. If the judge does not enter a mandatory injunction, the Debtor has nevertheless told the Advisors that any of the shared services are done as of the end of the day, correct?
A I don't believe that's the case. We'll consult with our counsel, both bankruptcy and regulatory.
Q I think you mentioned this, but you can confirm for the Court that some of the data held by the Debtor is actually the property of the Advisors, correct?
A I don't -- I don't know that it's the property of the Advisors. I think they're entitled to receive it, but we're entitled to keep a copy.
Q Okay. Well, I'm not going to waste the Court's time by reading the transition services agreement, but if that -- I'm

sorry, the shared services agreement -- but if that agreement provides that my clients' data is its property, you wouldn't disagree with that, would you?

A No, I wouldn't --

MR. MORRIS: Objection.

THE WITNESS: If that's what it says, I wouldn't disagree with it.

BY MR. RUKAVINA:

Q Okay. And in fact, the Advisors have already copied a large amount of data and have taken that copy for their own use, correct?

A That's what I've been advised.

Q Okay. And with respect to their own data, not the Debtor's data, you will continue to, with reasonable access, permit them to copy the balance of whatever their own data remains, correct?

A To the extent that we can, yes.

Q Yeah. Yeah. Okay. And just to confirm, other than the employees that you determined will be retained by the Reorganized Debtor, the remaining employees will be terminated effective February 28th?

A Not -- not all, no. There's a -- there are some changes to that.

Q Okay. Well, some employees are going to be terminated on February 28th, correct?

A Yes.
Q Okay. And the Debtor doesn't have a problem with my clients either directly or indirectly retaining those employees, correct?
A No problem at all.
Q Okay. Thank you.
MR. RUKAVINA: Your Honor, I'll pass the witness. Thank you.
THE COURT: Any redirect?
MR. MORRIS: I have no redirect, Your Honor.
THE COURT: All right. Thank you, Mr. Seery.
We'll take a ten-minute break. It's 10:51 Central. We'll come back a minute or two after 11:00.
THE CLERK: All rise.
MR. MORRIS: Thank you, Your Honor.
MR. POMERANTZ: Thank you, Your Honor.
(A recess ensued from 10:51 a.m. until 11:05 a.m.)
THE CLERK: All rise.
THE COURT: All right. Please be seated. All right. We're back on the record in the Highland-Advisors matter. Mr. Morris, you may call your next witness.
MR. MORRIS: Thank you, Your Honor. The Debtor calls (audio gap) Dondero.
THE COURT: I'm sorry. Did you say Mr. Dondero?
MR. MORRIS: Yes.

THE COURT: All right. Mr. Dondero, could you speak up? Please say, "Testing, one, two" so we pick up your video.

MR. DONDERO: Testing, one, two, three.

(Feedback.)

THE COURT: All right. Well, I heard you. I don't see the video yet. There you are. Okay. We're going to hope we've got some good audio. I was hearing a little bit of feedback. Please raise your right hand.

MR. DONDERO: Oops, I'm sorry. I can't hear anybody.

THE COURT: All right. I need you to please raise your right hand to be sworn in. Well, this is a problem. Mr. Dondero, --

MR. DONDERO: Take off the headphones?

MR. WILSON: Judge, we're trying to get his headphones to get the sound through them. Should just be just a second.

(Pause.)

THE COURT: All right. Do I need to be speaking to see if they can hear me clearly?

A VOICE: How's it going?

THE COURT: All right. What's going on?

MR. WILSON: I can hear you, Judge. We're just working through a technical issue with Mr. Dondero's headphones.

THE COURT: All right.

MR. WILSON: Hopefully we can resolve that momentarily. (Pause.) We can try that.

(Pause.)

MR. WILSON: Your Honor, we're going to move Mr. Dondero to another room so that we can get this issue resolved without the need for headphones.

(Pause.)

MR. DONDERO: Testing, one, two, three.

THE COURT: All right. We got you. Well, we've got your sound. Can you hear us okay, Mr. Dondero?

MR. DONDERO: Yes.

THE COURT: All right. Please raise your right hand.

(The witness is sworn.)

THE COURT: All right. Mr. Morris, go ahead.

MR. MORRIS: Thank you, Your Honor. John Morris; Pachulski, Stang, Ziehl & Jones; for the Debtor.

JAMES D. DONDERO, DEBTOR'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MORRIS:

Q Can you hear me okay, Mr. Dondero?

A Yes.

Q Okay. Just a few questions. You were aware in November that the Debtor had given notice of termination of the shared services agreements with the Advisors, correct?

A Yes.

Q Okay. And you understood that the Debtor was going to terminate all shared services to the Advisors as of January 31, 2021, correct?
A Yes.
Q And were Dustin Norris and D.C. Sauter authorized by you to try to negotiate with the Debtor the terms of a transition services agreement?
A Yes.
Q And had the Debtor adopted a transition plan as of January 31, 2021 pursuant to which it would not need any services from the Debtor?
A I don't know.
Q Okay. You're not aware of the Advisors having a plan in place as of the termination date that would have allowed the Advisors to obtain back-office and middle-office services from somebody other than the Debtor, correct?
A I don't know. They were always working on a Plan A and a Plan B.
Q Okay. Are you -- did you become aware that the Debtor had agreed to extend the termination deadline by a couple of weeks?
A Yes.
Q And is it your understanding that that extension was granted in order to give the Advisors more time to develop a transition services plan?

A I -- I think it was to continue negotiations. I don't -- I don't know if the plan was part of the reason.
Q Okay. Did you learn at some point early last week that the Debtor and the Advisors had reached an agreement on all material terms of a transition services agreement but for your access to the Debtor's offices?
A Yes. I believe over a thousand line items.
Q Okay. And did you learn that the Debtor had tendered a term sheet that reflected the entirety of the parties' agreement but for your access, with a demand that the agreement get signed or the Debtor would commence a lawsuit?
A I became aware of that Wednesday, in the middle of the ice storm, middle of the day.
Q Okay. Let's pull up Exhibit 17 and see if I can refresh your recollection as to the timing and the substance.
MR. MORRIS: And if we could go to the bottom of the email string.
BY MR. MORRIS:
Q This is an email string between lawyers for the debtor and the Advisors. Do you see that there's an email from Mr. Demo there dated Tuesday, February 16th?
A Yes.
Q Okay. And the lawyers on this email from K&L Gates, those were the lawyers who were representing the interests of the Advisors; is that right?

A Yes.
Q And do you understand that Timothy Silva of WilmerHale and my colleague, Mr. Demo, were representing the interests of the Debtor?
A Yes.
Q And do you see in the first paragraph that Mr. Demo informs Mr. Hogewood that the Debtor is prepared to sign the attached term sheet, in the absence of which it would be filing an adversary proceeding?
A Yes.
Q Okay. And does that reflect your recollection that, in fact, it was on Tuesday afternoon that the Debtor made the demand to either sign the term sheet or there would be litigation?
A It doesn't change my testimony. The first time I heard about it was -- about a suit coming at 6:00 was on Wednesday.
Q Okay. Let's go up to the -- Mr. Hogewood's response. Did you learn that -- did you have any communications with anybody on Tuesday about the possibility of the Debtor filing a lawsuit?
A No.
Q Okay. Can you go -- can you go to the email above? Do you see -- let me see if this refreshes your recollection. Do you see that Mr. Demo sent to Mr. Hogewood on Tuesday, just before 5:00 p.m., drafts of the Debtor's adversary proceeding

papers?
A Yeah, I've never -- except for I think you gave me these emails yesterday, but until yesterday I've never seen these emails before.
Q So, so the lawyers who were representing the Advisors' interests weren't keeping you informed last week about the status of negotiations; is that your testimony?
A Generally. Again, I delegated it to Dustin and D.C. to handle the details.
Q Okay.
MR. MORRIS: And scroll up to the -- to Mr. Hogewood's response.
BY MR. MORRIS:
Q Did you learn that Mr. Hogewood had asked for an extension of the deadline from 6:00 p.m. to midnight at any time last week?
A No.
MR. MORRIS: Let's go -- let's go -- let's go to Mr. Silva's email, the next one up.
BY MR. MORRIS:
Q Were you aware that the parties were negotiating and trying to finish up the agreement last Tuesday as the Debtor's deadline for filing a lawsuit was drawing near?
A I knew they were in negotiations on Tuesday and Wednesday, but I didn't know the deadline was growing near until

Wednesday.

Q Did you learn -- did you learn what the open issue or open issues were as of that time?

A I believe there was only one open issue. It was regarding my occupancy.

Q And what is your understanding of what the issue was as of that time last week?

A Since the beginning of the case, the Highland employees have been told to work from home so that the estate didn't have any COVID liability. There hasn't been a Highland employee in the office in a year except for occasional visits. NexPoint employees have worked every day through COVID, full staff every day.

With us taking over either a hundred percent or 75 percent of the lease, and the supervisory leadership strategy that I deserve, and on a regulatory basis have a responsibility to provide for the RIAs, I needed to be in the office on a going-forward basis. And I believe grand efforts were made on the part of Dustin and D.C. to create a wall for a section of the office for the Highland employees -- who have never come in for the last year, probably aren't coming in for the next year -- but if they were to come in, they would have private egress and ingress, and nobody else in the office, including myself, would ever see them come and go.

And I know there were clear negotiating representations

made on their part, but there's never anything that I've been accused of that's been in-person activity. There have been a couple texts, a couple emails, but nothing ever in-person. So the separation for employees who probably were never going to come in the office, and as NexPoint was paying 75 or a hundred percent of the lease, it made inordinate sense -- in fact, it was only tenable -- if I was able to come in and provide leadership and oversight to the (audio gap) Advisors.

Q Did you testify last night that it was Judge Jernigan who ordered the Debtor's employees to stay out of the office because of COVID?

A That's what I remember from early in the case, so that there wouldn't be any COVID liabilities in the estate, but that's why the Highland employees haven't been around for a year.

Q So it's your -- it's your memory that Highland employees haven't been around for a year and that the reason for that is because Judge Jernigan issued an order telling them to stay out of the office because of the COVID risk; is that right?

A That's -- that was my recollection.

Q Okay. You haven't been in the office in the calendar year 2021 except for the day that you went to give your deposition early in January; is that right?

A Yes.

Q And have the Advisors functioned, notwithstanding your

absence from the office?
A Yes.
Q Okay. And in fact, at the end of the day, notwithstanding everything you just said, is it fair to say that the only issue that you're aware of that separated the Debtor and the Advisors as of last Wednesday was your access to the offices?
A I believe that's the case.
MR. MORRIS: And can we just scroll up a little bit to Mr. Hogewood's -- the next email on the next page? Yeah. Right there.
BY MR. MORRIS:
Q In fact, that's -- to put a fine point on it, the Advisors' lawyer says specifically is keeping Jim Dondero away from the office worth losing out on the financial advantages? Is that the position that the Advisors took at that time?
A Again, I've never seen these emails before and I'm not aware of the specific back-and-forth negotiations.
Q Okay. But that's consistent with your understanding, that the only issue that was outstanding as of that moment in time, the only material issue, was your access to the office. Right?
A As of that moment in time, yes.
Q And otherwise, the Advisors, but for your desire to have access, the Advisors would have had a fully-negotiated complete transition services agreement with the Debtor and

there would have been no lawsuit, fair?
A I believe, yeah, I believe that's largely what -- the status at that point.
Q Okay. And so -- and so, because you weren't given access, the Advisors didn't agree to the proposal that was otherwise acceptable, correct?
A Yes.
Q Okay. And did you lose interest in the negotiations after the Debtor made it clear that they wouldn't provide access to you?
A Lose interest? Yeah, but I mean, the two parallel paths for discretion I had given Dustin and D.C. to work on was either complete the negotiated settlement that really would have been, I think, the best transition for everybody and a win-win for everybody, but if not, be prepared for us to go it alone or the Advisors to be able to go it alone and operate without Highland and without being in the space.
Q And did you give that instruction last Thursday after the -- after the Debtor refused to give you access?
A Yeah. They knew that that -- those were -- those were the only two -- the only two -- the only two that I had approved. They were the only two directions I had approved.
Q Are you aware that on Friday -- withdrawn. On Friday, the lawyers at K&L Gates made a proposal to the Debtor that contained two options; is that correct?

A Yes.

MR. MORRIS: Can we please put up on the screen Exhibit #19, please? And if we could go to the bottom.

BY MR. MORRIS:

Q Mr. Hogewood wrote to my colleague, Mr. Demo, just before noon on Friday, February 19th. Do you see that?

A Yes.

Q And this -- Mr. Hogewood presented two options. You were -- were you aware on Friday morning that Mr. Hogewood was going to be presenting two options?

A I was generally aware, which I think is what I testified to in my depo yesterday, that D.C. and Dustin were enthusiastically trying to come up with a settlement. They believed it was close enough to try and get something done, and they were going to work, you know, an A and a B, but consistent with my direction that there was really only two alternatives, but they were still optimistic, because, besides it being a win-win for everybody, it would be less risk and less work for the Advisors if something like the original transaction could get done.

Q Okay. Do you see --

MR. MORRIS: If we could take a look at Option B.

BY MR. MORRIS:

Q Option B, as written by Mr. Hogewood, would have had the Debtor assume the entire lease and have NexPoint vacate at the

end of the month. Do you see that?
A Yes.
Q And that's an offer that was made by Mr. Hogewood on behalf of the Advisors on Friday just around noontime; is that fair?
A I believe so.
Q Okay. Do you know --
MR. MORRIS: Can we scroll up, please?
BY MR. MORRIS:
Q And Mr. Demo responds just a few moments later by saying that he would discuss the options, right?
A Yes.
Q Okay. And then the very next moment, if you scroll to the next one, Mr. Hogewood actually informs Mr. Demo that he had been informed, "There may be an edit needed to Option B, so I need to pull that back momentarily." Do you see that?
A Yes.
Q Do you know what edit was being considered by the Advisors early in the afternoon on Friday?
A No.
Q Okay.
MR. MORRIS: Let's scroll up to the next email, please.
BY MR. MORRIS:
Q And Mr. Demo just responds and he says, "Understood."

Fair?
A (garbled)
Q Let's -- okay. And then the next email from Mr. Hogewood says, "I am authorized to put Option B back on the table as stated below. Both A and B are on the table for your consideration." Do you see that?
A Yes.
Q Do you believe that Mr. Hogewood was acting without authority when he made that statement to the Debtor?
A I don't know.
Q Did you ever ask Mr. Sauter or Mr. Norris whether Mr. Hogewood was acting outside the scope of his authority when he made this offer?
A No.
MR. MORRIS: Can we scroll up to the email -- the next email, please?
BY MR. MORRIS:
Q Do you see that Mr. Silva on behalf of the Debtor was looking for a time to discuss?
A Yes.
Q And then if we go to the next email in this string, they're asking for dial-in. Did you learn early in the afternoon on Friday that the Debtor had accepted Option B as presented by Mr. Hogewood on behalf of the Advisors?
A I -- I don't know when I became aware of that.

Q Did you learn --

MR. MORRIS: Let's go ahead and take this down and go to the next exhibit, please. And start at the bottom.

BY MR. MORRIS:

Q Do you see that Mr. Hogewood is writing to my colleagues again, and in the middle paragraph he says, "As you know, the term sheet preserves everyone's rights on various claims and other litigation, and Davor suggested it would be appropriate to track that language in the body of the agreed settlement order in addition to attaching the term sheet to the order"?

Were you aware early Friday afternoon that the lawyers for the parties were discussing the form of an agreed settlement order that would embody the Option B approach?

A No.

Q Do you see in the next paragraph there's a question as to whether John is preparing the order or an offer for the K&L Gates firm to take that on? Do you see that?

A Yes.

Q Were you aware that the law firm representing the Advisors that you own and control were offering to prepare a settlement offer -- a settlement order that would include the Option B approach that had been accepted by the Debtor?

A Nope. I wasn't involved in any of these details, nor had I seen any of these emails.

Q Okay. Let's go to the next email and see if you know

anything about the facts or the assertions in that email. Do you see Mr. Demo responds, and at the end of his first sentence, there is enough -- there's a reference to having enough room on the wires. Do you see that?

A Yes.

Q Are you aware -- were you aware on Friday afternoon that the lawyers for the Advisors that you own and control and the lawyers for the Debtor were having discussions about how to timely effectuate a wire transfer?

A No.

MR. MORRIS: Can we go up to the 3:33 p.m. email?

BY MR. MORRIS:

Q And just to move this along, did you learn that the parties -- that lawyers for the parties were expecting to go through the final draft of the document?

A No.

Q Were you aware that the lawyers representing the entities that you own and control wanted more time to be able to do that?

A I wasn't involved in this at all.

Q Okay.

MR. MORRIS: Can we scroll up to the email at 3:43 p.m.?

BY MR. MORRIS:

Q And do you see where Mr. Hogewood informs Mr. Demo that he

needs to push the call further because he is "having trouble connecting with someone to be sure they are in a position to review." Do you see that?

A Yes.

Q Was Mr. Hogewood trying to reach you on the afternoon of February 19th in order to make sure you had the opportunity to review the term sheet that was about to be signed?

A I don't know.

Q Do you see, if you scroll up, Mr. Demo asks Mr. Hogewood if he needs a little bit more time?

A Yes.

Q And then, finally, the last email in this deck, do you see at 4:15 Mr. Hogewood says to Mr. Demo, "We should cancel this call and I should just call you and John." Do you see that?

A Yes.

Q And that's because the Advisors pulled Option B that the Debtor had agreed to; is that right?

A Yes.

Q And it's your testimony that you had nothing to do with that decision; is that right?

A No. It -- no. I didn't say that. Once I became fully aware of what A and B were, I had no interest in A or B, and I pointed the team back to the conversations we had had on Wednesday regarding either it's the win-win scenario for everybody and continuity and the office and me being in the

office or it's a -- it's a divorce. And -- but I didn't have an interest in A or B.

Q And yet it is fair to say, though, that the Advisors' outside counsel and the Debtor's counsel spent the whole day on Friday pursuing Options A and B, including preparing settlement orders and for wire transfers, right?

A They'd been working tirelessly Wednesday, Thursday, Friday, Saturday, Sunday, trying to strike a deal, trying to be reasonable, but to no avail. I think now it's -- everybody's comfortable with the divorce and being out of the office.

Q Did -- do you know whether the Advisors made any proposals to the Debtor over the weekend for an *a la carte* menu of services that might be considered?

A Yes. I believe -- yes.

Q Okay. Does the Debtor -- withdrawn. Do the Advisors have a plan pursuant to which it will obtain all of the back-office and middle-office services that it needs that were previously provided by the Debtor in order to fully perform under the advisory agreements with the funds?

A I believe they have a plan.

Q And is that plan sufficient to enable the Advisors to fully perform their services under the advisory agreements with the funds?

A I believe so. The major gating item, which I think

changed over the weekend, was the historic data for the funds was being held hostage, and I think over the weekend, for the first time, it was agreed that the funds could have their historic data that they were entitled to. And I think that improved the quality of their alternative plans.

Q Does the -- do the Advisors need anything from the Debtor today?

A I believe very little, if nothing. They just need data and information and software that they're entitled to that they've paid for, paid for in full over the years.

Q And does the -- do the Advisors have a plan in place to obtain that information that it contends it's entitled to?

A I don't have the specific -- specifics. Dustin is your person there.

Q Do you personally believe that the Debtor had the right to terminate the shared services agreement as of last Friday?

MR. RUKAVINA: Your Honor, I'll object to that question as that calls for a legal conclusion. And I will note for the record that we are not trying today their declaratory action Count One, and we do not consent to that being tried.

THE COURT: Okay. I overrule. He can answer if he has an answer.

THE WITNESS: I don't know.

BY MR. MORRIS:

Q Do you believe that there is anything defective about the termination notices that you testified being aware to as of last November 30th?
A I don't know.
Q Do you have any reason to believe that those termination notices are unenforceable?
A I don't know.
Q Do you have any reason to believe that the Debtor has any continuing obligation to the Advisors following last Friday, after last Friday?
A I do believe there's an overall industry standard practice in terms of transitioning. I do think there's a responsibility of all parties to do things in a regulatorily-compliant way. So I do believe that that overrides and supersedes some of this contract dancing.
Q How much -- what regulatory regime are you referring to?
A The SEC.
Q Are you aware of any particular rule that would require the Debtor to provide services of any kind to the Advisors after the termination of the shared services agreements?
A No. I'm going based on experience.
Q Okay. So you don't have anything specific in mind; is that fair?
A I have specific historic experience --
Q All right. I'm asking you --

A -- of the --
Q I'm sorry.
A And then, I mean, I do have in mind, you know, based on our historic experience, like when we moved from State Street to SCI, I think it took nine months longer than anybody expected, and there wasn't a hard break in anybody's activities or attitudes toward each other. It was -- it delayed for issues that were -- some were beyond everybody's control, some of them were faults of the different parties, but in no case did anybody try and cause damage or allow damage to happen to regulated funds.
Q How long is the Debtor, in your view, how long is the Debtor obligated to make the data available to the Advisors? How long does this obligation stay in effect?
A I don't have a specific timeline. I did hear Seery say a few minutes ago that you would give it all and they would just keep a copy. I think to the extent that that happened, that cures quite a bit of it. But, again, the data had been held hostage as a negotiating point up until this weekend.
Q Hmm. Have the Advisors made arrangements to make the copy of the data that you just referred to?
A I don't know.
Q Do you know if there is a monetary amount that the Debtor is required to incur in order to continue to maintain the data until the Advisors can get a copy?

A I don't know, but I -- I don't believe it's material at all.
Q Okay. Have you done any analysis to -- if you don't know how long it's going to take to get the copy, how do you know how much it's going to cost to maintain the copy until it's retrieved?
A I don't, but large files up on the cloud in general are not that complicated to move around.
Q But it's your view, as the owner and controller of the Advisors, that the Debtor has a continuing obligation, notwithstanding the termination of the shared services agreement, to maintain the data for some indefinite period of time until the Advisors obtain a copy. Is that right?
A I'm saying there needs to be reasonable business transition in these circumstances. And I don't -- I don't -- I'm not the systems person, I don't know the details, but I know the costs are minimal. The monthly storage charge and -- what, is the Debtor going to delete everything to save $100 of storage charge on the cloud to intentionally harm investors? I mean, that's -- that's an alternative, but none of that makes any sense to me.
Q Let me ask you this. Under the shared -- under the transition services agreement that was fully negotiated as of last Tuesday or Wednesday, but for your access, was the whole issue of data access addressed in that document?

A I don't know. I assume so.
Q Okay. And do you also assume that the data issue would have been fully and completely addressed under the Option B that the Debtor accepted on Friday afternoon?
A I have no idea what was in Option -- I mean, I have no idea what was in Option B regarding the data.
Q Okay.

MR. MORRIS: Your Honor, I have nothing further.

THE COURT: All right. Pass the witness. Mr. Wilson?

MR. RUKAVINA: I think, actually, Your Honor, he's my witness on this one, since we're the Defendants.

THE COURT: Oh, I'm sorry. He's in Mr. Wilson's office. I got confused. Go ahead, Mr. Rukavina.

MR. RUKAVINA: No problem. No problem.

Mr. Vasek, if you'll please pull up Debtor Exhibit 2, and if you'll please go to Section 6.02. Well, make it so we can see 6.03 as well.

CROSS-EXAMINATION

BY MR. RUKAVINA:

Q Okay. Mr. Dondero, can you hear me?
A Yes.
Q Mr. Morris was asking you about data and return of data. I'd like for you to read with me Section 6.02, the second half, where it starts, "For the avoidance of doubt." Can you

see that, sir?
A Yes.
Q (reading) "For the avoidance of doubt, all books and records kept and maintained by Service Provider on behalf of Recipient shall be the property of Recipient, and Service Provider will surrender promptly to Recipient any such books or records upon Recipient's request." And then there's a parenthetical about retaining a copy. Do you see that, sir?
A Yes.
Q Did I read that correctly?
A Yes.
Q Okay. And Service Provider here is the Debtor, and Recipient is one of the Advisors, correct?
A Yes.
Q Okay. And now let's quickly read Section 6.03. (reading) "Upon expiration or termination of this agreement, Service Provider will be obligated to return to Recipient as soon as is reasonably practicable any equipment or other property or material of Recipient that is in Service Provider's control or possession." Did I read that correctly?
A Yes.
Q Okay. And are the Advisors relying on these provisions when you mentioned in response to Mr. Morris that the Debtor had some obligation to provide them their own data?
A Yes. I -- again, I'm not involved in the details or the

specifics, but that's a very standard clause you'd expect to see in a service agreement, and I'm -- in some form or fashion, I'm sure D.C. and Dustin are aware of that and have negotiated accordingly.

Q Well, let's talk about that briefly. Mr. Morris asked you several questions with respect to the negotiations in the last few weeks on the transition services agreement and with respect to the weekend's events, to which you responded that you don't know the answer. Do you recall those questions generally?

A Yes.

Q And is that because you delegated those decisions to both D.C. and Dustin and outside counsel, or is that because you're incompetent?

A I've found that I am mischaracterized whenever I talk to Seery directly or deal with things directly, and there's too much of an intent in this case to make this personalized about me. And there was over a thousand line items to negotiate. Dustin and D.C. are very capable executives. And again, to avoid mischaracterization and personalization of this stuff, I let them handle it.

Q Okay. And you were also asked by Mr. Morris about the Advisors' current backup plan or divorce plan, whatever we want to call it, and you didn't know some of those answers. Is that also because you delegated that to Mr. Norris, Dustin

Norris?
A Yes.
Q Okay. It's not because you don't take an interest in it; it's because you delegated it to someone that you just called a very capable executive, correct?
A Yes.
Q Okay. And Mr. Morris asked you about certain events of last Tuesday and Wednesday. What was going on, sir, here in North Texas last Tuesday and Wednesday?
A Well, it was the ice storm. I couldn't get in touch with my lawyers on Wednesday, including yourself, you know, and people didn't have electricity, they didn't have coverage.
Q Is it fair to say, sir, --
A I couldn't --
Q Is it fair to say, sir, just to speed this up, that last Tuesday, Wednesday, and Thursday, the Advisors and you and outside counsel, primarily me, were having a very hard time getting in touch, and in fact, we really couldn't get in touch?
MR. MORRIS: Objection to the form of the question. I mean, if Mr. Rukavina wants to testify, he's welcome to do that, but I think he's leading.
THE COURT: I'll overrule.
THE WITNESS: The answer is yes. The world wasn't functioning --

BY MR. RUKAVINA:
Q Okay.
A -- in Dallas, Texas, or in my legal ecosystem.
Q Is it possible that, as a result of that, certain miscommunications between all of us took place? Misunderstandings?
A Lack of --
Q Misunderstandings?
A Yeah. A lack of communication, period.
Q And Mr. Morris discussed your physical presence on the premises. In fact, other than that one time that was mentioned when you went to the office for the deposition, you have not been at NexPoint or the other Advisor's corporate offices for almost two months now; is that correct?
A Correct.
Q Has that caused disruption to the business of the Advisors?
A It's definitely affected the efficiency. And again, I don't think it's compliant on a long-term basis for a registered investment advisor to not have its oversight employees, you know, or oversight most senior employee on staff.
Q Thank you, Mr. Dondero.
MR. RUKAVINA: Your Honor, I'll pass the witness.
THE COURT: All right. Mr. Morris?

REDIRECT EXAMINATION

BY MR. MORRIS:

Q Sir, notwithstanding last week's weather, you knew that the lawyers for both the Advisors and the Debtor had reached an agreement on every single material term except for your access to the office, correct?

A Yes.

Q The weather doesn't change anything about that, right?

A Correct.

Q And the only reason that the Advisors refused to sign the agreement and this lawsuit was commenced is because you personally would not reach an agreement that didn't allow you into the offices, correct?

A I mean, yes, largely.

Q Okay.

MR. MORRIS: No further questions, Your Honor.

THE COURT: Any --

MR. RUKAVINA: Isn't it --

THE COURT: -- recross?

MR. RUKAVINA: Thank you, Your Honor.

RECROSS-EXAMINATION

BY MR. RUKAVINA:

Q Isn't it also true, Mr. Dondero, that the same can be said about Mr. Seery, that the only reason why the Debtor didn't enter into that agreement was because he would not permit you

to be on the premises for the next couple of years?
A Yes.
MR. RUKAVINA: Thank you, Your Honor.
THE COURT: All right. That concludes Mr. Dondero's testimony for now.
Mr. Morris, any more witnesses?
MR. MORRIS: No, Your Honor. The Debtor rests.
THE COURT: All right. Mr. Rukavina, you may call your first witness.
MR. RUKAVINA: Your Honor, just to give you a heads up, I'm probably going to have an hour, hour and a half with Mr. Norris. So I don't know what the Court's plan is for working through lunch or not, but I'll just give you that so that you can make the appropriate decision.
THE COURT: All right. Well, I would like to go ahead and get started and get some of that accomplished before lunch. My situation is I'm hoping to get an update, but I have another 1:30 matter that I think is going to be very, very short, but I'm waiting to -- you know, my courtroom deputy was going to reach out to the lawyers involved in that matter. So my point is I may have to break from this for a few minutes at 1:30, so I'd like to time our lunch break so that it occurs a little bit before 1:30. I think that'll make this easier.
So let's go ahead and get started. You wanted to call Mr.

Norris?

MR. RUKAVINA: Yes, Your Honor. Dustin with a D, Norris.

THE COURT: All right. Dustin Norris, would you please say, "Testing, one, two"?

MR. NORRIS: Testing, one, two.

THE COURT: All right.

MR. NORRIS: Testing, one, two.

THE COURT: I hear you loud and clear. I'm not seeing you yet. Oh, there you are. Okay. Please raise your right hand.

MR. NORRIS: Hello.

(The witness is sworn.)

THE COURT: All right. Thank you. Mr. Rukavina?

DUSTIN NORRIS, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. RUKAVINA:

Q Mr. Norris, can you hear me?

A Yes, I can.

Q Okay. Are you able to close the blinds behind you or somehow make that room a little darker?

A Let me reposition. Is that better?

Q Yes, thank you. For the record, sir, what is your name?

A Dustin Norris.

Q And what is your educational background?

A I have a bachelor's and master's degree in accounting from Brigham Young University.
Q Okay. Do you hold any professional licenses or certifications?
A Yes. CPA license, as well as FINRA License Series 7, 63, and 24.
Q Have you ever been disciplined by any regulatory body with respect to your licenses?
A No.
Q Have you ever had a crime, even a speeding ticket?
A No, never -- never had a crime. Not even a speeding ticket. For the record, I did get pulled over for not coming to a complete stop at a stop sign, but was dismissed through defensive driving. This is actually my first experience or interaction with a court other than the same interaction with the Court in December of last year.
Q Have you ever had your honesty or integrity challenged or questioned?
A No, I haven't.
Q Okay. And are you familiar with the two Advisors who are my clients here today?
A I am.
Q And how are you or why are you familiar with them?
A So, I am the executive vice president of each Advisor.
Q Okay.

A And --
Q Go ahead.
A I've been working for the Advisors since 2012.
Q So you have been employed by the Advisors since 2012?
A That's correct.
Q Okay. And what does your role as executive vice president entail?
A So, I oversee the marketing, sales, distribution, business development for our investment products, private placements, registered products, the funds that we've -- been talked about in this, this hearing.
Q Okay. And who do you report to?
A To Mr. Dondero.
Q Okay. And briefly, for the record, what is the business of these two Advisors that are Defendants today?
A Yeah. So, they primarily provide investment advice and management of various investment vehicles. That's private investment vehicles, it's public investment vehicles, publicly-registered closed-end funds, REITs, BDC, ETFs, and mutual funds.
Q Can you give the judge an estimate of the order of magnitude of all of the underlying investments managed or advised through all these vehicles that you mentioned?
A It's several billion dollars under management for NexPoint and Highland Capital Management Fund Advisors.

Q And is Mr. Dondero the fund manager, the guy in charge for all those investments?
A Most of them, yes.
Q Okay. And do you understand yourself to be a fiduciary?
A I do, both to the funds and to our Advisors.
Q Okay. What do you mean, the funds? And in particular, what -- what are the retail funds that Mr. Seery talked about earlier?
A Yeah. So, we have a number of publicly-registered mutual funds, closed-end funds, and ETF. And those are, as Mr. Seery pointed out, available to anyone that really wants to buy them, anybody that has a brokerage account or the ability to buy them through a financial advisor. And so those are the funds that I'm talking about. Primarily, they're 1940 Act-- registered mutual funds and closed-end funds.
Q Do any of those funds have their own boards?
A Yes. All of the '40 Act funds have their own board. It's an independent board of trustees.
Q What do you mean by an independent board of trustees?
A Yeah. So the majority of the board members are independent, and it's actually a -- 75 percent of the board members are independent trustees, as defined by the rules and regulations of the SEC. And so they actually hire us as the advisor. On an annual basis, they review our advisory agreements. And they control the day-to-day operation -- not

the daily operations, but control the oversight of those funds. And on an annual basis, they renew or choose not to renew our advisory agreements.

And so it is an independent process and an independent board. And each one of them have independent legal counsel as well that advises them on all matters that they incur, including everything we're talking about today.

Q Who is that independent legal counsel, if you know?

A Yeah. Blank Rome is the name of the law firm, and Stacy Louizos is the partner that represents them.

Q Does Mr. Dondero sit now, or since this bankruptcy case was filed, has he sat on any of these independent boards?

A He has not, no.

Q Okay. For these funds with independent boards, are you also any kind of employee or officer of them?

A Yeah. So, the funds themselves don't have individual employees. They have officers that oversee the operations. And I am executive vice president of each of the funds.

Q Okay. And as the executive vice president of each of those funds, who do you report to?

A So, I regularly report to the board on matters pertaining to the funds. I'm the liaison between the funds and the board on a number of matters. So I've been attending board meetings since December 2012 for these funds.

Q Okay. Have those boards met and had meetings in the last

couple of months regarding the shared services agreements and any transition thereof?

A Extensive meetings. They've held eight meetings since the beginning of the year, board meetings. And those weren't just short. Some of them were very long. Last year, there were 24 recorded board meetings, and a number of conversations in between, a number of discussions with their legal counsel, a number of discussions with the chairman of the board. So it's -- they've been extensively involved through the process.

MR. MORRIS: Your Honor, I move to strike the hearsay that we're hearing here about discussions that the boards had with other folks. If Mr. Norris has personal knowledge, that's one thing, but I think he's gone well beyond that.

THE COURT: Okay. Response, Mr. Rukavina?

MR. RUKAVINA: I'm not sure what testimony Mr. Morris is talking about, third-party testimony. I think the witness just said that the board has met many, many times to discuss the issues that are up for today.

THE COURT: Okay.

MR. MORRIS: And I think to the extent that the witness participated in such meetings, that's fine, he can specifically testify about that, but I don't think he should be otherwise testifying about what other people did who aren't here today to testify as to their own personal conduct.

THE COURT: Okay. Okay.

MR. RUKAVINA: I can rephrase the question, Your Honor.

THE COURT: I sustain. Rephrase.

BY MR. RUKAVINA:

Q Have you personally participated in meetings of those boards, Mr. Norris, at which those boards and you discussed the transition services agreement potentially being negotiated with the Debtor and the shared services agreements that were being terminated by the Debtor?

A Yes. I participated in eight board meetings this year. There's been five of them in February alone. And there were 24 board meetings last year, and I was a participant in each one of those meetings.

Q Okay. And did you advise those boards at some point in time about the termination of the shared services agreements?

A Yes, we did.

Q When did you start advising those boards that that was something that may happen or that has actually been noticed as happening?

A So, throughout the fall last year, I think the expectation was that there would be a -- I mean, obviously, there had been a plan filed with the Court. That was discussed with the board. Mr. Seery testified that he joined the board meetings in the fall and in the summer and talked about those. The discussions were around the transition of services. There was

discussion about a new company. And so the discussions were ongoing.

When the filing actually -- from when the filing actually happened, that was ongoing, of how would we be able to continue the services. And so, from the beginning, those were discussions that were had.

We did notify the board when the termination occurred. As well, we had a board meeting, a one-and-a-half day board meeting on December -- I think the dates were December 10th and 11th -- where the termination was discussed in detail.

Q Now, obviously, the Debtor sent notices of termination of these shared services agreements in late November. You're obviously familiar with that, right?

A Correct.

Q Separate and apart from the Debtor's decision to terminate these agreements, were you and the Advisors considering terminating these agreements?

A We were. We had discussion --

Q Let me ask -- let me ask the next question. I appreciate you answering, but let me -- let me do my job. When were the Advisors considering making such a move, and why?

A This was in the October-November time frame of last fall, as the -- particularly around the services we had been receiving related to the shared services agreement and the payroll reimbursement agreements. We didn't think that the

service was fulsome, we didn't think we were getting the service that was under the agreements, and the service had dropped off.

And in particular, the -- there was -- there were conflicts involved between the Debtor and between the service providers, particularly legal and compliance services, given all that was going on. And there were a number of matters they couldn't participate on. Historically used their legal and compliance services significantly.

And that, in addition to discovering that there were a number of employees we were reimbursing for in payroll reimbursement agreements that were no longer employed by the Debtor, yet we were paying for the full services.

So, with that, we had discussions internally about if and when or how we could terminate them, and --

Q Let me stop you.

A -- termination --

Q Let me stop you. Ultimately, I take it, the Advisors never tried to terminate these shared services agreements, correct?

A That's correct.

Q Why?

A There was an order specifically that Jim or anybody related to Jim could not terminate an agreement with the Debtor. And he specifically pointed that out to us when we

discussed this, and so we knew we couldn't take action. There was also -- counsel discussed that the stay with the Court --

Q Let's not -- let's not talk about counsel. Let's not talk about counsel, --

A Sorry.

Q -- Mr. Norris. Okay. But the point is, at least as of last October, would you agree, that the notion that these agreements would be terminated by one or the other parties was known to you?

A Yeah. So, the -- we expected that at some point there would need to be a termination. I -- that was discussed. And there was a plan, and I'm sure we'll talk about it, but a plan to transition the employees and the services to a new company and to new service providers. And I think both sides had been working for quite a while to ensure there was a smooth transition, and we expected that to happen. But there would need to be a termination of that agreement -- either a transfer of that agreement or a termination to a new company that would be providing new services, or transferred those services directly to us.

Q So I'd like you to pick what word you'd like to use, but what I've called a backup plan in my objection or what Jim called a divorce plan in his testimony, how -- what shall we call this backup plan?

A All-contingency plannings. Or we'll call it backup plan.

Q Okay.
A I think that works.
Q So is it fair to conclude that since at least last October, the Advisors have known about the possibility of having to do a backup plan?
A Yeah. And I think even before then we knew there was a possibility. But the plan, the strong Plan A of everything that had been communicated to us by the Debtor and their employees was that the intent was to transfer all those services to a new company, with the same individuals providing the same services. There was no significant indication to us that that would be any different.

Yet we still had then begun planning, well, what if, right, Plan B was implemented or began many months ago and in recent weeks, in recent months, it's been expedited to be able to ensure that we have a solid Plan B. But yes, it's been ongoing for months.

Q So if there is an implication or allegation made that the Advisors were negligent with respect to transitioning from the shared services agreements because they didn't start taking it seriously last August or September, would you agree or disagree with that allegation?
A I would disagree, because there were assurances or discussions that made it very clear that everybody was working together towards a Plan A. Yet we were still discussing -- I

know Mr. Seery mentioned he's a Boy Scout. I agree in that. Be prepared. I'm an Eagle Scout. And so we have been preparing, but the preparations weren't needed in the manner that we thought they were needed until in the last month, right, and -- because everything was moving in the right direction for a clean transition plan, and even up until last week.

However, the last month and a half we've had to prepare in earnest for Plan B, and that involved a tremendous amount of effort. And I'm happy to go into that now. But yes, there's -- there has been -- we have 80 employees across our Advisors, and almost every single one of them have been involved in Plan B, and a group of about 18 of us for several weeks, planning, game-planning, and thinking through all the contingency plans.

Q Well, let's round off the discussion about these boards. Did you make the boards aware since last fall and into this year about both the ideal plan, which was, I guess, you know, an agreement with the Debtor, but also a backup plan, in case?

A Yeah. So, in -- in August, --

Q When --

A -- when the Court -- oh, sorry, yeah.

Q No, no. Well, go ahead.

A Go ahead.

Q I was going to ask you how and when, but you -- you -- go ahead.

A Yeah. Yeah. So, up until August, there was, I think, a view that there would be a negotiation, a negotiation reached. Things had been pushing along. We know that in August there was a plan filed with the Court. And Mr. Seery even joined our board meeting. And so in that meeting he discussed with us, as well as the legal team of the Debtor, discussed with us the Plan B at that point, which was defined with the Court. That the goal and objective was a grand bargain, as he explained it, and that he -- that was the Plan A. But even under either plan, there would be a transition of services. He joined again, I believe, one or two more times, to additional board calls that fall. There was mediation we were aware of and had discussed with the board to help resolve some of these items.

And so, you know, just in the same time frame Mr. Seery shared earlier, it corresponded with those discussions that we were having.

In addition, D.C. Sauter and other individuals at our firm, as well as individuals from the Debtor, were working throughout the fall and into the winter on the various discussions on transition. And so that's --

Q Did you hear Mr. Dondero testify about over a thousand line items?

A Yeah, I did.

Q Do you know what -- what is he referring to, do you know?

A So, within the transition services agreement, there -- there's about 11 or 12 pages in an exhibit that are a number of agreements. That's -- that's the remaining agreements that we've agreed that are needed. He may have had a little hyperbole in his thousand, but there is -- there were -- there was at least a thousand points of discussion that had to be resolved. Most of them were minor, right, and we came to a quick agreement on most of those, and there was only a handful of things that needed to be resolved. And because of that, I felt comfortable and confident, particularly from the middle of January on, where I became much more involved, that there would be an orderly agreement on those points.

Q Did you tell the boards that the Debtor would enter into the agreement that had been negotiated only on the condition that Mr. Dondero not be permitted to be on the premises?

A Sorry. You said the Debtor would enter into or -- oh, that he wouldn't be permitted onto the premises?

Q Well, we'll go more -- we'll go in detail later, but I want to round off the board discussion here. Obviously, you heard from Mr. Seery and in my paper that we had an agreement done except for one issue, right?

A Yes. Yes.

Q And that issue was whether Mr. Dondero would be on the premises or not, right?

A Yes.

Q Did you discuss that with the board, that issue?
A We did. We --
Q And did you get any instructions from the board that have led you to do anything other than you've actually done?
A No. No, we -- they -- the board, as I mentioned, we've had eight board meetings this year discussing in detail our backup planning. They understood the Jim access issue and they felt comfortable with our backup planning. But also, you know, our view, and I think that they shared that, that he should have access --
Q Well, let's stop there. Let's stop there. Let's stop there. I'll ask -- I'll ask more of those questions later. I don't -- I don't want to invite Mr. Morris's objections here based on you talking outside the scope --
A Yeah.
Q -- of my question. Let's move on now to the shared services agreements themselves. You heard Mr. Seery's characterization of them from a top level. Would you agree with his characterization, or how would you characterize what the shared services agreements actually did?
A Yeah. I think he called them middle- and back-office services. I think, to add a little bit more to that, it's IT services, including the systems and computers that we all use. It's HR. It is accounting and back-office services, many of those for our advisors and some of them for our funds. We do

outsource a number of accounting functions to other service providers, and have for years, and they provide an oversight function for the accounting and the books and records for our funds. They also provide tax services and things like that for our advisors and funds.

Q Now, in --

A And as well legal and compliance services. Legal and compliance services as well.

Q In our exhibits that have been admitted are two employee or payroll reimbursement agreements. We don't have to go through those in detail, but you're -- are you aware of those agreements?

A I am, yes. And I would add that -- and those are in addition to the services that are provided under the shared services agreement. Those are front-office or investment services.

Q Okay. Now, did there come a time when a dispute arose between the Debtor and the Advisors as to how much an amount was owing by the Advisors to the Debtor under the shared services agreement?

A That's correct.

Q What was the basis of that dispute?

A Yeah. So, in particular, as I mentioned earlier, certain of the services we believe we are no longer receiving. Many of those related to legal and compliance. We've had to shift

a lot of those responsibilities in-house and to outside counsel.

And particularly related to the payroll reimbursement agreements, we hadn't realized that we were overpaying for employees that -- and again, they're payroll reimbursement agreements for employees that are dual-hat employees, dual employees of the Debtor and our Advisors, providing investment services. And there's a list or exhibit that shows the number -- the actual employees with their names and the allocations of their time. And so two-thirds of those employees, when we realized or saw the list or received the list on the exhibit in the agreement, which was around the end of November or early December, two-thirds of them are no longer employed by the Debtor. And we continue -- and they continue to bill us based on historical averages, not based on the actual amounts.

So we inquired of that, we asked for email --

Q Let me -- let me pause you.

A Oh, sorry.

Q Let me pause you.

A Yeah.

Q Let me pause you. So, during the negotiations with the Debtor in December, January, and February, did you ask for any kind of clarification or reconciliation of these amounts?

A Yeah. So, on multiple occasions, we asked for the detail of what they were invoicing us for, and then, in particular,

in late January and again a couple times in February, I asked multiple employees for reconciliation. Two reconciliations. One was a reconciliation of the employees that they were charging under the expense -- I'm sorry -- payroll reimbursement agreement, to the actual amounts that they charged us, and then separately I asked for a reconciliation of amounts billed to us under the shared services agreement to what they actually incurred on their end.

And the rationale for the latter was because the expense reimbursement -- or, sorry, the shared services agreement for Highland Capital Management Fund Advisors is actually a cost plus a margin of five percent. So they are to charge us what their costs are plus a margin of five percent, yet they continue to bill us the same amounts based on historical averages.

And so the amounts in dispute were particularly in the last few months, where those amounts hadn't changed and where we raised this concern.

Q Did you get a response or a reconciliation from the Debtor on these overpayment issues?

A No.

Q Okay. Now, when did you become -- well, you heard Mr. Dondero say that he delegated the primary responsibility for a transition of services to you, correct?

A Yes.

Q When was that?
A Yeah. So, January -- in mid-January, I became very involved. I had less of authorization prior to that. I was involved in some of the negotiations on contracts and things like that in early December. Had a meeting with Debtor employees on that, and that they had been working on for months, along with Mr. Sauter. Mr. Sauter had taken more of an active role prior, in December and October and even September, and before -- before all that.

So, in January, mid-January, they actually came to me on January 12th with permission from Mr. Seery to interact directly with me and to negotiate the additional terms of the transition with me. And Jim authorized me at that time to move forward.

Q Okay. Did you discuss with Mr. Seery whether you would be permitted to talk to Debtor employees as part of this?
A So, I did not talk to Mr. Seery, but I talked to J.P. Sevilla, Brian Collins, David Klos, and Frank Waterhouse, who they had told me explicitly that Mr. Seery had authorized them to negotiate with me.

Q Okay. Was there some impediment prior to that authorization to being able to discuss Newco issues with the Debtor's employees?
A So, there were a number of things. And as this Court is very well aware, that three weeks prior to that, there were a

number of events. There was a TRO for Mr. Dondero and our Advisors, there was a preliminary injunction for Mr. Dondero, and there were claims of interference. And we took a very cautious approach and didn't want to interfere in any manner. And so in these regards, and in many, I mean, everyone was very cautious. And so those were -- those were steps that it was challenging.

In addition, I should note that Mr. Scott Ellington was helping the Debtor and negotiating this transition agreement before he was let go in early January.

And so with all those events, we had to take a more cautious approach to communication.

Q Okay. And approximately when did Mr. -- did the Debtor, to your satisfaction, authorize direct interaction with the employees so that you could negotiate a more fulsome agreement?

A Yeah. It was when they called me on January 12th --

Q Okay. And is it fair to say --

A -- and notified me of that.

Q Is it fair to say that that's the date when the negotiations really got going?

A Absolutely, yes. Yeah.

Q Okay. Did you ever ask the Debtor for a draft agreement or term sheet or whatever you want to call it as far as a transition of services would be?

A I did, on multiple occasions.
Q When did you finally receive one?
A So, it was on January 28th, which was the last business day of the shared services agreement term. Sorry, January 29th, a Friday. And January 12th, we engaged, as I mentioned. We came to quick resolution on various items. And we began asking for a term sheet. I actually asked them whether they -- who they wanted to draft it, their counsel or our counsel. They checked with their counsel. I thought it was a good idea and agreed that it was a good idea for their counsel to draft it, because, as they put it, this was their baby for many months. They had -- because the Debtor employees and DSI, their consultants, had been very involved, in taking 15 months to that point, in figuring out what contracts were needed, analyzing what needed on a --
Q Let me stop you.
A -- go-forward basis --
Q Let me stop you, --
A Yeah.
Q -- Mr. Norris. The point being, it was agreed between you and the Debtor that the Debtor would take the first stab at a term sheet, and you received that on or about January 29th of this year?
A Correct.
Q Okay. Now, obviously, the Debtor extended the

termination, first to February the 14th, and then, second, to February 19. Correct?
A That is correct.
Q Okay. Did the Advisors pay the Debtor for those delays, pay cash money to the Debtor for those delays?
A We did. And we -- yes, we did.
Q Okay. And without belaboring the point or taking any more time than necessary, the numbers that I have in my objection are that, for the first extension, we paid --
A I believe it was around $560,000.
Q Thank you. Thank you. And for the second extension, do you recall?
A Around two hundred -- just over $200,000.
Q Okay. Why were those extensions necessary?
A They were necessary for multiple reasons, but it was necessary to get a transition agreement completed, and that was our goal and intent. It was also necessary to protect our funds and our investors, to have a smooth transition. But primarily, we were in a great spot until -- up until January 29th, we hadn't received a term sheet. So we couldn't negotiate a term sheet that was pages long, with schedules that were 10 or 15 pages long, in a day, and so we asked, in good faith, can we have an extension? And they also were agreeable to that, and it made sense for all parties.
Prior to that receiving the term sheet, though, there were

concerns that we would lose those services. They threatened to pull those services. However, at the end, all parties agreed.

And then the extension, the second extension was needed in order to continue those -- those agreements, negotiations as well, as they had pushed the termination date of the employees from the anticipated January 31st to January 19th, and so we asked that they moved the termination date of the shared services in line with the termination of the employees, because our understanding was those employees would be transitioning to a new company providing those same services.

Q Okay. Maybe I misunderstood something because of the video nature of this, but you mentioned something like pushing the termination of the employees from January 30th to January 19th. Just for the record to be clear, because, again, I might have misunderstood or misheard, but when was the Debtor going to terminate nonessential employees originally and up to what date was that pushed?

A Yeah. So our understanding is they were going to terminate them on the 31st of January. They did end up receiving termination notices that said January 19th. And so that was pushed from what our understanding was, but that was the first time I believe the employees received termination notices for the 19th. Thereafter, after we negotiated an extension of our shared services agreement one more week

before the 14th, to the 19th, the very next day they extended the termination dates to the 28th for all employees, which would extend it one week beyond the negotiated termination date for the shared services agreement.

Q Well, here's my fundamental question. To your knowledge, was that the Debtor's separate business decision as to when to terminate employees or did you request that the Debtor extend it to February 28th?

A That was their separate business decision. Um, --

Q That's fine.

A That was -- that was their separate business decision to extend it. We didn't even anticipate them extending it --

Q I just want the record to --

A (overspoken)

Q I just want the -- I just want the record to be clear, Mr. Norris. Let me direct you, please.

A Yes.

Q That that decision to extend the employee termination was not at our request?

A Correct.

Q Now, let's talk about these negotiations a little bit. To go back to this agreement that we had other than the Dondero access issue as of last Tuesday, you agree that there was an agreement other than the Dondero access issue as of last Tuesday, right?

A Yes, that's correct.

Q Okay. How, if at all, was the amount of money that we owed to the Debtor issue resolved between you and your counterparts at the Debtor?

A Yeah. So, they, at the end of January, demanded that -- and this was the first time that I was aware of the extent of the amounts or that they were going to include payment of past-due or disputed amounts as part of this agreement. That came in on, I believe, January 27th. And they demanded we pay it or they would cut off all shared services effective Friday, the 29th. And that included our access to the -- to our websites, our domains, our emails. It would include access to the office. And so that was a major item.

They demanded five point -- approximately $5.2 million in payments from our Advisors and a number of other entities. And so, as part of that, that was a -- that was a problem, because we can't speak for the other entities.

In addition, now we were commingling a financial dispute with the peaceful transition of services. And so that was resolved. We agreed with the Debtor and ultimately agreed that, okay, we would pay these disputed amounts as part of this, reserving our rights for any additional -- any additional argument of that for another time, but we would agree to pay our portion, which is approximately $3 million, our disputed portion of what they were billing, with $1

million up front. They wanted it all up front, but they were willing to allow us to pay $1 million up front and the remainder over 14 months.

Q Okay. Going back to this agreement save the one issue, how was the employee issue resolved?

A Yeah. So, the employee issue was an important one, and it had been. These employees had been working hard providing service for our funds and advisors for a very long time. The plan all along was to transition them, as Mr. Seery said, to a new entity. It would either by controlled by Mr. Dondero or by the employees themselves.

And so we needed -- we need those services, right, in the long run. And so that was resolved in that there would be a new company formed, which we've been calling Newco. It would be employee-owned. Initially, would be providing services exclusively to our Advisors, but then would have the ability to go out and provide the same services to other companies. And so we found that as -- from the beginning a great solution. And the principals of what would become Newco have been interfacing with us and with Mr. Dondero regarding the combination of those services.

So, as part of this agreement, the services would transition directly to Newco, with the same people providing the same services in the same seats.

Q Okay. What about -- just so that the record is clear,

there's a large corporate office over at Crescent Court here in Uptown Dallas, right?

A That's correct.

Q And the lease, obviously, just to speed things up, the lease is in the name of the Debtor, but for many years NexPoint and other employees have been on premises, correct?

A Yes. We've been there since they opened the space. I believe it was February 2012 when we moved there. Maybe February 2011. But our Advisors have been there in that space since then.

Q Okay. So how was the future of this lease and resulting lease payments resolved as part of this tentative agreement as of last Tuesday?

A Yeah. So, it was a 75/25 split, where the Debtor would pay 25 percent and we would pay 75 percent for the remaining lease term, which was approximately 14 months.

Q And approximately how much would our 75 percent over 14 months have amounted to?

A I believe that's approximately one -- between $1-1/2 and $2 million.

Q Okay. Now, we'll talk about this in some detail later, but there are certain third-party software and information providers -- Bloomberg, for example -- that the Debtor uses that we have access to under the agreements but that the Debtor must pay the third parties for, correct?

MR. MORRIS: Your Honor, I just object. Again, if Mr. Rukavina wants to testify -- this is not a question. This is testimony.

MR. RUKAVINA: Your Honor, --

MR. MORRIS: I mean, there's no foundation. There's nothing.

THE COURT: Sustained.

MR. RUKAVINA: Okay. Very well.

BY MR. RUKAVINA:

Q Mr. Norris, does the Debtor -- or, did the Debtor provide, pursuant to shared services agreements, access to third-party software platforms?

A Yes. They did. There was a number of agreements --

Q Stop. Stop.

A -- that were --

Q Stop. Stop. Stop. Were these some of the things that you were negotiating with the Debtor as you were negotiating that transition of services?

A Yes.

Q Name a few of the most important of these third-party service providers that you were negotiating with the Debtor.

A Yeah. Bloomberg, particularly the order management system of Bloomberg. Oracle, which is an accounting system, to name a few. Those were the most important ones.

Q Describe with some more specificity, please, what the

order management system is. OMS.
A Yeah. An order management system is an operating system that allows you to trade various funds and asset classes all through one system. And so we have a number of funds, we have a number of asset classes we trade, which include loans, bonds, and equities. And so trading all of that through a system that then sorts it, allocates it, and does it all in an efficient manner -- in addition, it incorporates various rules and metrics for trading and efficiency -- so it's very customized, it's very customized for the rules related to our funds, very customized for the rules related to what we trade for our Advisors, and it's been used primarily by the traders from our Advisors or employed by our Advisors.

So that's what the OMS is. And it's Bloomberg that has the software, and it's been customized directly with Bloomberg.
Q Okay. Did you come to an agreement with the Debtor as to how the future costs or license fees for these platforms and services would be allocated between the Debtor and the Advisors?
A We did. It would be, for most of them, which is approximately a hundred contracts, is about -- is a 60/40 allocation. We would pay 60 percent and they would pay 40 percent. There are some of them that they said they didn't use that we agreed we would pay a hundred percent of. But

most of them are a 60/40 split.

Q Okay. And did you calculate approximately how much in payments pursuant to that formula we would make, the Advisors would make in the future under the draft agreement?

A Yeah. So, it is approximately $240,000 per month, inclusive of the lease. So, exclusive of the lease, it was about $120,000 per month.

In addition, there were one-time payments for annual payments, which I think was around $200,000 or $300,000.

So it is a -- it's a couple million dollars over the life of the contract.

Q Okay. And to fast forward to last Tuesday, the one issue that had not been resolved was Mr. Dondero's physical presence on the premises, correct?

A That's right. That's right.

Q Was this a last-second issue or had this been discussed for some time?

A No, it wasn't a last-second issue. We actually included it in our first multiple drafts or responses to their term sheet. We got the term sheet on the 29th of January and it did not include any specifics around Mr. Dondero's access, but we added that in early drafts of the term sheet and it was removed by their counsel and reinserted in the -- I know there was discussion between counsel on various aspects of it. It was removed from what was their final version, and maybe even

the draft before that, but it was added in by us again as -- for all the reasons we mentioned before. We thought it needed to be stated explicitly in the agreement. And the attorneys had discussed that it could be handled --

Q Let's not talk about -- yeah, let's not talk about the attorney discussions.

A Okay.

Q You heard Mr. Seery say that the Debtor refused to permit Mr. Dondero onto the premises and you heard him say why. Did the Advisors offer any compromise on this access issue?

A We did.

Q What was that offer?

A So, we offered to -- and in all this, it's thinking, what are the employees from the Debtor that are going to be using this? We haven't even really received a good understanding of who that is.

However, we offered to take approximately 25 percent of the office. And there is a clear area where we could build a wall. They could have their own separate access, their own separate restrooms, their own separate entrance, where they wouldn't have any involvement or connection to us. And so we also offered with that, whenever you need access to the other portion, let us know. We can even have Jim Dondero leave, if you're concerned.

And so that was one option. We could build a wall. And

we even put that in the written agreement. We will build a wall at our expense. That was the -- that was the -- what our offer was.

Q How did the Debtor respond to that offer?

A They removed it from the agreement and they told us that we had until 6:00 p.m. to sign their agreement with no Dondero access or they would file a lawsuit.

Q And this was last Tuesday?

A This was Tuesday.

Q Okay. Were you able to respond by their deadline, which they -- then they later moved to midnight of that same day?

A I'm not sure if there was a response. It was handled between attorneys. Our counsel. I had -- just as Mr. Dondero stated, I had rolling blackouts in my home from 2:00 a.m. on Monday until Thursday. I -- I and D.C. were aware of the offer, as was our counsel, and I believe there was a -- and I believe there was a response from our counsel in time, but I'm not -- I wasn't certain at the time. I knew that, as well, there was an extension, but I didn't find out until the next day because I did not have power.

Q And ultimately, the Debtor either rejected that last offer or let the offer expire by not accepting it. It doesn't matter which. But is that accurate?

MR. MORRIS: Objection to the form --

THE WITNESS: Yes.

MR. MORRIS: -- of the question.

MR. RUKAVINA: Your Honor, I'll ask it a different way.

THE COURT: Sustained.

MR. RUKAVINA: I'll ask it a different way.

BY MR. RUKAVINA:

Q Did the Advisors accept the Debtor's last offer made on Tuesday of last week, the one you just referenced?

A No.

Q Why?

A As explained, I think, clearly by Mr. Dondero as well, it did not have the provisions that we thought necessary. And when you think about this, we were going to be required to pay significant dollars for an office space where our president and principal was not permitted.

We had an option to go other -- elsewhere, right? Here, we're in a separation experience. This agreement that they had, they had told us early on it was fill-or-kill. They told us early on that it was not *a la carte*. When we pushed them on that a couple weeks later, they said, well, the only thing that's not negotiable is the office, right? If you want everything else, you've got to have the office. That was in a discussion with various attorneys on the phone.

And so, with this, we knew this was a kind of take-it-or-leave-it offer, and we could have gone elsewhere. And we had

already been preparing, in the event that we couldn't have a deal, to go elsewhere. And so, with that, if they were not going to permit -- which we thought was very reasonable, specifically with all of the additions, you know, the consideration -- sorry, my battery is about to die on my computer. I'm plugging in the charger here.

So, with all of those considerations, we couldn't sign that deal, especially as -- without that key access.

Q You personally, Dustin Norris, now, personally, as an officer and a fiduciary, did you think that it was appropriate or inappropriate that Mr. Dondero be allowed on the premises in the future?

A I thought it would be appropriate for him to be there.

Q Why?

A So, I've been working for Mr. Dondero for a long time. I know the way he operates, and I know that the way that he manages his organization, which is a complex organization, he needs to be there in person. We haven't been in the office because of a -- a disregard for COVID. We are an essential business, and we have been, as a financial services business. But the way we operate is very in-person, and that's how Jim operates.

In addition, I've never heard of a situation where the principal or the control person of a company -- there's no question that Mr. Dondero controls the organization -- cannot

be there in person.

And so, from that perspective, given and knowing all of our other plans, given the ability for many people to relocate, given the abundance of office space elsewhere, if we were forced to accept an agreement that did not allow Mr. Dondero for the next 14 months to be there in person, it was -- it was going to be a challenge for us from a business perspective.

Q Do customers or investors or prospective customers and investors come to the offices historically to meet with the Advisors and their personnel?

A Pre-COVID, yes. Regularly.

Q Okay. Would Mr. Dondero participate in those meetings?

A He would, yes.

Q Were you concerned that him being unable to participate in those meetings would affect future business and profitability?

A Yeah. I think if you look at this -- key investors come in and see this big cavernous open office and ask why the manager of the funds is not even allowed to be in your office, you know, or is that impacting the way you operate, then yes, I think he needs to interact with people that are coming through the office.

Q He has not been in the office since about the beginning of this year; is that correct?

A Correct.

Q Do you feel like that has caused any harm or disruption to the Advisors' business?
A Yeah. I don't know that I would characterize it as harm, but it has been disruption, right? I'm -- the way that we operate, having Jim there, being able to have consistent, regular meetings in person, which for me were multiple times per day on a regular basis, and many others, it was disruptive. Being able to reach him, how to reach him. Do I need to get in my car and drive to another location where he's at, which I did on many occasions. We typically get people together very quickly in groups: Let's go talk to Jim. And that becomes a challenge to get things done quickly and in an efficient manner.

So it has been a disruption, and it's not something that we would desire to do, if we had the choice, for another 14 months.

Q Okay. Now let's talk about the backup plan, please. I guess let's start with: What is our backup plan? Well, let me start with this.
A Yeah.
Q Do we have a backup plan?
A And I think the key now, instead of calling it a backup plan, is an operating plan.
Q Okay.
A For --

Q Do --
A -- several weeks, --
Q Let me -- let me -- that's a very good point. Prior to a few days ago, did we have a backup plan in place for what we would do if we were not able to enter into a transition services agreement with the Debtor?
A We did, yes. And --
Q Since when -- let me -- let me direct you. Let me direct you. Since when did we have that backup plan?
A Yeah. So, the backup plan -- the backup plan began many months ago, but as I mentioned earlier, it began in earnest in the end of January, right? And over the last month especially, we've been putting in place all of the required systems and processes and procedures in order to continue doing all the duties under our advisory agreements. And that includes all of the services that are provided for the Debtor -- by the Debtor.

And our backup plan, a big part of that included the transition, and it still includes the transition of those employees to Newco. We are in active negotiations and believe that Newco, once those employees are terminated on the 28th, they will be able to perform their same duties on March 1st of this year.

And so we expect those services to happen. In the interim, we've prepared for and have contingency plans in

place in order to do all that we need to do. We have systems and servers that are set up in an SEC-compliant manner. We are operating on a new email system. We have our files --

Q Let's go --

A -- that are essential.

Q Let's go step by step here so that the judge --

A Yeah.

Q -- has a very clear picture of what all is involved. So I'm going to try to break it down. I think both you and Mr. Seery talked about back-office and middle-office services. What are those? What does that refer to in the industry?

A Yeah. So, back-office -- back-office and middle-office includes HR, IT. Accounting is a big part of that back-office services. And in regards to our funds, it is the oversight of the accounting process on a day-to-day basis and on a monthly and quarterly basis, for annual reports, for audits. It's the day-to-day valuation services that are provided to our funds. And so those are the key functions. It's legal and compliance as well --

Q So let's --

A -- the Debtor has been providing for our funds.

Q Let's go step by step. So let's assume that I'm -- I want to invest in your fund. In a retail fund, pardon me. Am I able to pop up daily or almost instant information regarding its assets, its valuations, et cetera?

A Yes. So, most of our --
Q Is that -- is that --
A -- funds --
Q Is that part of what you were just describing about valuation and accounting services on a real-time basis?
A Yes, it's part. It's more of the oversight function.
Q Okay.
A We outsource the daily processing and NAV-striking, or the actual accounting, day-to-day accounting, to an outside third party called SEI. And the Debtor had provided oversight function as well as valuation services for that daily accounting process.
Q Okay. So the Debtor, for accounting, wasn't actually crunching the numbers every day; it'll -- supervising third parties. And that's been the historical norm, correct?
A That's correct. I actually --
Q Now, let's --
A -- years ago filled that function.
Q Okay. So let's -- so how are we, the Advisors, today, compensating for the lack of the Debtor's back-office and middle-office services, or how are we transitioning from that today?
A Yeah. So, a key part of that is the transition to Newco, right, and as well that is planned for next week. However, in the interim, we have very good plans and processes in place.

We have -- on the accounting front, on a day-to-day basis, we have added our key personnel, our accounting teams, which has been actually bulked up in recent years. We have a number of publicly-traded REITS that have SOX-compliant processes and procedures.

And the CFO of our real estate platform, Brian Mitts, used to be the principal financial officer of all of these funds. He continues to be and operates as the principal financial officer for one of them, or had been throughout all of this time, and is a participant in all of the board meetings and regular valuation processes. In addition, he has a team of accountants.

And so they are now copied on all the day-to-day accounting emails from our third-party providers. They have been for several days.

In addition, as a backup measure, we hired on a consulting basis the former senior accounting manager who worked until April of about two years ago for the Debtor, providing these same services to our funds. And so, on a contract basis, he's there as needed.

In addition, we have received from the Debtor a list of employees, if they're needed, that we could hire. There's about seven of them in the accounting and operations functions. They gave us permission last week to do so. And one for valuation.

So, those functions, if they're needed in the interim period before Newco is in place, we'll have those.

In addition, from an IT perspective, which is an important part here, they maintain -- the Debtor maintained our systems and servers. We have contracted --

Q Let's not -- let's not -- we'll talk --

A Yeah.

Q We'll talk about -- we'll talk about IT momentarily.

A Yeah.

Q You mentioned -- so you just discussed accounting. What about -- and I think you -- did your discussion right now include transition of the valuation services?

A Yeah. So, in that regard, --

Q Okay. What about -- what about -- what about legal, transition of legal services and compliance, regulatory compliance?

A Yeah. That -- as I had mentioned before, the services we had been receiving from the Debtor have slimmed down dramatically, and particularly around legal services. We still had been receiving significant support from Lauren Thedford, who is a very reliable team member of the Debtor. She was also serving as an officer of the funds, of our funds, until Friday, when she resigned. But we have in place with SEI, they provide admini... regulatory and legal admin services to us, and have all along. They're prepared to step

up in her absence.

And also K&L Gates, who already serves as advisor counsel and fund counsel, is set and has been already picking up the slack and prepared to do anything that Lauren was doing. She is a valuable team member. We hope that as we transition to Newco that she'll be able to, as mentioned earlier, step back on as an officer of the funds.

Q Now let's talk about IT, information technology. What services was the Debtor providing to the Advisors in the nature of IT under the shared services agreements?

A Yeah. So, our IT equipment, our computers, our screens, were their property, or at least that's -- that's the -- that's what -- it's in their name. Not all of it, but some of it. In addition, they provide IT support. So if we have an IT problem, we need to call the IT guy, they provide that. They provide support for the servers. They own the servers. They own the system. Or at least that's what -- that's what their -- their claim is. And so they provide all of those kind of IT functions for us, or had until this past weekend.

Q Does that include email?

A That's right. They -- they --

Q Does that include -- hold on.

A We have a number of --

Q Hold on. Hold on. Does that include Internet -- does that include Internet connectivity?

A It included the Internet connections at work. It included the phones. It included our emails and email servers and the --

Q What about --

A -- domain that, even though they're in our names -- yeah.

Q That's what I was going to ask next. What about domain names? How are those handled?

A They have claimed that those are theirs as well, that the domains we use for our websites and for our emails are theirs.

Q Okay. And what about electronic data, just a wealth of internal books and records, kind of corporate data? Did the Debtor provide --

A Yeah.

Q -- any services with respect to that?

A Yeah. So, they retain all of the data that we use on their networks and servers, and all of that is stored on shared drives and on their system or on the computers that are owned by them. And so even though they're our books and records, I believe you read earlier the provisions of the data provision, and so that is all stored on their systems.

Q Okay. So we just kind of discussed the universe of the IT services that the Debtor provided. Did we miss anything or is that kind of the stuff that really matters?

A I think that -- I think that covers the --

Q Okay.

A -- the main items.
Q How is that being handled by the Advisors today, or how is that -- or has it been transitioned from the Debtor?
A Yeah. So, largely, we are handling it on our own and through a third-party provider. So, we have bought and purchased our own domain names. We've transitioned our emails to those new domain names. We have made copies of our data, or a lot of our data. There's still some stuff we need. But our essential data. And we have transitioned to a new server and systems that are -- that are secured and perform through this third party who does this for a number of asset managers, for endowments. And the way he has set it up is in an SEC-compliant matter. So, dual authentication. All of the things that you would expect from a security standpoint are in place. And we are operating starting on -- we were mirroring for a couple weeks, but on our own beginning on Saturday, when the shared services were terminated, and have been sending those emails from those -- the new systems and servers.
Q So that was going to be my next question. Is it that we just did this (snaps fingers) Saturday like that, or did we actually have a mirroring in place for quite some time?
A Yeah, we have for -- been working on this for multiple weeks with the outside IT service provider, and it's been done in phases. And so we've been -- we had a certain small portion of the people start early, they tested it out, and

then we rolled it out more broadly over the last couple of weeks.

Q Who is that third-party IT provider? What was that --

A Siepe.

Q Is that -- that's not proprietary information, is it?

A It's not.

Q Okay. Who is the third-party provider?

A It's Siepe. And they're a outsource --

Q Well, let me -- let me -- let me --

A -- provider --

Q Let me --

A Yeah.

Q Let me direct you. Will you please spell Siepe? I'm not even sure how to spell it. And then tell the Court what Siepe is and what it does.

A Siepe, it's S-I-E-P-E, and I believe it's Italian for hedge, and they are an outsourced IT and IT development provider. And it was actually started by a former member of -- a former employee of Highland about a decade ago, I believe. He spun out and created his own firm. And they do this for a number of asset managers, including for Highland. So they understand our systems. They understand their systems. They're intimately familiar with what we need. They've been servicing our Advisors for years and have created a lot of the connections that we have with outside service

providers.
Q This ain't their first rodeo?
A No. I would think -- it would be -- have been challenging to do it without Siepe, and -- but they were able to execute very quickly because they knew and were already operating with us for years.
Q So can investors, clients, in these funds today get on the Internet and get whatever information they were able to get a week ago, can they still get that today regarding their investments?
A Yes, they can. And I would add one other thing here, important, is the investors, all of their books and records and the data related to our advi... to our funds, the accounting data and the client data, are held at third parties. So we have a third-party transfer agent that has all of the information on client records. That is -- they don't come to us for their client statements. They go to our transfer agent.

In addition, our accounting functions, those data and files are all on their systems.

And so as far as we're talking about data and what they can come to us, they never come to us for their systems and their data. If they want to know what the value is, they can go to Morningstar.com or Yahoo Finance and see daily the pricing of our funds, which are published daily, even

yesterday, published there for them. But their actual client data is held at third-party administrators.

Q The point being, do you, other than maybe a change in the email address, the point being do you think that investors or clients or customers are even aware of the transition away from the Debtor in the last few days?

A Based on business interaction --

MR. MORRIS: Object to the form of the question.

THE COURT: I'm sorry, was there an objection?

MR. MORRIS: There is an objection. To the extent the question is asking for what other people think or believe or perceive, I think that's improper. No foundation.

THE COURT: All right. I sustain.

BY MR. RUKAVINA:

Q Have you received any complaints from investors or customers or clients in the last few days about their ability to do anything with respect to their investments?

A Not that I'm aware of, no.

Q Okay.

THE COURT: All right. Mr. Rukavina, it's about 1:00. How many more minutes do you have?

MR. RUKAVINA: I don't think I have more than ten minutes, Your Honor. Fifteen minutes, tops.

THE COURT: Okay. Well, we need to take a lunch break, so we're just going to break here. It is 1:00 o'clock.

I'm advised that my 1:30 matter is going to take maybe ten minutes. So we will convene -- let me get a clarification.

If we reconvene at 1:45, Mike, do we need to hang up? Do we need to terminate this and --

THE CLERK: Yes. We need to terminate this because she's already gotten one set up at 1:30, the other one.

THE COURT: Okay.

THE CLERK: So they could probably just call in to that one. We just need to get them the information. Let me see if I can contract Traci, see what the best way. Because, like I said, we've already got one for them.

THE COURT: Okay.

THE CLERK: So this one is going to end.

THE COURT: All right. So just stay, I guess, connected. Is that what you're saying?

THE CLERK: Yes, stay connected.

THE COURT: Yes, stay connected. We'll come back at 1:45. And my staff will let you know if by chance we need to terminate this and reconnect. But I think you can just stay connected. Operate under that assumption for now.

All right. So I will see you at 1:45.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

MR. POMERANTZ: Thank you.

(A luncheon recess ensued from 1:01 p.m. to 2:14 p.m.)

THE COURT: Mr. Rukavina was examining Mr. -- I was about to say Dustin -- Mr. Norris. So, are you ready to proceed, Mr. Rukavina? You said you had a few more minutes.

MR. RUKAVINA: Your Honor? Pardon me. Your Honor, I'm ready. Mr. Norris, can you hear me?

THE WITNESS: Yes, I can. Thank you.

THE COURT: All right. Mr. Norris, I'll remind you you are still under oath from your prior swearing in.

All right. You may proceed.

THE WITNESS: Thank you.

DIRECT EXAMINATION, RESUMED

BY MR. RUKAVINA:

Q Mr. Norris, I think before we broke we rounded off a discussion about the previously backup/now-operational plan for IT and electronic data. I'd like to move on now to office space.

A Okay.

Q What is the current status and plan for the Advisors to have office space, both for their current employees and for the Newco employees?

A Yeah. So, from our perspective, we've been in talks with an organization that's willing to sublease a space that is approximately -- close to our current space. And that is the current plan.

In the interim period, all of our employees are working

remotely, and are doing so without any major issues. They're able to -- in this COVID environment, fortunately, there are systems and processes that have already been built out and we've been able to transition to that without any issues. Major issues. Without any major issues.

Q Is there any temporary office space available this week for, you know, meetings or anything that might have to happen in-person?

A Yeah. So, I'm actually sitting in a temporary office space for a meeting. A company we have a relationship with is allowing -- and -- office space here.

Q Okay. What about hardware, like computers, routers, all of that stuff you testified earlier, most of which was the Debtor's property that I'm taking it we left on the Debtor's premises when we vacated Friday? What's the status of --

MR. MORRIS: Your Honor, objection. Again, I don't know what the testimony is and the references to "we". There's no -- there's no evidence in the record that anything was left behind. There's no evidence of any of this.

MR. RUKAVINA: I'll start again, Your Honor.

THE COURT: All right. Sustained.

BY MR. RUKAVINA:

Q Mr. Norris, you've heard Mr. Dondero testify or Mr. Seery testify that the employees of the Advisors that were onsite at Crescent Court vacated. Did you hear that testimony?

A Yes.
Q Is that accurate testimony?
A That is accurate. We all moved out by the end of day on Friday.
Q That's Friday, the 19th of February?
A Correct.
Q Did any employees, to your knowledge, or did you see anyone take any equipment, machinery, et cetera, that was not property of the Advisors?
A Yeah. So, we were informed that we would have access to the systems, as they testified to earlier, until today. So we held onto those. They never told us they needed our laptops. They never told us to leave our stuff, or their stuff. And so we're prepared to provide those and return those. And we are actually operating now independent of those IT resources, being laptops, et cetera, and screens.

So, there were a number of laptops that were assigned to us that we purchased just in the last few months, about 15 of them. A number of screens as well. We took those, and those continue to be used.

For essential personnel, we had, over the last several weeks, purchased additional laptops. As you know, laptops -- you may know laptops are in short supply, and so we ordered them for the essential people that did not have a computer at home, so that they could be operating. Those were outfitted

and ready, many of them picked up last week, some picked up this morning. And those that didn't have a laptop ready, we ensured that they had home access and are able to log in through the cloud. So, all of our systems are hosted by AWS, which is an Amazon system, set up so that we can remote login through a VPN connection. So, our employees are able to access their email and our systems through there.

Q Okay. To the extent any of the Advisors' employees are in possession of computer equipment that belongs to the Debtor, will that be returned promptly?

A Yes. As they request it, it will be, yes.

Q Okay. Have the Advisors offered to purchase for cash money those used laptops and other equipment?

A We have, yes.

Q Did the Debtor accept?

A It was part of our, as we referred to earlier, a slimmed-down proposal over the weekend, which was very minimal, and it included the laptops. And we offered a sum for that, and the OMS system. The sum we offered was $300,000, and we also offered to take one hundred percent of the OMS invoice going forward, and offered the Debtor to continue using that, as we know they -- we believe they may or may not need use for it. But we offered that over the weekend, and they simply responded with, We don't even know why you need this. And the answer was their offer was still on the table, with no access

to Jim, and the whole agreement.
Q So, the Debtor wouldn't negotiate on an *a la carte* purchase?
A No. We offered, actually, last Thursday as well, once we had received the -- kind of the -- Wednesday or Thursday, I can't remember the exact date, after the court filing had been made, for a small, very slimmed-down, which was primarily the OMS and certain data items, which they came back with some counters which weren't workable. And then again, throughout the weekend, I worked all day Saturday. They said they would be willing to consider a slim-down, but send them an agreement, and -- something that Jim Dondero had explicitly agreed to. And we spent all day, discussed with Jim, and sent them to them Sunday morning, to which they -- they did not agree to.
Q Okay. Did they counter, or did they just say no?
A I think that the -- the counter was the offer from Friday, and I can't remember which one it was. But there was a counter, but it was not what Jim had authorized.
Q Okay. Let's move onto the third-party software that we discussed before, Bloomberg, OMS, or Oracle. What is the current status of that vis-à-vis our transition plan?
A Yeah. So, from a trading perspective, trading has been done outside of OMS in the past, right? And if you look at -- it's not as easy. There's also -- so, we have a manual

process in place that we're able to, and that we've tested, that we're able to perform from a trading perspective, where our traders interface directly with the brokers, where they're able to manually input the trade. They're able to be communicated to our custodians and our accountants, and then that is able to be settled manually.

So, that's not ideal. We would like to have an order management system. That said, I know there's discussions with the Debtor, more employees of DSI, about getting copies of their OMS for the data that is ours within the OMS, or allowing us to get that data in order to actually enter into an agreement separately with Bloomberg, which we've been discussing with Bloomberg. And Bloomberg is willing, with their approval, to get that copy and set it up without any setup fees for us, and we would have a new instance of that OMS.

Separately, there are some other free off-the-shelf OMS solutions that our outside service providers have said they can quickly implement. And so it's just determining based on, really, the events today, and the discussions going on on the OMS, what our path forward is. But we have a plan, which we're executing on, to execute trades.

As the Debtor said, they are still providing access to our -- their systems through the end of the case today. And I think, as Mr. Seery said, there's -- they still see trades

going through the system. That's at their goodwill, and I think that's great.

But the OMS is an area of continued focus. Again, we have a plan to go forward or without it, but ideally we would have a smooth transition there.

Q So, if the OMS purchase -- the OMS system can't be purchased from the Debtor, you mentioned a potential agreement with Bloomberg where a new OMS system would be purchased or built? Or explain more what you mean by that.

A Yeah. So, Bloomberg has -- and this is their software, the order management system through Bloomberg -- but it has been highly customized over many years and has our historical data in there, our rules, our Advisors' rules set up that we use for trading. And so it would take several months for us to go in and code exactly how we would like it. However, my understanding is there's a backup where Bloomberg, with the authorization from the Debtor, could transfer the underlying data and setup.

Or alternatively, like I said, we offered over the weekend to pay them a monetary sum to take over the Bloomberg contract, and not just the OMS, but others that I think it was approximately $450,000 a year in ongoing costs we would take one hundred percent of and still provide them access.

Q Access for a fee or access for free?

A Free. Free of charge.

Q Okay. So just so that the judge knows, are we able to execute trades today?
A Yes.
Q Will we be able to execute trades tomorrow?
A Yes.
Q Will we be able to execute trades into the future until we either purchase or develop an OMS electronic system?
A Yes.
Q And in the meantime, it's being done manually, I think you said?
A Yep, manually.
Q And do you have confidence that the manual system is going to be safe and accurate?
A I do. There's -- there is multiple people involved. They've actually run tests -- not test trades, but actual trades, over the last couple of weeks through this system. And our trader has been trading for over two decades, and this is a system he used years ago before we put in place the OMS. There is some --
Q Stop, stop, stop, stop, stop. What system did he use years ago? I want you to be specific.
A This manual system --
Q Okay.
A -- that we're using today. We call it manual. It's a direct with -- with a process that we used previously.

Q Okay. Thank you. I just wanted that clarification.

Do we have -- the Advisors, that is -- do the Advisors have insurance in place for whatever it's called in your business, but for basically messing up a trade? Whether it's professional negligence or O&E or whatever it is. E&O.

A Yes. Our funds have insurance that is through ICI, which is a -- they do this specifically for investment companies. So, we have a -- I think it's an errors and omissions insurance that covers, for example, if there was a NAV error. A NAV error is if a fund made a mistake. In addition, we have NAV error correction policies, where, if it's the Advisors' fault, then the Advisor would have to kick in. But the Advisor has insurance as well, as well, to cover things of that nature.

Q What's the policy limit?

A I believe it's $5 million. I'm not certain, but I believe it's $5 million.

Q Okay. So, over the course of the last several questions, I've gone through kind of various processes and services that the Debtor used to provide. Have I missed anything big-ticket that you feel is of importance?

A As far as essential items, no. There are some smaller items like HR, which is recruiting and hiring, those types of smaller things. Cash management, communicating with custodians, where those are smaller, minor items, but aren't

-- we're able to cover internally but you didn't mention in particular. But those are -- those are the big items.

Q And do you have confidence or a lack of confidence that your backup plan, now the operating plan, is going to succeed?

A I do. It's not the path that we all wanted to go down, right, as we wanted to have a transition. We wanted to have all these systems and software, as evidenced by trying again to have the Bloomberg OMS through the weekend. It's not going to be perfect, but I feel like we have everything in place to do the job that we're required to do.

And we've tried to put in place, you know, controls to mitigate risks wherever possible, and so I feel confident in the plan. I've spent weeks and weeks losing sleep, coordinating, you know, stressing over these items as a backup plan, in addition to trying to negotiate an agreement. I've had a team of senior people across our firm who are from each area of our firm. I have spoken with Debtor employees to consider what additional risks do we need to consider. And so I think it's been very well-thought-out. And I mentioned the last several weeks, that was when, again, when it became an earnest necessity to ensure we had something.

Prior to that, you know, in December and November, we received a list of all agreements. We reviewed a list of all of our agreements, all the Debtor's agreements. And so we were thoughtful already then what we needed. And so as we had

to then execute quickly, we knew exactly what was necessary and what the Debtor was providing us. And so, as well, with this transition agreement, there's about a hundred or so services in there, and discussing what were essential and what were not, what we could enter into by ourselves and what we couldn't. And almost every one of them we could have entered into ourselves. We would have loved to -- and I think we would have had a cost savings, and it would have been a benefit to them -- to reach this broad agreement, but for the one remaining issue that neither Jim would approve.

So, we tried. We went through the, as I said earlier, a thousand line items. We negotiated, I believe, in good faith all along the way. Whenever -- an ultimatum was given to us on Tuesday. I continued pushing all the way through Friday, all the way through the weekend, and this is what I wanted. But along the way, we were preparing in every way for the backup, because I have '40 Act registered mutual funds, I have a board who's demanded it, and we were trying in every way to be able to continue these services in the event that HCMLP would no longer provide them.

Q I think we've established that the Debtor will be terminating the employees, some employees as of February the 28th. Do you expect to hire those employees through Newco come March 1?

A Yeah. So, to make an adjustment there, there are about

eight to ten employees that are investment professionals that we would need to hire directly at our Advisor. Earlier on in the process, there was a question of whether we hire all employees directly, whether Newco hires them, whether Newco is owned by Jim or whether it's an independent business. The current plan, which has been the last couple of months, is that Newco would be independent, they'd be run by an independent management team. We would -- we would be -- provide -- providing them or entering into a shared services agreement.

And so our full understanding and expectation is that those employees for Newco will be hired or anticipated to be hired after they're terminated on the 28th. All of that, I know, is in negotiations, but I believe that is what the Debtor is willing to do, and that those eight or ten employees will be hired by us once they're terminated.

Q So, approximately how many employees, through Newco or directly, do you expect to hire on or about March 1?

A I think there's approximately fifty or so. I know that the Debtor is considering adding, I believe, somewhere around five to ten employees, or taking those. I think we have -- we have not heard or been told. We've been asked -- we've asked several times. They haven't told us who those employees are. But I think we have a pretty good idea.

But at this point, we think that the majority of the

people providing services to us in the back office and middle office, again, because they'll want -- I believe they'll want or are going to be handful of front-office people that help with private equity and winding down those assets. But the bulk, if not all, of the back-office personnel will transfer over to Newco, with a handful of the investment professionals to us.

Q Do you have any concern or is there anything outstanding that would give you concern that that will not happen on or about March 1?

A I sure hope it does, but one thing that may cause me -- maybe the only thing that may cause me concern is they have twice moved back or maybe three times moved back the termination dates. Now clearly know that our plan is to involve Newco and all those employees to continue providing services.

In the event that happens, we're prepared to continue. The items that we're covering in the interim period are the essential items. There's a number of services that -- that Newco would provide that are not essential for the operations of our funds. They include things like tax services for our advisor or the books and records of our advisor, like the HR recruiting services. You know, those could wait, or we could contract them elsewhere.

And so -- but I do hope -- and our -- we don't anticipate

any disruption here. I know that they've said that Newco can hire whoever they want. I think that that's going to be smooth and orderly.

Q Well, so let me ask, let me ask -- I'm down to two or three more questions, but let me ask a worst-case scenario question. Come tomorrow or come Friday, you realize that you can't do OMS manually; for some reason, the Debtor doesn't release its employees; all of your planning turns out to have been inadequate, and essential functions are not able to get done: Are there third-party providers that could immediately step in and provide basically every service that the Debtor is currently providing to the Advisors in such an event?

A There are. I think the trading -- I think we have a good plan. But to your point, your promise, if we couldn't pull it off or there were issues, you can outsource trading. You can outsource that. It's not a turn-on-the-switch, but we do have and have had discussions with service providers there.

In the end, if Newco didn't work out, there are other service providers, which I know that people in our team and the Debtor have talked to, to provide outsourced accounting oversight. There are -- there's multiple options. We just have not --

Q So is it fair to say, is it fair to say that you have currently a Plan B to your Plan B?

A Yeah, well, there is, yes, but I feel very good about our

current Plan B that we've implemented, to the extent I don't think we're going to need that. But if there is a lack of cooperation for some reason, we do have other options to outsource those services.

Q Okay. My final question --

A Again, I don't anticipate -- I don't -- I don't -- I don't think that's going to be the case, but --

Q My final question, Mr. Norris. This backup plan and now the operational plan that you have, was it in any way motivated, sped up, anything by the filing of this lawsuit?

A No. I think one thing the finalization -- the filing of the lawsuit did was make us realize that the backup plan we had been working on was absolutely needed. I felt very good about where we were at that point, and we were prepared to move forward.

It did change that I, over the next six days, me and several other of the critical employees that have been working on the backup plan would be involved in preparing for this exact situation. Instead of continuing those discussions, I'd rather be boots on the ground, dealing with my employees, the senior management team and everyone else. Luckily, you know, after my deposition, before my deposition yesterday, I was involved in how is everything going. We had checkpoints and touchpoints. We had calls in the afternoon.

Fortunately, there were no significant issues, but there

were a lot of minor issues. There were things that needed to be approved or people had questions. But that, I think, is the only thing that changed here. It's -- we had to -- now we knew that, okay, they're going to pull the plug because of this.

At that point, I was not expecting that really to happen at that point, that that would be the issue.

Q Well, Mr. Norris, --

A But luckily, we had planned for it.

Q Mr. Norris, if an allegation is made that it was the filing of this lawsuit that somehow spurred us into taking our responsibilities seriously, would you agree with any such allegation?

A No. I would disagree.

Q Thank you.

MR. RUKAVINA: I'll pass the witness.

THE COURT: All right. Mr. Morris?

THE WITNESS: I can't hear you. I think you might be on mute, Mr. Morris.

(Pause.)

CROSS-EXAMINATION

BY MR. MORRIS:

Q Got it. Can you hear me now?

A I can, yes.

Q Okay. Super. I have a few questions, sir.

A Yes.
Q You spent a fair amount of time testifying about how poorly the Debtor was performing under the shared services agreements last October and November. Do you remember that?
A I remember I testified. I wouldn't say it was some time, but yes.
Q You specifically mentioned the October and the November time frame, right?
A Correct. I believe so.
Q And you said that during that October and November time frame, there were lots of conflicts of interest that were arising; is that right?
A I don't remember my specific wording, but if it's part of the record, then yes.
Q Uh-huh. And you said that the Advisors weren't getting the same level of services that they thought they were entitled to; isn't that right?
A That's correct.
Q And you thought -- and the Advisors thought long and hard about terminating, about taking the initiative and terminating the shared services agreement, right?
A I don't know if I used the word "long and hard", but yes, we did consider and discuss the termination of the shared services agreements.
Q And the reason that you decided in October and November

not to do that is because you knew there was an order in place that prevented a Dondero-related entity from terminating an agreement. Isn't that right?

A That's -- that's one of the reasons, yes.

Q That's the only reason you identified before; isn't that right?

A I believe so.

Q And that --

A That was a determining -- that was a make-or-break point, yes.

Q And it was a -- and that was false testimony; isn't that right?

A No.

Q Well, just a month later, in December, the Advisors sent a letter to the Debtor threatening to terminate the CLO management agreement; isn't that right?

MR. RUKAVINA: Your Honor, I'll object to that, it's not in the evidence, and I'll object on the basis of the best evidence rule.

THE COURT: Response?

MR. MORRIS: You can answer, sir.

THE COURT: Response?

MR. RUKAVINA: Your Honor, I didn't hear a response.

MR. MORRIS: The witness is the executive vice president of the Advisors. The Advisors were the subject of a

preliminary injunction proceeding. During that proceeding, against these very same Defendants, this letter was admitted into evidence where they -- where the Advisors did exactly what Mr. Norris said they would never do because they didn't think they had the authority to do that. Mr. Norris is the best evidence right now, Your Honor.

THE COURT: Okay. I overrule the objection.

MR. MORRIS: Your Honor, that's not --

THE COURT: I overrule the objection. I remember the evidence from the December hearing. So he can answer.

THE WITNESS: Yeah, so can you repeat the question, just so I make sure I answer appropriately?

BY MR. MORRIS:

Q Sure. In December, the funds and the Advisors for which you serve as the executive vice president, on, I think, December 23rd, sent a letter to the Debtor threatening to terminate, right? Threatening to use what authority they thought they had to go in and terminate the CLO management agreements. Isn't that right?

A I was not involved in the drafting of the letter, but my understanding is there was no threat. It was -- and I believe the letter even said, subject to court approval or stay or process. I would love for -- if there is a letter, if you want to bring it up, but I wasn't directly involved with the letter.

Q And the Advisors didn't send a letter to the Debtor in October or November saying, We want to terminate the agreement subject to whatever you just said. In fact, you concluded that you couldn't do it because of the injunction, right?
A Correct.
Q Yeah. You've spent an awful lot of time talking about this operational plan that the Advisors have today. It was a much more modest plan during your deposition yesterday; isn't that right?
A I wouldn't --
MR. RUKAVINA: Your Honor, I'll object --
THE COURT: I'm sorry?
MR. RUKAVINA: I object to that characterization.
THE COURT: You object to --
MR. RUKAVINA: Your Honor, I'll --
THE COURT: -- the charac...
MR. RUKAVINA: I'll withdraw that. I'll withdraw that objection, Your Honor.
THE COURT: All right. Go ahead.
THE WITNESS: No, I answered the questions in the manner that you asked them in the deposition. I don't think that you asked for detailed descriptions. In fact, I know you didn't. And so there was a lot more than what I discussed in my deposition yesterday.
BY MR. MORRIS:

Q Okay.
A Nothing -- there's nothing that -- nothing that conflicts with what I said yesterday.
Q James Palmer was hired to provide accounting and audit services yesterday on a contract basis, correct?
A He was hired yesterday, yes. And that was, yes, part of the additional oversight for our accounting function. We're handling a lot of that internally, but Mr. Palmer was experienced with our platform and with our funds, and we thought it was prudent, in the -- if needed, to have somebody on call. And our board actually requested it. And so that's a -- you know, that is someone who we feel very comfortable with providing those services.

MR. MORRIS: I move to strike everything after "Yes," Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:
Q Okay. I'm going to ask you, sir. This is cross-examination. I'm going to ask you leading questions that are intended to elicit a yes or no answer.
A Got it.
Q Your counsel will have the opportunity to redirect if he think it's necessary.

So, let me ask the question again. Mr. Palmer was hired by the Advisors to provide audit and accounting services

yesterday. Isn't that correct?
A No.
Q Yesterday was his first day on the job. Isn't that right?
A He is a contract employee. So we didn't hire him.
Q Okay. You did testify yesterday that yesterday was the first day he was providing services that had been provided by the Debtor. Is that fair?
A Yes.
Q Okay. And Siepe is another entity that the Debtor had a -- that the Advisors had a prior relationship, right?
A Correct.
Q And you don't have an agreement with Newco today, do you?
A Not yet.
Q So, Newco is not providing any services today, right?
A No.
Q And you don't have office space today, right?
A Not yet.
Q Okay. So, when the sun rose on Saturday morning, to use the same analogy, I guess, you'd been kicked out of the house and you had no place to go. Is that fair?
A No.
Q Everybody's working remotely right now, right?
A Yes.
Q And the Advisors have no lease for any office space on a long-term basis, right?

A No, but we've toured space and have a -- we are ready to sign a sublease as soon as we're ready.
Q Okay. But you didn't have that as of Friday; is that fair?
A No.
Q Okay. And you -- and you're doing trading now on --
A Actually, can I make a -- can I make a correction? I -- you said you didn't have that. I said we had done a tour, and I had done a tour before Friday, and that we had a lot lined up, and I had them asking us, Are you ready to execute, will you be here Monday?
So, that was there. Again, realizing we were going to be, hopefully, the plan was to reach a full agreement with you, but having that backup plan in place, not to sign a lease and spend the money unless we knew we weren't going to be able to be in the office space. So that's why.
Q All right. So let me ask the question again. As of Friday, the Advisors had no place to go at the end of the extended shared services period, correct?
A I disagree with that.
Q Okay. They don't have an -- does the Advisors have an address today?
A We have an address, yes.
Q Yeah? Where is the address?
A So, we -- we have been -- we have a -- so we have a -- our

NexPoint Securities has an office on McKinney Avenue in Dallas, which is where we -- we have an ability to send our mail to and to have an office, which is where we intend to actually be subleasing.

Q Okay. But you don't have a sublease today, and that address isn't the address of the Advisors, right?

A It is all but in place, waiting to not spend the significant expenditure in the event that we could, which our plan was to hope to reach an agreement.

Q Okay. And you're doing trades manually? Do I have that right?

A It is -- we call it a manual process, but it involves like -- there's a certain -- it doesn't involve the OMS system. That's right.

Q And when your operational plan is fully in place, would you expect it to have an OMS system?

A Yes.

Q But your operational plan today doesn't have one of the pieces that you expect it to have in the future; is that right?

A It has -- it has a usable option, but no. We're close to entering into an OMS, and that's not the long term. Yeah. We aren't going to be doing a manual -- our manual process forever.

Q Yeah. But you're very, very, very happy with your

operational plan, right? You're very proud of it?
A Given the constraints we were working under, I feel it's -- it is a plan that works. Would I think that the alternative with what we were negotiating would be better? Probably. Would it be better to have access to our systems, to our computers, without having to turn them back into you? Yes, absolutely.
So I don't remember the word you just used, but I think very happy or very pleased, I wouldn't say that. I would say it is functional, it helps us do our duty and our job, and we're going to get back to that ideal. And the reason I negotiated all the way through the week and all the way through the weeks and all the way through the weekend is because there was a better alternative, which was a negotiated settlement.
Q All right. We'll talk about that in a moment. But notwithstanding the fact that there may have been a better alternative, as of today the Advisors have adopted and implemented an operating plan for the provision of all of the same back-office and middle-office services that the Debtor previously provided, correct?
A To cover -- and I would say they do, yes.
Q Okay.
A Yes.
Q And as of today, the Advisors are fully able to perform

under their shared -- under their advisory agreements with the funds; is that correct?
A Yes.
Q There is nothing the Debtor has done that has prevented the Advisors from fully performing under their advisory committee -- advisory agreements with the funds, correct?
A It took great effort over the last several months, but no, not that I'm aware of.
Q Okay. Other than access to the data, there are no services that the Advisors need from the Debtor. Is that correct?
A No, but the peaceful transition of the data is important, right? We have, as you mentioned, we have most of the data we need, but the peaceful transition of the data and the files in the systems -- not the systems, but the data backups of the systems -- will be critical, yes.
Q Okay. But other than data, there are no services that the Debtor needs to provide to the Advisors as of today, correct?
A Not that I know of.
Q And having been as involved in the process as you've been, you would know if there was a service that the Debtor had to provide to the Advisors today; isn't that right?
A Yes.
Q Okay. And you don't know of any service that the Debtor needs to provide to the Advisors as of today, right?

A I don't. We mentioned data. I think one of those -- well, I'll leave it as yes.
Q Okay.
A Yeah.
Q Did you have this plan in place, this operational plan, was that -- were all of the pieces in place last Tuesday night? No. Withdrawn.
Were all of those pieces in place as of January 31st, 2021?
A No.
Q So is it fair to say that the Debtor didn't -- that the Advisors did not have an operational plan that would permit them to obtain all of the same services that the Debtor had been providing under the shared services agreement as of October -- as of January 31st?
A No.
Q They did have a plan in place at that time to get those services? Is that what you're saying?
A Yes. There was a plan, a Plan B. It wasn't nearly what Plan B is today because we've -- we've had multiple additional weeks to ensure that everything's in place, but we had Plan B. But at the time -- maybe I'll leave it there. But at the time, there was good faith negotiations up to that point, where Plan A looked like it was going to happen. And so that was the full expectation with a backup plan which was not as

intricate.
Q Did the Advisors ever inform the Debtor at any time during the negotiations that they had an operational plan pursuant to which it could obtain the same middle- and back-office services that the Debtor had been providing?
A If you include your Debtor employees, then yes.
Q Did you ever use it as a point of negotiation? Did you ever try to tell the Debtor, you know, if you guys don't agree to our terms, we're going to walk away, because we've got this fully-operational plan to get the same services that you guys are providing? You're not the only game in town?
A I never used that kind of exact approach, no.
Q Did you use any approach where you relied on the operational plan as leverage to try to drive a better deal with the Debtor?
A No. I don't think so.
Q No? Okay. And fast-forward to that Tuesday night when the Debtor said take the plan without Mr. Dondero or we're going to sue you. You remember that, right?
A Yes.
Q And every aspect of the agreement was in place except for Mr. Dondero, right?
A Except for his access to the office, --
Q And the --
A -- yes.

Q And the Debtor had told you time and time again, every time it appeared in a document, they removed it, and they told you every single time no access for Mr. Dondero, right?
A No.
Q Did you have any reason to believe that that was ever going to change?
A I did. And I said no to your last question, right? I didn't say yes. I said no to your last question, that --
Q And did the Advisors make a decision to reject the Debtor's offer for the sole reason that Mr. Dondero wouldn't be permitted access?
A That was the last point. As mentioned, every other point was agreed to.
Q And why didn't the -- why didn't the Advisors -- did the Advisors -- withdrawn.

Did the Advisors say to the Debtor, we get it, you're not going to let Mr. Dondero in, but that's a line in the sand for us? But please, there's no need for a lawsuit. We've got a wonderful operating plan ready to go. You're asking the Court to force us to adopt and implement the plan, we have one right here, so let's not litigate. Let's just walk away and let bygones be bygones. Did you ever offer to get rid of the lawsuit by showing the Debtor your plan?
A We would have loved to have gotten rid of the lawsuit, but I didn't see it until it was filed. When the ultimatum was

given, we had rolling blackouts. My home didn't have electricity rolling from 2:00 a.m. on Monday until Thursday. And so by the time there was -- and everybody else, inclusive of our attorney, Mr. Rukavina. And so to say that I -- I received it Thursday or Wednesday morning, when one of your employees forwarded it to us. I hadn't seen drafts. Maybe our counsel had. But we didn't even have a chance to say, oh, let us -- let us pull this because we read what your report was. The Advisors didn't even have a chance to respond. At least that is my understanding. I never had a chance to respond. I never saw it. Maybe counsel did.

Q Well, you saw the lawsuit eventually, didn't you?

A I did.

Q Did you ever -- did the Advisors -- after you saw the lawsuit, did the Advisors ever call up the Debtor and say, hey, look, let's not litigate? We have exactly what you want. We've got this fully-operational plan that provides us with everything we need. You don't need to do anything further. Did you ever say that to the Debtor?

A No, because the back -- the -- we still wanted to reach an agreement. That was the goal. And it was a surprise for us to have a shock, we're going to pull this or we're going to sue you on Tuesday evening. And so, no, we still -- I -- and that's why I negotiated and continued to work all the way through the end of the week and through the weekend on

something, because I still felt like that was the better plan for everybody.

I don't know why we had to be sued, I don't know why it had to be urgent, because at that point we had been working for weeks and months. And the weeks -- really good. And the only difference was Jim Dondero's access. And it was Tuesday. And they didn't even ask us, you know.

Anyway, so that was -- I just -- I just disagree with your characterization of the process.

MR. MORRIS: I move to strike, Your Honor. It really is a very simple question.

THE COURT: Sustained.

BY MR. MORRIS:

Q Did the Advisors, after the commencement of the lawsuit, did the Advisors ever tell the Debtor that there was no need for litigation because the Advisors had a fully-operational plan that they had adopted and were prepared to implement, which is exactly what the Debtor was seeking from the Court?

A I don't know.

Q You're not aware of that, right?

A I'm not.

Q You don't -- you never thought that maybe we could avoid this whole thing by just sharing with the Debtor this operational plan that you've described in great detail, right?

A Well, on Friday, I know you put in, in a response to our

board and Advisors, that you were made aware that we had a plan that felt good, yet there was no consideration or discussion on removing the lawsuit.

So, I'll leave that to what counsel happened, but I would have loved to not be involved. I'm not a legal expert. There were many attorneys involved. I wish that if that were an option, it would have been raised. But here we are today.

Q Sir, not only did the Advisors not tell the Debtor that they had an operational plan that could avoid the lawsuit, instead, the Advisors made proposals on Friday, one of which did not even include having access to the office by Mr. Dondero. Isn't that right?

MR. RUKAVINA: Your Honor, I object to that question as it mischaracterizes the evidence. The question began with that the Advisors never told the Debtor that they had a backup plan. I think the witness --

MR. MORRIS: Your Honor, --

THE COURT: Okay. Sustained. Rephrase.

MR. MORRIS: Yeah. No problem.

BY MR. MORRIS:

Q So, so to the best of your knowledge, the Advisors never told the Debtor that they thought litigation could be avoided because they had an operational plan. Is that right?

A That's my -- that -- yeah, that's right.

Q Okay. And instead, on Friday, the Advisors continued to

try to pursue an agreement with the Debtor. Is that right?
A I don't know about the "instead." But, yes, we tried to continue reaching an agreement.
Q And are you familiar with the offer that was made by the Advisors to the Debtor on Friday morning?
A I am.
Q Did you authorize the sending of that offer to the Debtor?
A The request, yes. Me and D.C. Sauter were involved with counsel, so we -- we did -- we did.
MR. MORRIS: All right. Can we please put up on the screen Exhibit 19? Can we start at the bottom, please?
BY MR. MORRIS:
Q So, are these the Options A and B that were presented to the Debtor on Friday morning?
A Based on the email, yes.
Q Okay. And Option B contemplated that the Advisors would completely vacate the space by the end of the month, right?
A Correct.
Q And that's an option that you and Mr. Sauter authorized the lawyers to send to the Debtor, correct?
A Yes.
Q Okay. And you had that authority from Mr. Dondero, right? Mr. Dondero gave you the authority to negotiate; is that correct?
A He gave me the authority to negotiate in those final

couple of days. There were certain things he gave me authority to negotiate on. And specifically -- and to things that shouldn't be included on this point, we discussed this beforehand as well. But we had authority to negotiate.

Q And you had authority to make this proposal, right? Option B?

A Ultimately, no.

Q At the time you made it, you thought you had it, right?

A Yes.

Q You weren't acting outside of what you knew to be your scope of authority, were you?

A No.

Q Okay. Did you discuss with Mr. Sauter these two options before they were delivered by your lawyers to the Debtor?

A Yes.

MR. RUKAVINA: Your Honor? Your Honor? Hold on.

Your Honor, Mr. Sauter is an attorney. He's in-house counsel. So I think that to the extent that they're discussing business, that's not privileged. To the extent they're discussing legal strategy, that is privileged. So I would instruct the witness to be conscious of that --

THE COURT: All right.

MR. RUKAVINA: -- and to not disclose attorney-client privileged communications.

THE COURT: All right.

BY MR. MORRIS:

Q Sir, did you discuss these two proposals with Mr. Sauter before it was delivered by your lawyers to the Debtor?

A Yes.

Q And did Mr. Sauter also agree with the substance of these two offers that were being presented to the Debtor?

MR. RUKAVINA: Mr. Norris, can you answer that question without invading the attorney-client privilege?

MR. MORRIS: I'm just asking about the offers. I'm not asking about any legal advice or anything. I just want to be that clear.

MR. RUKAVINA: That's why I'm asking Mr. Norris. If they discussed business, I don't think we have a problem. But if they discussed legal strategy, I think it's a problem. So I think the witness just has to tell us whether --

THE WITNESS: There --

MR. RUKAVINA: -- they discussed business or legal.

THE WITNESS: There -- there was a -- there was some legal -- legal strategy as well, yeah.

MR. RUKAVINA: Your Honor, I would -- I would ask that that -- I would object to that question on that basis, that it calls for the invasion of the attorney-client privilege.

THE COURT: All right. I sustain.

MR. MORRIS: I'll try -- I'll try and ask the

question again, then.
BY MR. MORRIS:
Q Mr. Norris, did Mr. Sauter agree and authorize the sending of these two proposals by the Advisors' lawyers to the Debtor on Friday morning?
A We both agreed with that approach.
Q Okay. And you both -- is it fair to say that you both believed that you were acting within the scope of authority that Mr. Dondero had given you?
A We thought so, and -- well, I'm sure your questions will lead me to the -- to the ultimate of what happened here, but yes.
Q Yeah. And this proposal didn't permit Mr. Dondero back into the Highland office space; is that right?
A It didn't prevent him? Is that what you said?
Q Didn't permit him. Didn't allow him.
A Option A just above did and Option B did not.
Q Okay. So, you and Mr. Sauter, as the Advisors' designated negotiators, authorized the Advisors' lawyer to present as Option B an option that did not permit Mr. Dondero access to the Debtor's offices, right?
A Yes, but gave us full access to everything else.
Q Okay. It was really --
(Pause.)
THE COURT: Uh-oh.

BY MR. MORRIS:
Q How does Option B -- how does Option B, if you know, --
A Sorry, you froze. You froze there for a minute, I think.
THE COURT: Yes. I think you did.
MR. MORRIS: No, I think I just paused.
THE WITNESS: Oh, you were just thinking? Oh, that was really talented. Wow.
BY MR. MORRIS:
Q No, it's -- it's not that good. Do you know how Option B differs from the term sheet that the Debtor provided on Tuesday night?
A It would not include the access -- it wouldn't include access to the office for anybody. The, as it says there, the Debtor would take a hundred percent of the lease.
Q Okay. So, it was going to be complete walkaway? The Advisors were going to completely walk away at the end of the month, right?
A Correct.
Q And that was -- that was an offer that you believed you were authorized to make to the Debtor, right?
A Yes.
Q Okay.
MR. MORRIS: Can we go two emails up to Mr. Hogewood's? Oh. Yeah. The one at 12:04. Yeah.
BY MR. MORRIS:

Q Were you aware that there came a time early in the afternoon that the Debtor was informed that there may need to be an edit to Option B, so they pulled that back for a bit?
A I wasn't aware, no.
Q No? All right. Do you have any knowledge as to what edit Mr. Hogewood was referring to in his email there?
A I don't.
Q Okay. Were you aware -- did you get a copy of Mr. Hogewood's email? Was it forwarded to you? Do you know -- withdrawn. Let me ask a better question.

Do you know if Mr. Hogewood delivered -- withdrawn.

Did you know on Friday morning that Mr. Hogewood had delivered the two options, the two proposals, that you and Mr. Sauter had authorized?
A Yes.
Q Okay.

MR. MORRIS: Can we go up an email or two, please?

BY MR. MORRIS:
Q And then Mr. Hogewood wrote back and he said that he was authorized to put Option B back on the table, as stated above. Do you see that?
A I do.
Q Do you know who authorized Mr. Hogewood to put Option B back on the table?
A I don't remember. I don't know. I wasn't on the chain.

Q Okay. But it's fair to say at this point in time, midday on Friday, as far as you knew, your lawyer had communicated Option A and Option B to the Debtor, and they were authorized to do that, right?
A Yes.
Q Okay. And did you learn subsequently that there was a phone call between the lawyers for the Advisors and the lawyer for the Debtor during which the Debtor indicated that it was prepared to accept Option B?
A I don't know, no, I don't know about that.
Q You were never told that?
A No. Not that there was a phone call.
Q Uh-huh. Did you learn at any point on Friday that the Debtor had accepted Option B, the Option B that you and Mr. Sauter had authorized the Advisors' lawyers to make?
A Yes.
Q Okay. So, there did come a time when you knew that the Debtor had accepted Option B, right?
A Yes.
Q And are you aware that, after accepting Option B, the lawyers discussed turning the agreement into a settlement order to resolve the litigation?
A No. I wasn't aware of that.
Q Are you aware that the lawyers were discussing plans for the transfer of -- by wire of cash that would be due under the

agreement?
A I was not.
Q Okay. After the Debtor accepted Option B, the Advisors withdrew it, correct?
A I don't know if we with... we did withdraw it, yes.
Q And after it was presented, Mr. Dondero said that he hadn't personally approved it, correct?
A In the terms of which -- the actual offer, yes, that's correct.
Q So, Mr. Dondero, having given you and Mr. Sauter the authority to negotiate, learned that the Debtor had agreed to your proposal pursuant to which he wouldn't be allowed access to office space and he made the decision to withdraw the offer, correct?
A I wouldn't agree with exactly the phrasing, no.
Q Sir, Mr. Dondero is the person who decided that he had not approved of Option B, and that's why it was retracted, correct?
A That's right.
Q So, on Tuesday night, the Advisors had a fully-negotiated agreement for the provision -- for the transition of all of the back-office and middle-office services, but for access to Mr. Dondero, correct?
A Correct.
Q And the only reason that didn't get signed is because of

that issue, right?
A That's my understanding, yes.
Q And the Debtor continued to negotiate with the Advisors, even after filing the lawsuit, correct?
A Yes.
Q The Debtor was never told that the Advisors had a fully-operational plan pursuant to which it had an alternative to obtain the same services, correct?
A That's incorrect.
Q After negotiations broke down, is that the moment that a reference was made to alternative plans?
A No.
Q Sir, on Friday, you personally reached an agreement with the Debtor on Plan B, right? You authorized the making of an offer that the Debtor accepted, correct?
MR. RUKAVINA: Your Honor, I'm going to object at this time based on a legal conclusion. The witness is not a lawyer and he's not qualified to opine on whether an agreement, which to me suggests is something binding and enforceable, was ever reached.
THE COURT: Response?
MR. MORRIS: Your Honor, I'm not looking to enforce any agreement, so let me try and restate and --
THE COURT: All right. Sustained.
MR. MORRIS: -- address Mr. Rukavina's --

THE COURT: He'll rephrase.

MR. MORRIS: Yeah.

BY MR. MORRIS:

Q Even as late as Friday, after starting the lawsuit, you had made an offer. You had authorized the making of an offer that the Debtor had agreed to again, correct?

A I had auth... I had said we should -- yes, I had authorized the offer and then your fax saying on the acceptance. I wasn't involved in the back-and-forth communication among the attorneys.

Q But you knew it was accepted, subject, let's say, subject to the execution of definitive documentation. How's that?

A I was told that they were willing to take the offer. And so, yes. And --

Q And sometime later that day, it got pulled because of Mr. Dondero, correct?

A Correct.

Q And even on Saturday, the Advisors made proposals on an *a la carte* basis for the provision of services, correct?

A Yes. And we have made very similar *a la carte* provisions on Thursday and Wednesday, which were also rejected by the Debtor.

Q And -- okay. So it wouldn't have been the full kind of deal that was contemplated in the term sheet; it would have been a selection of very specific services. Do I have that

right?
A That's right. On Wednesday, it was Oracle and Bloomberg, which was authorized by Mr. Dondero. We were to offering to continue with our offer to take over the lease and all the other terms, or a slim-down, which would include no disputed amounts or payments, which at that time I think we called Plan B or Option B. And that was -- I believe that was Thursday. Or Wednesday night. So, yes, those continued. And then we had a similar, very similar proposal again on Sunday, with the same -- very similar services to what we asked for on Wednesday night or Thursday. And those were rejected both times.
Q And is it fair to say that the services that the Debtor was seeking -- withdrawn.
Is it fair to say that the services of the Advisors were seeking from the Debtor on Thursday, Friday, and Saturday were services that the Advisors had not yet engaged anybody else to provide?
A The two -- we already talked about Bloomberg and where our status is there. And on Oracle, it would be a nice to have instead of transitioning, and that is more for the Advisors' books and records and would be nice to have.
Q So, --
A Yes.
Q Okay. You have a Plan B for the new operational plan.

Did I hear that part right?
A As I mentioned -- oh, I said our operating plan was a hypothetical from -- from Mr. Rukavina, that in these other events fall through, are there other people that you could hire to do these services? And I said yes.
Q Okay. So if any part of the operational plan fails, the Advisors would look to third parties to provide, you know, whatever service they wouldn't obtain and they wouldn't look to the Debtor to provide any services, correct?
A That's correct.
Q Is it fair to say that, other than access to the data, the Advisors will never seek any services of any kind from the Debtor going forward?
A As we sit here today, I believe your employees are set to have three more operating business days and then will be terminated, those -- the employees that services our accounts. So, with the expectation that Newco will be formed, I have no expectation we'll be asking for any significant services, other than data, transfer of emails, et cetera.
Q Well, that's a pretty qualified answer. What do you mean by no significant services?
A Most of them -- well, the data, emails, et cetera, are all minor items, and I think they're -- you say data, but I think there's -- there's a handful of things that probably fall under that data and books and records that are what I'm

talking about, yes.
Q You know, one of the things that the Debtor is very concerned about here is having no future obligation. The Debtor -- do you understand that the Debtor believes that it has terminated the shared services agreements as of Friday?
A I do, yes.
Q Do you understand that, other than the data that it holds, the Debtor wants the comfort of knowing that it has no future obligations to the Advisors of any kind, other than to provide access to the data?
A Yeah, that's fair. Yes, I understand that.
Q As the executive vice president of the Defendants, as the executive vice president of the Advisors, can you, under oath, give the Debtor comfort that the Advisors will not look to the Debtor for any services of any kind after today? Other than the access to the data?
A Data and books and records, yes.
Q Okay. So access to data and books and records is the only thing that the Advisors will look to the Debtor for at any time in the future after today; is that fair?
A I would say it's not fair, because to say there's not other significant -- insignificant or minor items -- as Mr. Dondero testified, there's usually a smooth transition. I don't anticipate there will be significant items that would take a lot of your time or we need to invade you, but I would

hope there would be a fair and orderly transition. And I can't predict the minor items, but I don't think -- I can't envision anything significant.

Q Do you believe, as the executive vice president of the Advisors, that the Debtor has an obligation to perform any services for the Advisors after today, other than giving access to the data and the books and records?

A No.

Q What happens if Newco isn't formed? Is there any scenario that you're aware of where the Advisors would look to the Debtor for any services in the event that Newco is not formed?

A No. Not that I'm aware of. I don't know. I don't think so.

Q I think you mentioned earlier about the transfer of data. What does the Debtor need to do, from your perspective, in order to transfer the data and the books and records?

A We need the Debtor to authorize its IT director to transfer the data. We stand by ready. I sent an email to your IT team asking for him to get the required approvals on Friday morning, and our -- CFA, the outsource team, stands by ready, at our cost, to transfer any remaining data.

So we just need you and Mr. Seery and -- to authorize the free transfer of data. Not necessarily you, but Mr. Seery, and then your IT team and your employees can feel comfort. Because over the last few weeks they have not provided any

data or any assistance providing data because they're concerned. They're concerned about their liability, they're concerned about things that the Debtor has told them. And so I just -- if you and Mr. Seery can tell them any data that is -- I mean, yeah, we're prepared to send a request of what we need, but they need Mr. Seery, because he has been holding that over them.

Q And what data are you referring to specifically?

A Yeah. We're talking about historical emails, emails that are held in what's called the vault. It is files in our systems. We've been able to copy, we think, most of what we have, but there is a number of records. We would like a copy of the database that backs up home (phonetic). We'd like a copy of the Bloomberg OMS, which I mentioned before. The data that backs up our data. Just a backup copy.

And there's a number of other items which we'll request, but these are all very simple items that don't take very long. I would imagine, with proper approval, and almost no work from your end, maybe your one IT guy, these can be transferred in a very efficient, effective, quick manner, most of it this week or within a couple days.

Q Okay.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: All right. Redirect?

THE WITNESS: Thank you, Mr. Morris.

MR. MORRIS: Thank you.

REDIRECT EXAMINATION

BY MR. RUKAVINA:

Q Mr. Norris, you mentioned that Debtor employees knew of our backup plan. Give some more specificity, meaning how and why you think they knew that and who did you talk to about that and when.

A. Yeah. So, the individuals authorized to discuss with me were David Klos, Frank Waterhouse, Brian Collins, and J.P. Two of those individuals are members of the -- well, one's still an officer, two or both were officers of our funds. And so in our discussions as well throughout, I mentioned, hey, we're working on backup plans. There were aspects of those they couldn't be involved in because they were negotiating for the other side. But they were aware that we were working on things.

In addition, Mr. Seery represented they knew we were taking data off or copying data off the system, leaving it all on their system, and that we were backing up emails and that we were working on a backup plan.

So I don't think it was a surprise to anybody. Their IT team knew and was very aware. We purchased new domains. We requested domains. We even had requested if they would forward domains to ours, which I think the answer was no. If they would forward emails.

And so I don't think there was any surprise that there was backup planning going on. And so there were discussions. It wasn't -- we didn't discuss the details. We didn't discuss the details because we were entered into a negotiation with millions of dollars at stake, and if I show or we discuss all of our alternative plans, then there is less ability to negotiate.

Q Okay.

MR. RUKAVINA: Mr. Vasek, if you will please pull up that letter that I sent you.

BY MR. RUKAVINA:

Q Okay. If we have to scroll down, Mr. Norris, we can, but are you familiar with this letter from the Debtor's attorneys to the boards and us the evening of February 19th, Friday?

A I am.

Q Okay. Is this the letter that you referenced when Mr. Morris was asking you about why we didn't just tell the Debtor that we had a backup plan and therefore we could dismiss this litigation?

A I believe so, yes.

Q Okay.

THE COURT: Is this an exhibit?

MR. RUKAVINA: No, Your Honor. I'm about to move for its admission. Your Honor, I'd ask that this be admitted as my Exhibit O.

THE COURT: All right. Any objections?

MR. MORRIS: Sorry. No, Your Honor.

THE COURT: All right. It'll be admitted.

(Advisors' Exhibit O is received into evidence.)

MR. RUKAVINA: And Your Honor, we will --

THE COURT: You'll have to supplement the docket with it.

MR. RUKAVINA: Thank you. We will.

THE COURT: Okay.

MR. RUKAVINA: Mr. Vasek, if you'll please scroll down to Page 3 of 4, the paragraph that begins, "During the course of this conversation." Actually, the next paragraph that says, "We understand."

BY MR. RUKAVINA:

Q Do you see that there, Mr. Norris?

A Yes.

Q Okay.

MR. RUKAVINA: What is that there, Mr. Vasek? I'm seeing a square. Okay.

BY MR. RUKAVINA:

Q So that paragraph begins, "We understand, based on this conversation, that HCMFA and NPA have made arrangements to obtain the resources they need to provide the services on a continuous and seamless basis to their clients, including the registered investment companies to which they serve as

investment advisor. We plan to proceed with our request for a mandatory injunction at the February 23rd, '21 hearing." And then it keeps going.

Did I read that accurately?

MR. MORRIS: Can you please --

THE WITNESS: Yes.

MR. MORRIS: -- keep going, because I think it's important?

MR. RUKAVINA: Well, you get to ask him next.

BY MR. RUKAVINA:

Q Did I read that accurately, Mr. Norris?

A Yes.

Q Okay. So tell me, then --

MR. RUKAVINA: Well, strike that. I'll move on.

You can leave that up, Mr. Vasek, if Mr. Morris needs to use it.

BY MR. RUKAVINA:

Q Now, do you recall you were asked about that Option A and Option B from last Friday, and Option B had been withdrawn? Do you recall that?

A Yes.

Q And do you recall that, under that Option B that was withdrawn, that the Debtor accepted that Mr. Dondero wouldn't be on the premises, right?

A Yes.

Q Okay. But would NexPoint have been on the -- on the premises?
A No. No.
Q So, under both Option A and Option B, would Mr. Dondero have been with his employees?
A Yes.
Q Okay.

MR. RUKAVINA: I'll pass the witness. Thank you.

THE COURT: Recross?

MR. MORRIS: Can we put that exhibit back up on the screen, please?

RECROSS-EXAMINATION

BY MR. MORRIS:
Q First of all, sir, you have no idea what was discussed in the conversation that's referenced in the first sentence, correct?
A I don't. I was not a part of it.
Q Okay. Do you know if the Debtor in this instance was trying to hold the Advisors' feet to the fire?
A Again, I was not part of the conversation.
Q So you don't know the motivation for sending this letter; is that fair?
A I don't.
Q Can you read out loud the letter -- the --

MR. MORRIS: I can't see it, actually. Can you just

push it down a little bit, because I've got the little box in the upper right corner? No, the other way. I'm sorry. Yeah. Perfect.

BY MR. MORRIS:

Q Do you see -- can you read out loud the sentence that begins, "We plan to proceed"?

A (reading) "We plan to proceed with our request for a mandatory injunction at the February 23rd, 2021 hearing and hope that we can submit to the Bankruptcy Court a consensual order incorporating HCMFA's and NPA's acknowledgment of HCMLP's right to terminate services under the shared services agreement as provided for herein and their commitment to provide services to their clients on a go-forward basis."

Q So in fact, as of -- do you know when this -- do you know when on Friday this letter was sent?

A I don't know the time.

Q Okay. It's -- it's -- based on what you just saw, the reference to the conversation, is it fair to say that this occurred after the Debtor was informed that the Advisors were withdrawing Option B?

A I believe so.

Q Right. And here, in fact, the Debtor is asking the Advisors to join it in providing a consensual order that would resolve this motion, right?

A I don't know. They're -- it said, "hope that we can

submit a consensual order incorporating HCMFA's and NPA's." This was sent to our counsel. So it was hoping that counsel would agree to that, yes.

Q Well, counsel is not going to agree to anything without the client's authorization; --

A Correct.

Q -- is that fair?

A Correct.

Q And did the Advisors ever authorize their counsel to try to negotiate a consensual order?

MR. RUKAVINA: Your Honor, I object to that. That's clearly attorney-client privilege.

THE COURT: Sustained.

MR. MORRIS: All right. I'll ask a different question.

BY MR. MORRIS:

Q Did the Advisors ever engage in negotiations with the Debtor over a consensual order, as was offered by the Debtor in this letter?

A I defer to legal counsel on that.

Q Okay. You're not aware of any such negotiations, right?

A I know there were discussions, particularly around our plans over the weekend, where there were offers of something related to the lawsuit. Removal or what -- I don't know the specific terms, but there were offers made, and I deferred to

counsel on that.

Q But we're here today because there is no consensual order pursuant to which the Advisors would present their plan to the Court and state specifically that the Debtor had no further obligation, correct?

MR. RUKAVINA: Your Honor, that's an irrelevant question. And again, it's litigation strategy and attorney-client privilege. And we're here today on a mandatory injunction.

THE COURT: Sustained.

MR. RUKAVINA: Not because --

THE COURT: Sustained.

MR. MORRIS: Withdrawn. I have no further questions, Your Honor.

THE COURT: All right. That concludes Mr. Norris's testimony. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. What else do you have, Mr. Rukavina? Your next witness?

MR. RUKAVINA: I have nothing further, Your Honor. The Defendants rest on this motion.

THE COURT: All right. Mr. Morris, anything further from you?

MR. MORRIS: No, Your Honor. I'm prepared to proceed to closing argument.

THE COURT: All right. I'll hear it.

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: Okay. Your Honor, thank you for taking the time to listen today. We regret that we had to come down this path, but the Debtor felt that it had no choice at the time that it filed the action.

We think the evidence conclusively establishes that the Debtor had the contractual right to terminate the shared services agreements. It exercised that right. It exercised that right after putting the world on notice that it wouldn't be providing shared services after a specified period of time.

The Court is fully familiar with the Debtor's plan of reorganization, the asset monetization plan, the downsizing of employees that was expected. And it was the Debtor who had concerns about the funds, the investors, the marketplace, and, frankly, the Debtor's ability to implement its own plan of reorganization, as Mr. Seery so fully testified to.

You know, trying to do the right thing here, the Debtors extended the termination date by a couple of weeks. They engaged in earnest negotiations. I don't think there is any dispute at all that the parties actually reached an agreement on every single business term, every single business term, except Mr. Dondero's insistence for access to the Debtor's offices.

I think the Court is familiar with the record in this

case. There's already an injunction in place barring him from the Debtor's offices. The reasons for that are also familiar to the Court. I don't think the Debtor was at all unreasonable in taking the position that it did.

They did what they could, but they came to a point where they couldn't continue to provide services consistent with the plan of reorganization that had been presented to the Court. And in order to avoid the substantial risk of being impeded from executing on its plan, in order to avoid the substantial risk that would have occurred had it simply exercised its right and walked away -- the risk of market disruption, the risk of potential involvement by the SEC -- it had no choice but to file this lawsuit.

And honestly, Your Honor, for the life of me, I don't know why they didn't try to use this wonderful operating plan as negotiating leverage. I've never heard of such a thing. But that's their choice. We're not here today because they failed to do that. But had they done that, this lawsuit wouldn't exist.

Had Mr. Dondero not injected himself on Wednesday and decided that his access was more important than the rest of it, we wouldn't be here today.

Had the Advisors said, when we gave them the take-it-or-leave-it option on Wednesday, we're leaving it, thanks for the effort, we tried hard, this stuff means a whole lot to us, but

we have a great plan here, let's not litigate, there's no reason to do this, we wouldn't be here today.

We wouldn't be here today had they not withdrawn Option B on Friday.

I don't think -- again, this is summary judgment territory. There's no dispute about the facts. There's no dispute that, for the fourth time, the reason that we're here is because Mr. Dondero completely undermined the people who he had authorized to negotiate on behalf of the Advisors and the lawyers who did diligent work, who tried very hard to bring this to fruition, who were engaged in negotiations, as the record shows, not just getting to a deal but going further and preparing settlement documents, preparing wire transfers, only to have the rug pulled out from under them again.

The Debtors had no knowledge of any plan whatsoever for the transition of services. I think -- I have respect for Mr. Norris. I think that he overstates things, but that's okay. Everybody's allowed to -- their perspective. But clearly, there's a lot of pieces to that operating plan that aren't in place. But here, at the end of the day, Your Honor, we don't care.

What we want to do is complete the divorce, as Mr. Hogewood said. And I've got a proposal now that, you know, I hope will be acceptable to both the Court and to Mr. Rukavina. And the proposal would be to allow us to submit to Your Honor

by the end of the day tomorrow a proposed form of order that will contain a limited number of factual findings and will render this motion moot. And it would be moot because the Advisors have now put into evidence an operational plan that they have -- that they are committed to. They have said on the record that they no longer need any services of any kind from the Debtor, except access to the data, and we would be good with that. We would be prepared to just say this is moot because of the operational plan that Mr. Norris described in such great detail.

I don't want to burden the Court with a lot more. I think that that's a way to just resolve this to the satisfaction, really, of everybody.

I'll just briefly say on the jurisdictional issue and the arbitration, because they are issues out there, it's inconceivable that the Court doesn't have jurisdiction here. This matter concerns the Debtor greatly. You know, we're here precisely because we need the relief that we requested initially, and that -- and that, apparently, the -- that was the adoption and the implementation of a plan so that the Debtor knew it would have no further liability. It was the Debtor's plan of reorganization that was at issue here, its ability to downsize in the way it told this Court and its creditors that it would do.

So I don't think -- I don't think there's a question of

jurisdiction at all.

And with respect to arbitration, you know, I'll note, firstly, of course, that the Advisors, they filed the claim against the Debtor. They didn't move to lift the stay. They haven't relied on the arbitration clause when -- when it's good for them.

But more importantly, Your Honor, I don't think a motion of this type in particular is the subject of any arbitration provision. It only applies to one of the agreements, as I understand it, in any event. But it's the arbitration clause.

This isn't about the interpretation of the agreement. I don't think there's any dispute about the Debtor's right to terminate. I don't think there's any dispute about any, you know, language in the agreement. There's no interpretive provision of the agreement that we're talking about here. What we're -- all we're talking about is making sure that, you know, the Debtor wouldn't be taking on a potential liability. And I've gotten comfort from Mr. Norris that we're not, because, you know, Mr. Norris said that the Debtor -- that the Advisors can fully perform under the advisory services agreement, that there's nothing that the Debtor did to prevent the Advisors from fully performing under the Advisors' agreement, that they don't need any services from the Debtor going forward. And I think that's -- that really is what I think appropriately does render this motion moot.

And what I would propose, again, just to be clear, is that we could give a proposed order to Your Honor tomorrow at the end of the day, give Mr. Rukavina until the end of the day Thursday to make whatever edits he believes are appropriate, and then Your Honor will do whatever Your Honor thinks is best, as always.

THE COURT: All right. Well, while I like the concept, and I haven't heard from Mr. Rukavina yet, I'm really worried about false hope that you would prepare something, Mr. Rukavina would be fine, and I'd simply sign it without much time spent on it.

Let me start with this. You said the order, it would be something like an order resolving the motion. It'll contain certain findings of fact, you said, such as the Advisors have an operating plan, the Advisors need no services from the Debtor going forward except access to data. Okay. Would I really get an order that has 14 additional findings, and if so, what would those be?

MR. MORRIS: I think we would just go through -- I don't think that there's really any dispute as to these facts. There would be no findings in there about, you know, withdrawal of Plan B or we gave them an ultimatum or any -- there would be nothing like that, Your Honor. It would simply be: The parties were signatories to shared services agreements. The Debtor exercised its right of termination.

The parties have agreed to extend the termination date twice. The Debtor -- the Advisors have prevented -- I'm doing this off the top of my head, of course -- but the Advisors have prevented -- has -- have prevented -- presented uncontroverted testimony that they have an operational plan pursuant to which they will obtain all of the back-office and middle-office services that were previously provided by the Debtor. And in case there's any failure in their plan, they have got alternative arrangements with third parties and won't look to the Debtor in the future for any services of any kind other than the retrieval of their data. I think that's about what it would say.

THE COURT: Okay. My next question is this: Are we going to have a fight in a few days about the retrieval of the data issue? I mean, I just heard Mr. Norris say it was a no-big-deal exercise, that the Debtor just needed to make its IT director available and they would be standing ready to receive it, and he made it sound like a no-big-deal task.

MR. MORRIS: Yeah. I guess my hope is that we would be able to iron out that last wrinkle, but I think the solution to that is to simply say, if the parties have a dispute on that narrow issue, they come back to the Court, that the Court has continuing jurisdiction to resolve any dispute over -- I think it was the provision that Mr. Rukavina had put up on the screen, I forget, I think it was with Mr.

Dondero, where the Debtor has some obligation with respect to books and records.

THE COURT: Well, and Mr. Seery said earlier today that the Advisors can have access to the records and data, but not 24 hours a day and not without a cost. So is that going to be an issue, the cost?

MR. MORRIS: You know what, I have just I guess one other alternative that I'm just thinking off the top of my head. Maybe put in some type of third-party neutral who can, you know, to the extent that it's even necessary, and I hope that it won't be because I think we've gotten a lot of assurances about the lack of services that are needed going forward, but perhaps we can -- perhaps the Court can appoint some third party who would take the burden off of the Court of any future dispute and try to resolve it that way, you know, with the parties splitting the cost. That's an alternative.

THE COURT: All right. Mr. Rukavina, what do you say?

MR. RUKAVINA: Your Honor, I'd like to give a closing, please.

THE COURT: Yes.

CLOSING ARGUMENT ON BEHALF OF THE ADVISORS

MR. RUKAVINA: And please understand, Your Honor, this is going to be a difficult closing for me to give because I'm going to be rather blunt. My bluntness should never,

never substitute my deep respect for this Court and for bankruptcy courts and for bankruptcy jurisdiction. I'm a bankruptcy nerd. Hopefully Your Honor knows that. And my closing is also going to be made a little bit more difficult because I honestly don't understand why we're here today.

We are here in a lawsuit, not a negotiation before the Court. Mr. Morris and I had days to negotiate, we spoke, and we didn't reach an agreement. We are here on a six-day notice mandatory injunction where now the Debtor wants to have some order with some findings. We are here today on a motion for a mandatory injunction that compels my client to do something where we're not told what it is to do.

We are not here today, Your Honor, on Count One, their declaratory relief that they've terminated appropriately and done nothing wrong. We're not here today on that. It is inappropriate to make any findings on that. That issue will be resolved in due course.

We're not here today on any future duties. I heard the record, too. I heard the evidence. I can't imagine there being any future duties. But that is an advisory ruling that we're not here on today.

So, again, we are here today on whether my client is going to be enjoined to do something. And the reason why we will not agree to that --

THE COURT: Can I stop you? What I hear from the

Debtor is, in light of everything we have all heard the past seven hours, and apparently things the Debtor was not expecting to hear -- that is, we're ready to cut it off tomorrow, today; all we need is the data -- he's happy to say, okay, my request for an injunctive -- a mandatory injunction is moot now. I'm not asking the Court for that.

So, you know, I feel compelled to start with the pragmatic possible resolution of this. Why --

MR. RUKAVINA: Your Honor?

THE COURT: Why is that not an acceptable way of resolving this? He doesn't --

MR. RUKAVINA: Because --

THE COURT: He doesn't need an injunction, he says, if we can have an order.

MR. RUKAVINA: It's not -- Your Honor, I would then humbly submit that why doesn't he withdraw his motion? I mean, the problem that I have, Your Honor, is that anything that I agree to is going to submit my clients' internal business affairs to this Court's oversight.

I think Your Honor asked very important questions. What happens in two or three days' time if something happens? What about these findings? I am -- I think that this whole motion is moot, but I am very worried that even a finding of mootness is an exercise of jurisdiction over my clients' internal affairs.

What I think the Court should do is dismiss this motion -- I'm sorry, deny this motion without commentary, without findings, without conclusions. There's still Count One and Count Two which will be resolved in due course. And you know what? If my client messes up somehow in this transition -- not to mention that my clients are highly reputable, they're governed, they're regulated, there's other people looking at this -- they can come back to Your Honor.

But please understand my perspective, please understand my clients' perspective, because I think it's important. We have been hauled in front of this Court on allegations that we have willfully failed and refused to adopt and effectuate a plan. The allegations here are extreme. They've been shared with the creditors. They've been shared with our boards, who knew about this all along. They've been shared with the SEC. They've been shared publicly.

So I am glad that the record is now clear that these allegations were baseless when made, but even if they were made in good faith, they are baseless today.

But I don't even want the Court exonerating my clients' plan. I don't want the Court commenting on the wisdom of my clients' plan. Because we will not agree, as a nondebtor party, with all respect, Your Honor, to have this Court take any oversight over our affairs. It'll lead to some future dispute, some future contempt, some future sanctions, and

that's just not something that we as nondebtors are going to consent to.

The Court doesn't have jurisdiction. The Court doesn't have core jurisdiction.

But let's put all that aside. The four elements of an injunction, Your Honor. Where is any evidence of harm? Mr. Seery did not --

THE COURT: You know what? As long as we're not going to have a consensual order here, we need to take the issues you've raised, starting with subject matter jurisdiction. Okay? If I don't have consensus, I've got to examine my own subject matter jurisdiction.

So, on that point, do you say I apply the Fifth Circuit's pre-confirmation test of bankruptcy subject matter jurisdiction or post-confirmation test?

MR. RUKAVINA: Your Honor, the plan has --

THE COURT: Okay. I signed the confirmation order, but it's one day old. It's still appealable. And it's nowhere close --

MR. RUKAVINA: Your Honor?

THE COURT: -- to going effective, I fear. So, under either test, tell me why I don't have subject matter jurisdiction first.

MR. RUKAVINA: I would like to argue that the pre-confirmation -- that the post-confirmation test applies, but I

can't, in good faith. The plan has not gotten -- gone effective. There still is an estate. So, as of today, I think Your Honor is dealing with the pre-confirmation jurisdiction, --

THE COURT: Okay.

MR. RUKAVINA: -- which is definitely broader.

THE COURT: Okay.

MR. RUKAVINA: There is no jurisdiction, because you have heard no evidence of any effect on this estate as a result of this injunction being issued or not issued. Mr. Seery had every opportunity to be asked about harm, interference, how does this affect the reorganization? He did not give you any. This does not increase --

THE COURT: Well, what I think I heard, and I may be mixing up written pleadings, declarations, versus what he said today, but what I know I heard in either the papers or his oral testimony today was that the Debtor is worried about exposure to liability from who knows who.

MR. RUKAVINA: Okay.

THE COURT: The investors in the private funds or someone else for not having a smooth transition plan here and cutting things off on February 28th without knowing there's a plan. Okay? So if the estate is exposed to potential liability, is that an impact on the estate being administered, per *Wood v. Wood*?

MR. RUKAVINA: Of course it is, Your Honor. But we have to go to evidence. That's not in the evidence. That's in the brief that they filed. It is not in Mr. Seery's declaration. It is conclusory. It is not evidence. There is no evidence today of anyone that could sue the Debtor. I have no idea of anyone who could sue the Debtor -- pardon me -- regarding this.

THE COURT: He did say in testimony he was worried about the SEC if this was not done right.

MR. RUKAVINA: Well, Your Honor, with due respect, his worry is conclusory and his worry does not rise to an effect. He didn't tell you that the SEC has investigated or is threatening anything. It's a purely hypothetical worry. So I do not think that Your Honor has even related-to jurisdiction now that Your Honor has heard all of the evidence.

Now, let me be clear. Your Honor has jurisdiction over Counts One and Counts Two in this lawsuit, subject to arbitration, right? That's the declaratory action as to whether they terminated correctly. That's a legitimate exercise of jurisdiction. And their monetary claim for unpaid amounts: Clearly, the Court has jurisdiction. All I'm talking about is whether the Court has jurisdiction to enjoin a nondebtor party to do something. Not -- not to not do something, not a status quo injunction, but a mandatory

injunction.

And you have heard no evidence, Your Honor, no nexus as to how the injunction that Your Honor has been asked to order is going to affect the estate. None.

THE COURT: Okay. But you say a nondebtor third party. It's not just any nondebtor third party. Among other things, it's a counterparty to executory contracts that the Debtors say, you know, we either terminated these during the case or they're deemed rejected, and we're wanting some cooperation from the counterparty.

I mean, doesn't that give --

MR. RUKAVINA: Okay.

THE COURT: -- subject matter jurisdiction, because we're talking about a counterparty to an agreement that would have been governed by 365?

MR. RUKAVINA: I think, Your Honor, if there is some duty in those contracts or some duty in the law to act in a particular manner upon termination or rejection, there would be jurisdiction.

But just like when Your Honor ruled against us in December -- Your Honor said, I find nothing in this contract that provides for such a duty -- there's nothing in these contracts that provides any obligation on my client.

THE COURT: That is a different agreement. That was a different agreement, for the record.

MR. RUKAVINA: Fair enough.

THE COURT: That was --

MR. RUKAVINA: Your Honor, fair enough.

THE COURT: That was the CLO agreements that your clients were not parties to.

MR. RUKAVINA: But Your Honor asked the right question then, and that's still the right question: Point me to some statutory or contractual right for what you want. They have not pointed you to any.

So, yes, hypothetically, if these agreements -- let's just assume that these agreements required post-termination good-faith unwinding. There would be jurisdiction. But these agreements don't provide any of that. The only thing that's provided is that, post-termination, the Debtor shall promptly return to us our property. And that -- there's no problem with that. We trust that the Debtor -- we heard Mr. Seery -- the Debtor's not going to mess that up. It'll be done quickly and painlessly, I hope.

That's not what they're asking for. They're asking for Your Honor to tell my client how to conduct its internal business affairs, and there's nothing in these contractual rights.

So, hypothetically, let's just assume that the Court has some related-to jurisdiction. Okay. It's still not core jurisdiction. And these contracts have been terminated, Your

Honor. There is no live contract. No one has shown you any statute or regulation that governs. So, that's jurisdiction.

The same fact of no harm, the same fact of no right, goes to the elements of an injunction, recalling that a mandatory injunction requires a much greater, much clearer burden. Again, Mr. Seery did not testify as to any harm. He said he was worried about the SEC and he said something like it might make plan implementation more difficult. Again, conclusory allegations. Those are not -- that's not evidence of immediate and imminent injury. It is certainly not evidence of irreparable injury, and it is certainly not evidence of a nonmonetary injury.

So, again, I ask -- I understand Your Honor has been in this case for a long time. I understand Your Honor has been in the Acis case before that. I understand from Your Honor's confirmation ruling that you have formed certain opinions about my clients, opinions that I think are unfair, quite frankly, that basically conclude that we are a vexatious litigant and that we are the tentacles of Mr. Dondero. I ask you to put all that aside. Because that's what the Debtor wants you -- the Debtor wants you to just reflexively conclude that somehow we're nincompoops and incompetents and we need court supervision. Put all that aside, Your Honor, and just ask yourself: What am I being asked to do? I'm being asked to order a nondebtor as to how to conduct its own internal

business -- not even business related to the Debtor, but how to conduct its own internal business -- even if we are the biggest nincompoops, which absolutely is not borne out by the record.

This is the wrong court for any such relief. It's the wrong court.

The reason why I showed you that letter from last Friday was I thought it was -- I think Mr. Morris is an excellent lawyer and I've worked very well with him, but I think that the allegation is so fundamentally unfair, that somehow this is our fault because we didn't tell them about a backup plan and we wouldn't just consent to the entry of an order that gives Your Honor jurisdiction over us. That's unfair, Your Honor. This is an inquisition in that respect. In that respect, it's an inquisition.

We were sued. We defended ourselves. We're not -- this is the fourth lawsuit, by the way, that the Debtor filed against us, Your Honor.

And as I asked you at the confirmation hearing, what evidence is there that we're vexatious? Okay, we filed a motion in front of Your Honor that was frivolous. It happened. And we're glad that the Court didn't sanction us. We're glad. Perhaps the Court still will. But that's it. Nothing else that we've done.

We've been quiet in this case. We've been minding our own

business. We've been preparing a backup plan. We've done everything right. And the Debtor comes to you shocked, shocked, alleging that we don't have any plan, alleging that the sky is falling. And even when the Debtor learns that that's not the case, we still had to go through today.

Why did we go through today, Your Honor? Why did my client -- why did my client have to sit here like someone that had done something wrong, like a criminal defendant, and be inquired as to all of its internal business practices, with implications made that my client doesn't know what it's doing? Why did we go through today just to have some order that's a -- that provides for something?

They want a mandatory injunction, Your Honor. You should thumbs-up it or thumbs-down it. And if you thumbs-up it, it'll be without jurisdiction, without basis, and it'll be extraordinary.

I can just keep talking and talking, but I'll repeating the same points, Your Honor, so I thank you.

MR. MORRIS: Can I just have five minutes, Your Honor?

THE COURT: You can.

REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: You know, I think the Court can issue an order finding that the motion is moot on its own accord. It doesn't need a consensual order to do that. I think the Court

-- I would believe that the Court would have a factual finding to support the finding of mootness.

But I don't really get the righteous indignation at all. It's as if Mr. Rukavina didn't hear anything I said. Because we're most certainly not asking the Court -- we weren't even, in the motion, asking the Court to do anything specific other than direct the Advisors to adopt and implement a plan. It didn't have to be with us. We didn't care who it was with. We didn't care what the elements were. The fact of the matter is Mr. Seery testified extensively, not just about the potential impact this would have on the Debtor's plan of reorganization, but he testified that certain of the Debtor's employees had received threats. He testified, based on his experience, that this is a highly-regulated industry, and if there was -- if we walked away without any plan in place, which is exactly why he said we filed this motion, that it would be -- that it would be potentially catastrophic and that undoubtedly the SEC would be involved. And Mr. Rukavina cannot give the Debtor any assurances that it would have no liability. Mr. Rukavina, I'm sure, is not going to allow his client to indemnify the Debtor for any damages that may have occurred in the future.

We're a little far afield here, Your Honor. We simply wanted to make sure that there was a plan in place to avoid a catastrophe. That was the irreparable harm that we were

looking at. And at the end of the day, they came in -- you know, I wish they had done it last week. I wish they had told us last Thursday. I wish they had told us last Wednesday. I wish they had told us during the negotiations. I wish they had told us last Friday, instead of pulling Plan B. I wish they -- you know. But it doesn't matter. They don't have an obligation to do that and I'm not, you know, I'm not going to pretend that they do. It would have been better if they had. They didn't. But they did, they did what the Debtor needed them to do today, and that is present their plan to the Court.

And while we, you know, have questions about when it was prepared, whether it's fulsome, they like it, and that's the important part. And they're not going to look to the Debtor for any services in the future. That's the important part.

The risk that Mr. Seery was concerned about has been eliminated, and I, you know, appreciate that. And that's why I thought we came in here with a very rational and pragmatic solution, to just -- to just -- you know, they've done what we've asked for. We've gotten the relief that we've asked for. The Advisors have sworn under oath that they have an operating plan to obtain the essential services that the Debtor used to provide. That's the relief we were asking for. I'm not quite sure what there is left here.

THE COURT: Okay. Thank you.

All right. The first thing I'm going to say is that the

Court believes it has subject matter jurisdiction, bankruptcy subject matter jurisdiction, over the requested relief. If it's a pre-confirmation test that I am supposed to apply here -- that is, the *Wood v. Wood,* could this dispute have a conceivable effect on an estate being administered -- I find that that test is met.

I think the concern of potential liability and exposure on the part of the Debtor is well-founded, even if it was not articulated to the Advisors' satisfaction today. I think, based on the litigious history here between these parties and the contentiousness, I should say, between these parties during this case, there is certainly a well-founded concern, and certainly I think the Debtor is just being prudent, worried about the SEC, investors, the Advisors, the funds, someone else pointing fingers at the way the Debtor did or did not act in transitioning services over. I think that is a basis for subject matter jurisdiction under the pre-confirmation test.

If the post-confirmation test applies here, we know that Fifth Circuit cases such as *In re Craig's Stores*, *In re Case*, *National Gypsum*, among others, articulate the test of bankruptcy subject matter jurisdiction being could the outcome of the dispute bear on the implementation, the execution, or the interpretation of a confirmed plan? I think that test is likewise met here.

Obviously, the plan contemplated a separation, and this request for relief appears to be basically seeking some supplemental -- a supplemental order to supplement the confirmation order, to supplement the Debtor's attempt at divorcing these parties as part of the monetization plan.

So I think bankruptcy subject matter jurisdiction does exist here.

I didn't hear in oral arguments, closing arguments, anything about the arbitration, but I think there's a real question here whether the Advisors may have waived their right to invoke the arbitration clause that's in one of the shared services agreements, not both of them, by filing pleadings so often, participating in this bankruptcy case so often, without invoking that.

But again, as I see it, this adversary proceeding is largely -- essentially, I should say -- asking for an order supplementing the confirmation order, and it doesn't really seem like a dispute *per se* under the shared services agreements that have already been terminated.

So I think an argument can be made that there's been waiver here, but even if there's not, that this is core in that it bears on the plan confirmation, certainly more than a dispute arising under the literal terms of the shared services agreement.

I reserve the right to supplement and amend this, if I

need to, in a more thorough written ruling.

But anyway, based on the Court determining it does have subject matter jurisdiction here, I see it appropriate to enter an order that, based on the Court's several hours of testimony today from three different witnesses -- Mr. Seery, Mr. Dondero, Mr. Norris -- and based on many documents that have been submitted into the evidence, the Court finds that the shared services agreements were already terminated pursuant to their terms and can also be deemed rejected under 365 of the Code previously.

The Court will find that the Advisors do not need any further services from the Debtor under these agreements as of today's date, except access to data and records, which, based on the testimony of Dustin Norris, can be easily effectuated, Mr. Norris's testimony being that what the Debtor would need to do to allow access to the data is authorize the Debtor's IT director to transfer data and we stand ready to receive it. And data would include historical emails, vault emails, files in the system, and a number of other items, but, quote, there would almost be no work from the Debtor's end.

So, believing that to be the case, I would order that the Debtor stand ready between now and the 28th to provide that access and that the Advisors stand ready to receive that access. And if the process extends beyond February 28th, then it will have to be subject to further orders of this Court,

but the Court would expect there to be a cost if it extends past February 28th. And again, the Court would consider that in a further hearing, how much cost should be imposed on the Advisors. But the advisors have represented to me through Mr. Norris it's easy, it can be accomplished easily, so therefore I would think it could happen between now and the 28th, and if it does, no cost imposed on anyone.

I will further find that the Advisors have represented and the Court therefore finds that there is an operating plan in place for the Advisors to continue to operate uninterrupted beyond today. And again, the only thing I would envision that needs to happen between today and February 28th is the access to data.

So, having made these findings, the Court believes that the request for a mandatory injunction is moot and is therefore denied.

Are there any questions? Mr. Morris, I want you to be the scrivener, and, of course, run it by Mr. Rukavina. But are there any questions or concerns about what I've just articulated?

MR. MORRIS: I just have one, Your Honor.

THE COURT: Uh-huh.

MR. MORRIS: You made reference to rejection of the contract. From our perspective, it's not rejection. We don't want to open this up to a rejection claim of any kind. It

really was just a termination of the agreement, in accordance with the terms. And I had put the provisions up before the Court during my opening and walked Mr. Seery through. That's the basis for the --

THE COURT: Okay.

MR. MORRIS: -- termination of the agreement. It's not rejection at all.

THE COURT: Fair point.

MR. RUKAVINA: And Your Honor, there's no -- there's no -- yeah, there's no problem. There's no problem on that. We do not disagree. We do not disagree with Mr. Morris.

THE COURT: Fair point. I made the mistake of belts and suspenders, trying to fill in any hole there might be. But yes, I had the evidence that there was a termination of both agreements on November 30th. One of them had a 60-day window before it became effective, the other a 30-day. So they are terminated.

All right. Mr. Morris, anything else from you?

MR. MORRIS: No. We'll prepare a form of order.

THE COURT: All right. Mr. Rukavina, anything further from you?

MR. RUKAVINA: Your Honor, obviously, I have questions. I have reservations. I need to look at whether the Court's findings are going to be binding in this adversary proceeding. So, at this point in time, I'm just not prepared

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. DONDERO: I'm on the line.

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

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

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

THE COURT: I am --

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

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

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

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

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

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Pause.)

THE COURT: Oh, Michael?

(Court confers with Clerk.)

THE CLERK: Hello? Hang on. Mr. Morris?

THE COURT: Is anyone still there?

THE CLERK: Mr. Rukavina is still there. Mr. Rukavina, Mr. Morris, are you all still there?

MR. RUKAVINA: Judge, this is Davor.

THE COURT: All right.

MR. RUKAVINA: I think we're all wondering whether we're going to have the contempt hearing.

THE COURT: Well, yes, that's why I came back in.

MR. RUKAVINA: I can't hear you, Judge. We can't hear you.

THE COURT: I realized I -- it's 4:19 Central time. We are not starting the contempt hearing.

Mr. Morris, are you there now?

MR. MORRIS: I am. I did have one suggestion.

THE COURT: All right. I neglected to mention our other setting, but we are not going to start at 4:19 Central time. Do we want to talk about scheduling on that?

MR. MORRIS: I did, Your Honor. And it's just an idea, and I understand we've had a long day. But I was going to suggest if there was any way to just get their motion *in limine* out of the way today, so that when we come back for the evidentiary hearing parties are fully prepared. If you don't want to do it, that's fine. Otherwise, I'm available at Your Honor's convenience.

THE COURT: All right. I am going to have you all communicate with Ms. Ellison about rescheduling that. I have no idea what my calendar looks like next week, but I'm not going to do it this week. I've got a backlog of other case matters that I need to get to this week.

MR. MORRIS: Okay.

THE COURT: So, you know, maybe we'll do it next week. On the motion *in limine*, you've not filed a response? It was just filed yesterday, so I'm guessing there's no response.

MR. MORRIS: Yeah. I was going to do -- I was going to do it orally. I'm happy to do a written response, and I'm happy to just proceed on the papers. I just think it would be helpful to have that, you know, or if we could put aside an hour later this week to do that, because then preparing, if we know the evidence is in or out, I think it'll just make the trial a lot more smooth.

THE COURT: All right. I barely had time to pore over it, so let me have Traci reach out to you all tomorrow and let you know do I want a hearing on it or not. I have an initial reaction. I don't know if Mr. Dondero's counsel is on the phone. I don't want to talk about this too much if he's -- do we have Dondero's counsel?

MR. WILSON: I'm present, Your Honor. John Wilson.

THE COURT: Okay. I will tell you right now that,

having done a quick review of it, I didn't feel inclined to grant it. I'm going to have the TRO in front of me and I'm going to hear the evidence of what happened, and it's either going to match up as a violation of the provisions of the TRO or not. You know, I feel -- I'm not a jury. I can decide whether it is violative of the TRO or not. The theme of it was, oh, it's going to have a prejudicial effect. I mean, I've already heard about a lot of this. So I'm inclined not to grant it. But, again, I did a very quick look at it at 5:00 o'clock last night. And that's why I asked Mr. Morris, was he going to have a response, because --

MR. MORRIS: Yeah. I was planning to do it orally today, Your Honor. If I may just have until 5:00 o'clock tomorrow, I'll submit an opposition that won't exceed five pages.

THE COURT: Okay. So that's what we'll do. And then once I've looked at the motion more carefully, as well as the response, I'll decide if I need oral argument or if I'm just going to rule on the pleadings, okay, and Traci will let you all know. All right? And again, Traci will coordinate with you tomorrow or sometime this week about a resetting on the contempt motion.

All right. Thank you.

MR. MORRIS: Thank you, Your Honor.

MR. WILSON: Thank you, Your Honor.

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 Date
Certified Electronic Court Transcriber

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EXHIBIT 22

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

IN RE:	*	Chapter 11
	*	
	*	Case No. 19-34054sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.	*	
	*	
Debtor	*	

MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)

NOW INTO COURT, through undersigned counsel, comes The Dugaboy Investment Trust and Get Good Trust (jointly, "Movers") and respectfully move this Court for the appointment of an Examiner for the reasons set forth herein:

I.

BACKGROUND

1. On December 23, 2019, the United States Trustee filed its *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Dkt. No. 271]. The United States Trustee's motion was denied by this Court's *Order Denying United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Dkt.

No. 428]. Since around that time, the Debtor has been operating as a debtor-in-possession at the direction of an appointed independent board of directors.

2. On November 24, 2020, the Court approved the Debtor's *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "Disclosure Statement") [Dkt. No. 1476]. As detailed in Article II.B. of the Disclosure Statement, the value of the Debtor's Assets has decreased by more than $235 million, or about 42%, from the commencement of the case to September 30, 2020. The Debtor's Monthly Operating Report for November of 2020 reports a loss in value of $248 million [Dkt. No. 1710].

3. The Plan of Reorganization proposed by the Debtor and set for hearing on January 26, 2021 contains significant release and exculpation provisions for the management of the Debtor and the Independent Directors that are not allowable under applicable 5th Circuit law (*Opposition to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* filed by The Dugaboy Investment Trust and Get Good Trust [Dkt. No. 1667] and the *United States Trustee's Limited Objection to Confirmation of Debtors' Fifth Amended Plan of Reorganization* filed by the United States Trustee [Dkt. No. 1671]).

4. At a hearing held on January 8, 2021, this Court voiced a concern about costs and expenses in connection with this case. The Court noted that it believed over sixty (60) lawyers attended the hearing and that a mere Preliminary Injunction hearing, based upon a back of the envelope calculation, cost the estate and parties in interest in excess of $300,000.00.

5. On January 12, 2021, counsel for Movers sent a letter to various counsel enlisting their support to the appointment of an Examiner to investigate various issues in this case and

to author a report that could be used by the Court and parties in interest. It was suggested by The Dugaboy Investment Trust that the appointment of an Examiner was a less costly means to resolve issues, as opposed to full blown litigation between the various parties and their legions of lawyers. The letter suggested that an Examiner be appointed to provide to the Court and the parties in interest a report that would address key matters. The Examiner's investigation and report would address issues and items that would not delay or cause a continuance of the confirmation hearing on the Debtor's Plan.

6. The appointment of a neutral, third party Examiner who would serve as an independent agent for the estate would be in the best interests of the Debtor and its creditors. The Examiner's investigation would alleviate the need for discovery disputes and litigation by getting to the bottom of the legitimacy of the allegations made by the parties and potential claims that may exist on behalf of the estate or against persons acting on behalf of the estate. The present claims retention statement filed by the Debtor is merely a laundry list of potential claims and parties and provides no real guidance or explanation as to the retained claims.

7. Movers will fully cooperate with the Examiner with respect to any examination of potential issues concerning the claims of or against Movers.

II.

REQUEST FOR RELIEF

8. Movers request that this Court appoint an Examiner in this case under section 1104(c) of the Bankruptcy Code in order to perform investigations and to prepare a report under section 1106(b). Section 1104(c) of the Bankruptcy Code states, in pertinent part:

> If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the

> United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor…
> 11 U.S.C. § 1104(c) (emphasis added).

9. The express language of section 1104(c) and c(2) makes clear that where, as in this case, a party has previously moved for the appointment of a Chapter 11 trustee and the fixed liquidated unsecured debts exceed $5 million, the court shall appoint an Examiner at the request of a party in interest. Id. Even so, other courts note that an application to appoint a trustee is not a prerequisite for the appointment of an Examiner, only that no such trustee has been appointed in the case. *Keene Corp. v. Coleman* (*In re Keene Corp.*), 164 B.R. 844, 855 (Bankr. S.D.N.Y. 1994) (looking to identical language in § 1104(b), finding that the denial of a motion to appoint a trustee is not a prerequisite to appointing an Examiner); See also *In re Residential Capital, LLC*, 474 B.R. 112, 118, 121 (Bankr. S.D.N.Y. 2012) (requiring only that a chapter 11 trustee must not have been appointed).

10. Here, all elements for the appointment of an Examiner have been met under section 1104(c)(2) of the Bankruptcy Code: (i) the Court has not previously appointed a trustee in this case; (ii) Movers, parties in interest, move for the appointment of an Examiner prior to plan confirmation; and (iii) it is indisputable that the Debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.[1]

11. When all such elements are met, courts have no discretion whether to grant relief, and must appoint an Examiner. *In re Erickson Retirement Communities*, LLC, 425 B.R. 309, 313 (Bankr. N.D. Tex. 2010). This Court in *Erickson Retirement Communities* stated:

[1] See Debtor's Amended Schedules E-F, Dkt. No. 1082-1, and Dkt. Nos. 1273 and 1302.

"This court agrees with such courts that, where the $5 million unsecured debt threshold is met, a bankruptcy court ordinarily has no discretion. This Court has complete discretion as to the matters that are examined."

12. The Court in *Erickson* denied the appointment of an Examiner due to the fact that "there was no allegations of wrongdoing on the part of the Debtor" at 313. In *Erickson* the Examiner was requested to report on an "appropriate value allocation". In this case Movers are requesting, and the Court should want, an explanation from a neutral third party as to why the assets of the Debtor had such a significant reduction in value during the case. Was it due to mismanagement or negligence? The reason for the decline in value is not an investigation that the Debtor or its counsel can make (they are not disinterested) but one that must be made by an independent third party. The discussion in the Debtor's Disclosure Statement [Dkt. No. 1473, pgs. 28-29] is conclusory and only accounts for $90 million of the decline in value. The balance is not explained except to assert that Covid was in part responsible. Leading market indicators for the period between October of 2019 and October of 2020 reflect annualized growth rate for the Dow of 4.67%, the S&P 14.95% and Nasdaq 43.11%. In light of these market gains, questions exist as to why the Debtor's Assets declined in value and whether the Debtor's management acted in a prudent fashion.

III.

SUGGESTED AREAS OF INQUIRY AND METHODOLOGY

13. Movers have received responses from the Debtor and the Creditors' Committee relative to Movers' letter of January 12, 2021, wherein the Debtor and the Creditors' Committee rejected joining in the Examiner motion and contended that the request was designed to

delay confirmation and that the Litigation Trustee would investigate the claims possessed by the estate. The letters received from the Debtor and the Creditors' Committee assert that the claims that have been made against the Debtor and the parties it seeks to have released and exculpated in its Plan are frivolous. The letters go on to state that the claims will be investigated by Marc Kirschner who is a highly qualified professional.

14. The areas of inquiry suggested by Movers below will not delay confirmation of the Debtor's Plan and the suggestion that the Litigation Trustee, through the use of its counsel, will investigate the claims in a more efficient manner than a highly qualified Examiner would misses the entire point of Movers' letter. The assertion that the Litigation Trustee will investigate all claims is inaccurate since claims against the Debtor's management are released and exculpated and are not included in any retained claims. It is difficult to believe that the Creditors' Committee does not want to know why there is a loss of over $200 million in Asset value and whether any of that loss could be recovered from responsible parties. Secondly, this Court, under the Plan, will have no control over the costs and expenses of the Litigation Trustee and its counsel in pursuing such litigation, and the only means of ensuring benefit to the estate for the activities of the Litigation Trustee would be to require that counsel pursing the claims on behalf of the Litigation Trustee work on a contingent fee basis.

15. The Plan filed by the Debtor contains significant releases and exculpations for the persons overseeing the Debtor's activities in the case. Movers are troubled by the fact that the Debtor's Assets have declined in value with only a portion of the loss explained by "reserves" and forced stock sales due to margin issues. The Court, at the Preliminary Injunction hearing, indicated that it was concerned with the dissipation in the value of

assets. A neutral Examiner could provide an independent view as to the loss in value and avoid costly fights over production of documents. Is the Debtor afraid to allow a third party to review and answer the question "Why"?

16. The Debtor should welcome an Examiner viewing the claims that it and the Litigation Trustee have against various parties. An Examiner's report would be difficult to rebut and, in all likelihood, would bring about settlement of claims without the need for multiyear and costly litigation.

17. Movers suggest that each party provide the Court with a written submission suggesting areas of inquiry for an Examiner's report. The Court can then fashion the areas of inquiry such that they do not slow down the confirmation process but provide a meaningful cost savings to the creditors of the estate and the potential party litigants.

IV.

PRAYER FOR RELIEF

WHEREFORE, The Dugaboy Investment Trust and Get Good Trust request that this Court grant this motion and appoint an Examiner under section 1104(c) of the Bankruptcy Code to conduct an investigation of the propriety of the Debtor's post-petition operations, sales, and trades in accordance with section 1106(b) of the Bankruptcy Code.

January 14, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 14th day of January, 2021, a copy of the above and foregoing *Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

- David G. Adams david.g.adams@usdoj.gov, southwestern.taxcivil@usdoj.gov;dolores.c.lopez@usdoj.gov
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/s/Douglas S. Draper.

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

IN RE:	*	Chapter 11
	*	
	*	Case No. 19-34054sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.	*	
	*	
Debtor	*	

ORDER GRANTING THE MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)

Upon consideration of the *Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* (the "***Motion***") filed on January 14, 2021, by The Dugaboy Investment Trust and Get Good Trust (jointly, "***Movers***") seeking an order appointing an examiner; and the Court having jurisdiction to consider the Motion and all relief requested therein, as well as all related proceedings; and due and sufficient notice of the Motion having been given under the circumstances; and the Court having convened a hearing at which counsel for all interested parties had an opportunity to appear and be heard; and good and sufficient cause appearing, the Court finds that the Motion should be, and thereby is, Granted.

It is, therefore,

1. ORDERED that an Examiner be appointed for Highland Capital Management, L.P. in the captioned matter for the purposes set forth herein; and it is further

2. ORDERED that the United States Trustee for the Northern District of Texas (Dallas Division) (the "***United States Trustee***"), shall timely file its Application for Order Approving the Appointment of an Examiner and a proposed Order thereon (the "***UST Appointment Application Order***"); and it is further

3. ORDERED that immediately upon the entry of the UST Appointment Application Order, the Examiner is authorized to investigate the matters identified in a futher order issued by this Court; and it is further

4. ORDERED that within three (3) days of the entry of this Order, any party wishing to have a matter investigated by the Examiner shall submit in writing to this Court the following: a) identification of the matter to be investigated; b) a reason why such investigation is necessary; and c) why such investigation of the matter identified will not delay confirmation of a plan in this Case; and it is further

5. ORDERED that the Examiner shall have the duties, powers and responsibilities of an examiner under Section 1106(b) of the Bankruptcy Code; provided, however, that the scope of the Examiner's duties, unless expanded or limited by further order of this Court, shall be limited to the investigations identified by this Court in a Supplemental Order to be entered ; and it is further

6. ORDERED that the Examiner shall be a "party in interest" under Section 1109 of the Bankruptcy Code with respect to matters that are within the scope of the duties set forth in this Order and shall be entitled to appear at hearings held in these cases and to be heard at such hearing with respect to matters that are within the scope of the Examiner's duties; and it is further

7. ORDERED that nothing contained in this Order shall diminish the powers and authority of the Debtor , Committee, Reorganized Debtor and Litigation Trust under the Bankruptcy Code, including the powers to investigate transactions and entities, commence contested matters and adversary proceedings, and object to claims, and it is further

8. ORDERED that neither communications between the Examiner and Debtor nor communications between the Examiner and the Committee shall be deemed a waiver of any attorney–client or work product privilege otherwise belonging to the Examiner, the Debtor or the Committee; and it is further

9. ORDERED that any and all objections to the relief granted herein are overruled; and it is further

10. ORDERED that this Court shall retain exclusive jurisdiction over any dispute concerning this Order.

End of Order

Submitted by:

/s/Douglas S. Draper.
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EXHIBIT 23

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

	)	**Case No. 19-34054-sgj-11**
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	Tuesday, February 2, 2021
	)	9:30 a.m. Docket
Debtor.	)	
	)	CONFIRMATION HEARING [1808]
	)	AGREED MOTION TO ASSUME [1624]
	)	

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

WEBEX APPEARANCES:

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Exhibit C

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

DALLAS, TEXAS - FEBRUARY 2, 2021 - 9:38 A.M.

THE COURT: Good morning. Please be seated. All right. We are ready to get started now in Highland Capital. We have a confirmation hearing as well as a motion to assume the non-residential real property lease at the headquarters. All right. This is Case No. 19-34054. I know we're going to have a lot of appearances today. I think we're just down to a handful of objections, but I'm nevertheless going to go ahead and get formal appearances from our key parties that we've had historically in this case.

First, for the Debtor team, do we have Mr. Pomerantz and your crew?

MR. POMERANTZ: Yes. Good morning, Your Honor. Jeff Pomerantz, along with John Morris, Ira Kharasch, and Greg Demo, on behalf of the Debtor-in-Possession, Highland Capital.

THE COURT: All right. Good morning. All right. For the Unsecured Creditors' Committee team, do we have Mr. Clemente and others?

MR. CLEMENTE: Yes. Good morning, Your Honor. Matthew Clements; Sidley Austin; on behalf of the Official Committee of Unsecured Creditors.

THE COURT: All right. I'm actually going to call a roll call for the Committee members who have obviously been very active during this case. For the Redeemer Committee and Crusader Fund, do we have Ms. Mascherin and her team?

(Pause.) Okay. We're -- if -- you must be on mute.

MS. MASCHERIN: Your Honor, I apologize.

THE COURT: Okay. Go ahead.

MS. MASCHERIN: I apologize, Your Honor. I was on mute and could not figure out how to unmute myself quickly. Terri Mascherin; Jenner & Block; on behalf of the Redeemer Committee.

THE COURT: All right. Good morning.

All right. What about Acis? Do we have Ms. Patel and others for the Acis team?

MS. PATEL: Good morning, Your Honor. Rakhee Patel on behalf of Acis Capital Management.

THE COURT: Good morning.

All right. Mr. Clubok, I see you there for the UBS team, correct?

MR. CLUBOK: Yes. Good morning, Your Honor.

THE COURT: Good morning.

All right. For Patrick Daugherty, I think I see Mr. Kathman out there, correct?

MR. KATHMAN: Good morning, Your Honor. Jason Kathman on behalf of Patrick Daugherty.

THE COURT: All right. Good morning.

All right. What about HarbourVest? Anyone on the line for HarbourVest?

MS. WEISGERBER: Good morning, Your Honor. Erica

Weisgerber for HarbourVest.

THE COURT: All right. Very good.

All right. Well, I'll now, I guess, turn to some of the Objectors that I haven't hit yet. Who do we have appearing for Mr. Dondero this morning?

MR. TAYLOR: Good morning, Your Honor. Clay Taylor of the law firm of Bonds Ellis Eppich Schaefer & Jones appearing on behalf of Mr. Dondero. I have with me, of course, Mr. Dondero, who is in the room with me. Dennis Michael Lynn, John Bonds, and Bryan Assink are also appearing on behalf of Mr. Dondero.

THE COURT: All right. Thank you, Mr. Taylor.

All right. For the Dugaboy Trust and Get Good Trust, do we have Mr. Draper and others?

MR. DRAPER: Yes, Your Honor. This is Douglas Draper on the line.

THE COURT: All right. Good morning.

MR. DRAPER: Good morning, Your Honor.

THE COURT: All right. What about what I'll call Highland Fund, the Highland Funds and Advisors? Do we have Mr. Rukavina this morning, or who do we have?

MR. RUKAVINA: Your Honor, good morning. Davor Rukavina and Julian Vasek for the Funds and Advisors. I can make a full appearance, but it's the parties listed on Docket 1670.

THE COURT: All right. Thank you, Mr. Rukavina.

All right. What about --

MR. HOGEWOOD: Your Honor?

THE COURT: Go ahead.

MR. HOGEWOOD: Your Honor, Lee Hogewood. I'm sorry, Your Honor. Lee Hogewood is also here on behalf of the same parties.

THE COURT: All right. Thank you, sir.

All right. What about NexPoint Real Estate Partners, HCRE Partners?

MS. DRAWHORN: Good morning, Your Honor. Lauren Drawhorn with Wick Phillips on behalf of NexPoint Real Estate Partners, LLC. I'm also here on behalf of the NexPoint Real Estate entities which are listed on Docket 1677, and NexBank, which is -- their objection is 1676.

THE COURT: All right. Thank you.

All right. Let's cover some of the employees. I think I see Ms. Smith out there. Are you appearing for Mr. Ellington and Mr. Leventon?

MS. SMITH: Yes, Your Honor. Frances Smith with Ross & Smith, along with Debra Dandeneau of Baker McKenzie, on behalf of Scott Ellington, Isaac Leventon, Thomas Surgent, and Frank Waterhouse.

THE COURT: All right. Could you spell the last name of your co-counsel from Baker McKenzie? I didn't clearly get

that.

MS. SMITH: Yes, Your Honor. It's Debra Dandeneau, D-A-N-D-E-N-N-A-U [sic].

THE COURT: Okay. Thank you.

All right. CLO Holdco, do we have you appearing this morning?

MR. KANE: Your Honor, John Kane on behalf of CLO Holdco.

THE COURT: Thank you, Mr. Kane.

All right. I know we had a different group of current or former employees -- Brad Borud, Jack Yang -- and some joining parties: Kauffman, Travers, Deadman. Who do we have appearing for those? (Pause.) Anyone? If you're appearing, we're not hearing you. Go ahead.

MR. KATHMAN: Good morning, Your Honor. Jason Kathman. I represent Mr. Deadman, Mr. Travers, and Mr. Kauffman as well.

THE COURT: Okay. Thank you. And I can't remember who represents Mr. Borud and Yang. Someone separately.

MR. KATHMAN: It's Mr. Winikka, Your Honor.

THE COURT: Oh, Mr. Winikka.

MR. KATHMAN: And I haven't scrolled through to see whether he's with -- in the 120 people signed in this morning. But I believe that objection has been resolved. I think Mr. Pomerantz will probably address that later. So Mr. Winikka

may not be appearing.

THE COURT: Okay. All right. Well, anyone for the IRS?

MR. ADAMS: Good morning, Your Honor. David Adams, Department of Justice, on behalf of the United States and its agency, the Internal Revenue Service.

THE COURT: Thank you, Mr. Adams.

For the U.S. Trustee, who do we have appearing this morning? (No response.) I'm not hearing you. If you're trying to appear, you must be on mute. (No response.) All right. Well, I suspect at some point we'll hear from the U.S. Trustee, even though I don't hear anyone now.

At this point, I will open it up to anyone else who wishes to appear who I failed to call.

MS. MATSUMURA: Your Honor, this is Rebecca Matsumura from King & Spalding representing Highland CLO Funding, Ltd. Thank you.

THE COURT: All right. Thank you, Ms. Matsumura. HCLOF.

Anyone else?

MR. HELD: Your Honor, this is Michael Held with the law firm of Jackson Walker, LLP on behalf of the office landlord, Crescent TC Investors, LP.

THE COURT: All right. Thank you, Mr. Held.

MR. HELD: Thank you, Your Honor.

THE COURT: Okay. Any other lawyer appearances?

All right. Well, again, if there's anyone out there who did not get to appear, maybe we'll hear from you at some point as the day goes on.

All right. Mr. Pomerantz, this is an important day, obviously. How did you want to begin things?

MR. POMERANTZ: So, Your Honor, I have a brief opening to talk about what I plan to do, and a little more lengthy opening, and it'll be come clear. So if I may proceed, Your Honor?

THE COURT: You may.

MR. POMERANTZ: Your Honor, we're here to request that the Court confirm the Debtor's Fifth Amended Plan of Reorganization, as modified. The operative documents before Your Honor are the Fifth Amended Plan, as modified, that was filed along with our pleadings in support of confirmation on January 22nd and the minor amendments that we filed on February 1st.

Here is my proposal on how we can proceed this morning. I would intend to provide the Court with an opening statement that would last approximately 20 minutes. And then after any other party who desires to make an opening statement, I would propose that the Debtor put on its evidence that it intends to rely on in support of confirmation. The evidence consists of the exhibits that the Debtor filed with its witness and

exhibit list on January 22nd and certain amendments that we filed yesterday.

We would also put on the testimony of the following witnesses: Jim Seery, the Debtor's chief executive officer, who Your Honor is very familiar with, and also a member of Strand's board of directors; John Dubel, a member of Strand's board of directors; and Mark Tauber, a vice president with Aon Financial Services, the Debtor's D&O broker.

We have also submitted the declaration of Patrick Leatham, who is with KCC, the Debtor's balloting agent. And we don't intend to put Mr. Leatham on the stand, but he is available on the WebEx for cross-examination, to the extent necessary.

I propose that I would leave the bulk of my argument, which includes going through the Section 1129 requirements for plan confirmation, as well as responding to the remaining outstanding objections, until my closing argument.

With that, Your Honor, I will pause and ask the Court if Your Honor has any questions before I proceed.

THE COURT: I do not have questions, so your method of going forward sounds appropriate. You may go ahead.

MR. POMERANTZ: Thank you, Your Honor.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: As I indicated, Your Honor, we stand here side by side with the Creditors' Committee asking that the Court confirm the Debtor's plan of reorganization.

As Your Honor is well aware, this case started in December in -- October 2019, was transferred to Your Honor's court in December 2019, and has been pending for approximately 15 months.

On January 9, 2020, I stood before Your Honor seeking the approval of the independent board of directors of Strand, the general partner of the Debtor, pursuant to a heavily-negotiated agreement with the Committee. And as the Court has remarked on occasions throughout the case, the economic stakeholders in this case believed that the installation of a new board consisting of highly-qualified restructuring professionals and a bankruptcy judge, a former bankruptcy judge, was far more attractive than the alternative, which was appointment of a trustee. And upon approval of the settlement, members of the board -- principally, Mr. Seery -- testified that one of the board's goals was to change the culture of litigation that plagued Highland in the decade before filing and threatened to embroil the Debtor in continued litigation if changes were not made.

And as Your Honor is well aware, the last 14 months have not been easy. The board took its role as an independent fiduciary extremely seriously, much to the consternation of the Committee at times, and more recently, to the consternation of Mr. Dondero and his affiliated entities.

And what has the Debtor, under the leadership of the

board, been able to accomplish during this case? The answer is a lot more than many parties believed when the board was installed.

The Debtor reached a settlement with the Redeemer Committee, resolving disputes that had been litigated for many years, in many forums, and that resulted in an arbitration award that was the catalyst for the bankruptcy filing.

Participating in a court-ordered mediation at the end of August 2020 and September, the Debtor reached agreement with Acis and Josh Terry. The Court is all too familiar with the years of disputes between the Debtor and Acis and Josh Terry, which spanned arbitration proceedings and an extremely combative Chapter 11 that Your Honor presided over.

The Debtor next reached an agreement with HarbourVest regarding their assertion of over $300 million of claims against the estate. The HarbourVest litigation stemmed from its investment in the Acis CLOs and would have resulted in complex, fact-intensive litigation which would have forced the Court to revisit many of the issues addressed in the Acis case.

And perhaps most significantly, Your Honor, the Debtor was able to resolve disputes with UBS, disputes which took the most time of any claim in this case, through a contested stay relief motion, a hotly-contested summary judgment motion, and a Rule 3018 motion.

While the Debtor and UBS hoped to file a 9019 motion prior to the commencement of the hearing, they were not able to do so. However, I am now in a position to disclose to the Court the terms of the settlement, which is the subject of documentation acceptable to the Debtor and UBS. The settlement provides for, among other things, the following terms:

UBS will receive a $50 million Class 8 general unsecured claim against the Debtor.

UBS will receive a $25 million Class 9 subordinated general unsecured claim against the Debtor.

UBS will receive a cash payment of $18.5 million from Multi-Strat, which was a defendant and the subject of fraudulent transfer claims.

The Debtor will use reasonable efforts to assist UBS to collect its Phase I judgment against CDL Fund and assets CDL Fund may have.

The parties will also agree to mutual and general releases, subject to agreed carve-outs.

And, of course, the parties will not be bound until the Court approves the settlement pursuant to a 9019 motion we would hope to get on file shortly.

I am also pleased to let the Court know -- breaking news -- that this morning we reached an agreement to settle Patrick Daugherty's claims. I would now like to, at the request of

Mr. Kathman, read into the record the Patrick Daugherty settlement.

Under the Patrick Daugherty settlement, Mr. Daugherty will receive a $750,000 cash payment on the effective date. He will receive an $8.25 million general unsecured claim, and he will receive a $2.75 million Class 9 subordinated claim.

The settlement of all claims against the Debtor and its affiliates -- and affiliates will be defined in the documents -- with the exception of the tax claim against the Debtor, Mr. Dondero, and Mr. Okada -- and for the avoidance of doubt, except as I describe below, nothing in the settlement is intended to affect any pending litigation Mr. Daugherty has against Mr. Dondero, Scott Ellington, Isaac Leventon, Marc Katz, Michael Hurst, and Hunton Andrew Kurth.

Mr. Daugherty will release the Debtor and its affiliates and current employees for all claims and causes of action, except for the agreements I identify below, and dismiss all current employees as to pending actions. We believe this only applies to Thomas Surgent and no other employee is implicated.

Mr. Surgent and other employees, including but not limited to David Klos, Frank Waterhouse, Brian Collins, Lucy Bannon, and Matt Diorio, will receive releases similar to the covenant in Paragraph 1D of the Acis settlement agreement, which essentially provided the release would go away if they assisted anyone in pursuing claims against Mr. Daugherty.

Highland and the above-mentioned parties will accept service of any subpoenas and acknowledge the jurisdiction of the Delaware Chancery Court for the purposes of accepting any subpoenas. And for the avoidance of doubt, Highland will accept service on behalf of the employees only in their capacity as such.

Highland will also use material -- will use reasonable efforts at no material cost to assist Daugherty in vacating a Texas judgment that was issued against him. We've also looked at a form of the motion and believe we have agreed on the form of the motion.

Highland, its affiliates, and current employees will covenant and agree they will not pursue or seek to enforce the injunction and the Texas judgment against Daugherty.

And lastly, Daugherty will not be able to settle any claims for negligence or other claims that might be subject to indemnification by the Debtor or any successor.

Accordingly, Your Honor, other than the claims of Mr. Dondero and his related entities, and the unliquidated claims of certain employees, substantially all claims have been resolved in this case, a truly remarkable achievement.

Separate and apart, Your Honor, from the work done resolving the claims, the Debtor, under the direction of the independent board, has worked extremely hard to develop a plan of reorganization.

After the independent board got its bearings, it started to work on various plan alternatives. And the board received a lot of pressure from the Committee to go straight to a plan seeking to monetize assets like the one before Your Honor today. However, the board believed that before proceeding to do so and go down an asset monetization path, it should adequately diligence all alternatives, including a continuation of the current business model, a reorganization sponsored by Mr. Dondero and his affiliates, a sale of the Debtor's assets, including a sale to Mr. Dondero.

In June 2020, plan negotiations proceeded in earnest, and the Debtor started to negotiate an asset monetization plan with the Committee, while still pursuing other alternatives.

Preparation of an asset monetization plan is not typically a complicated process. However, creating the appropriate structure for a business like the Debtor's was extremely complicated, because of the contractual, regulatory, tax, and governance issues that had to be carefully considered.

At the same time the Committee negotiations were proceeding down that path, Mr. Seery continued to spend substantial time trying to negotiate a grand bargain plan with Mr. Dondero. It is not an exaggeration to say that over the last several months Mr. Seery has dedicated hundreds of hours towards a potential grand bargain plan.

And why did he do it? Because he has always believed that

a global restructuring among all parties was the best opportunity to fully and finally resolve the acrimony that continued to plague the Debtor.

Notwithstanding Mr. Seery's and the independent board's best efforts, they were not able to reach consensus on a grand bargain plan, and the Debtor filed the plan, the initial plan, on August 12th, which ultimately evolved into the plan before the Court today.

The Court conducted an initial hearing on the disclosure statement on October 27th, and then ultimately approved -- the Court approved the disclosure statement at a hearing on November 23rd.

While the Debtor continued to work towards resolving issues with the Committee with the filed plan, Mr. Dondero, beginning to finally see that the train was leaving the station, started to do whatever he could to get in the way of plan confirmation.

He objected to the Acis settlement. When his objection was overruled, he filed an appeal.

He objected to the HarbourVest settlement. When his objection was overruled, he had Dugaboy file an appeal.

He started to interfere with the Debtor's management of its CLOs, stopping trades, refusing to provide support, and threatening Mr. Seery and the Debtor's employees.

He had his Advisors and Funds that he owned and controlled

file motions that Your Honor said was a waste of time.

He had those same Funds and Advisors threaten to terminate the Debtor as a manager, in blatant violation of the Court's January 9, 2020 order.

His conduct was so egregious that it warranted entry of a temporary restraining order and preliminary injunction against him. And of course, he has appealed that ruling as well.

But that was not all. He brazenly threw out his phone, in what the Court has remarked was spoliation of evidence, and he violated the TRO in other ways, actions for which he will answer for at the contempt hearing scheduled later this week.

And, of course, he and his pack of related entities have filed a series of objections. We have received 12 objections to the plan, Your Honor, excluding three joinders. And as I mentioned, we have been pleased to report that we've been able to resolve six of them: those of the Senior Employees, those of Patrick Daugherty, those of CLO Holdco, those of the IRS, those of Texas Taxing Authorities, and those of Jack Young and Brad Borud.

The CLO Holdco objection was withdrawn in connection with the settlement reached with them in connection with the preliminary injunction hearing that the Court heard -- started to hear last week.

The Taxing Authorities' objections have been resolved by the Debtor agreeing to make certain modifications to the plan

that were included in our filing yesterday and to include certain provisions in the confirmation order to address other concerns.

The group of employees who are referred to as the Senior Employee are comprised of four individuals -- Frank Waterhouse, Thomas Surgent, Scott Ellington, and Isaac Leventon -- although Mr. Ellington and Mr. Leventon are no longer employed by the Debtor.

On January 22nd, Your Honor, we filed executed stipulations with Frank Waterhouse and Thomas Surgent. These stipulations were essentially the Senior Employee stipulations that were referred to in the plan and the disclosure statement.

And as part of those stipulations, the Debtor, in consultation with and agreement from the Committee, agreed to certain modifications of the prior version of the Senior Employee stipulation with both Mr. Waterhouse and Mr. Surgent that effectively reduced the compensation they needed to provide for the release from 40 percent to five percent of their claims.

The Debtor and the Committee believed the resolution with Mr. Surgent and with Mr. Waterhouse was fair, given the importance of these two people to the transition effort and the increased reliance upon them that the Debtor would have with the departure of Mr. Ellington and Mr. Leventon. And as

a result of that agreement, Your Honor, on January 27th, Mr. Waterhouse and Mr. Surgent withdrew from the Senior Employee objection.

Subsequently, we reached agreement with Mr. Ellington and Mr. Leventon to resolve the objections they raised with confirmation. And at Ms. Dandeneau's request, I would like to read into the record the agreement reached with both of them, and I know she will correct me if I get anything wrong.

THE COURT: Okay.

MR. POMERANTZ: Among other things, Mr. Ellington and Mr. Leventon asserted in their objection that they were entitled to have their liquidated bonus claims treated as Class 7 convenience claims under the plan, under their reading of the plan, and their understanding of communications with Mr. Seery. The Debtor disputed the entitlement to elect Class 7 based upon the terms of the plan, the disclosure statement, and applicable law. But as I said, the parties have resolved this dispute.

Mr. Ellington asserts liquidated bonus claims in the aggregate amount of $1,367,197, which, to receive convenience class treatment under anybody's analysis, would have had to be reduced to a million dollars.

Mr. Leventon asserts a liquidated bonus claim in the amount of $598,198.

If Mr. Ellington and Mr. Leventon were entitled to be

included in the convenience class, as they claimed, they would be entitled to receive 85 percent of their claim as and when the claims were allowed under the plan.

To settle the dispute regarding whether, in fact, they would be entitled to the convenience class treatment, they have agreed to reduce the percentage they would otherwise be entitled to receive from 85 percent to 70.125 percent. And as a result, Mr. Ellington's Class 7 convenience claim would be entitled to receive $701,250 if allowed, and Mr. Leventon's Class 7 convenience claim would be entitled to receive $413,175.10 if allowed.

Mr. Ellington and Mr. Leventon would reserve the right to assert that a hundred percent of their liquidated bonus claims are entitled to administrative priority, and the Debtor, the Committee, the estate and their successors, would reserve all rights to object.

If anyone did object to the allowance of the liquidated bonus claims and Mr. Ellington and/or Mr. Leventon prevailed in such disputes, then the discount that was previously agreed to -- 85 percent to 70.125 percent -- would go away and they would be entitled to receive the full 85 percent payout as essentially a penalty for litigating against them on their allowed claims and losing.

As an alternative to the estate preserving the right to object to the allowance of Mr. Ellington and Mr. Leventon's

liquidated bonus claims, the Debtor and the Committee have an option to be exercised before the effective date to just agree that both their claims will be allowed, and allowed as Class 7 convenience claims. And if that agreement was reached, then the amount of such liquidated bonus claims, they would receive a payment equal to 60 percent of their allowed convenience class claim.

In exchange, Mr. Ellington and Mr. Leventon would waive their right to assert payment of a hundred percent of their liquidated bonus claims as an administrative expense.

So, under this circumstance, Mr. Ellington would receive an allowed claim of $600,000, which is 60 percent of a million dollars, and Mr. Leventon will receive a payment on account of his Class 7 claim of $358,918.80.

Under both scenarios, Mr. Ellington and Mr. Leventon would preserve their paid time off claims that are treated in Class 6, and they would preserve their other claims in Class 8, largely unliquidated indemnification claims, subject to the rights of any party in interest to object to those claims.

Mr. Ellington will change his vote in Class 8 from rejecting the plan to accepting the plan, and Mr. Leventon would change his votes in Class 8 and Class 7 from rejecting the plan to accepting the plan. And Mr. Ellington and Mr. Leventon would withdraw any remaining objections to confirmation of the plan, and we intend to put this settlement

in the confirmation order.

Your Honor, six objections to the plan remain outstanding. One objection was filed by the Office of the United States Trustee, and the remaining five objections are from Mr. Dondero and his related entities. And I would like to put up a demonstrative on the screen which shows how all of these objections lead back to Jim Dondero.

THE COURT: All right.

MR. POMERANTZ: You see on the top left, Your Honor, there's a box in white that says A through E, which are the five remaining objections. And you can see how they relate. But all of it goes back to that orange box in the middle, Jim Dondero.

These objections, which I will address in my closing argument in detail, are not really focused on concerns that creditors are being treated unfairly, and that's because Mr. Dondero and his entities don't really have any valid claims. Mr. Dondero owns no equity in the Debtor. He owns the Debtor's general partner, Strand, which in turn owns a quarter percent of the total equity in the Debtor. Mr. Dondero's only other claim is a claim for indemnification. And as Your Honor would expect, the Debtor intends to fight that claim vigorously.

Dugaboy and Get Good have asserted frivolous administrative and unsecured claims, which I will discuss in

more detail later.

Dugaboy does have an equity interest in the Debtor, but it represents eighteen-hundredths of a percent of the Debtor's total equity.

And Mr. Rukavina's clients similarly have no general unsecured claims against the Debtor. Either his clients did not file proofs of claim or filed claims and then agreed to have them expunged. The only claims that his clients assert is a disputed administrative claim filed by NexPoint Advisors.

And the objections aren't legitimately concerned about the post-confirmation operations of the estate, to preserve equity value, how much people are getting, whether Mr. Seery is really the right person to run these estates. That's because Mr. Dondero has repeatedly told the Court that he believes his offer, which doesn't come close to satisfying claims in full in this case, is for fair value and that creditors, who are owed more than $280 million, will not receive anywhere close to the amount of their claims.

Rather, Mr. Dondero and his entities are concerned with one thing and one thing only: how to preserve their rights to continue their frivolous litigation after confirmation against the independent directors, the Claimant Trustee, the Litigation Trustee, the employees, the Claimant Trust Oversight Board, and anyone who will stand in their way. For Mr. Dondero, the decision is binary: Either give him what he

wants, or as he has told Mr. Seery, he will burn down the place.

Your Honor will hear a lot of argument today about how the -- and tomorrow, in closing -- about how the injunction, the gatekeeper, and the exculpation provisions of the plan are not appropriate under applicable law. The Debtor, of course, disagrees with these arguments, and I will address them in detail in my closing argument.

But I do think it's important to focus the Court at the outset on the January 9, 2020 order that the Court entered which addressed some of these issues. This order, which has not been appealed, which was actually agreed to by Mr. Dondero, has no expiration by its terms and will continue post-confirmation, did some things that the Objectors just refuse to recognize and accept.

It approved an exculpation for negligence for the independent directors and their agents. It provided that the Court would be the gatekeeper to determine whether any claims asserted for them -- against them for gross negligence and willful misconduct could be pursued, and if so, provided that this Court would have exclusive jurisdiction to adjudicate those claims. And it prevented Mr. Dondero and his related entities from causing any related entity to terminate any agreements with the Debtor.

I also note, Your Honor, that the Court's July 16, 2020

order approving Mr. Seery as chief executive officer and chief restructuring officer included the same exculpation and gatekeeping provision as contained in the January 29th -- January 9th order.

Your Honor, we have all come too far to allow Mr. Dondero to make good on his promise to Mr. Seery to burn down the place if he didn't get what he wanted. The Debtor deserves better, the creditors deserve better, and this Court deserves better.

That concludes my opening argument, Your Honor.

THE COURT: All right. Thank you. I had one follow-up question about the Daugherty settlement. You did not mention, is it going to be reflected in the confirmation order, is it going to be the subject of a 9019 motion, or something else?

MR. POMERANTZ: It'll be subject to a -- it'll be subject to a 9019 motion, Your Honor.

THE COURT: All right.

MR. POMERANTZ: I apologize for leaving that out.

THE COURT: All right. Thank you. Well, --

MR. KATHMAN: Your --

THE COURT: -- I appreciate that you stuck closely to your 20-minute time estimate.

As far as other opening statements today, I'm going to start with the objections that were resolved. Mr. Kathman, I

see you there. Who will speak on behalf of Patrick Daugherty and the announced settlement?

OPENING STATEMENT ON BEHALF OF PATRICK DAUGHERTY

MR. KATHMAN: Good morning, Your Honor. Jason Kathman on behalf of Mr. Daugherty.

Mr. Pomerantz correctly recited the bullet points of the settlement that we agreed to in principle this morning. There was one that he did leave off that I do want to make sure that I mention and that it's read into the record. And he read at the top end that Mr. Daugherty does maintain his ability to pursue his 2008 tax refund bonus claim, or tax refund compensation claim. If the Court will recall, there's a contingent liability out there based on how compensation was paid back in 2008 that's the subject of an IRS audit. And so the settlement expressly contemplates that those -- that that claim will be preserved and Mr. Daugherty may pursue that claim. Should the IRS have an adverse ruling and we have to pay money back, we get to preserve that claim.

And so the one thing that is preserved, Your Honor -- and the same way that Mr. Pomerantz read verbatim the words, I'm going to read verbatim the words that we've agreed to: Daugherty maintains and may pursue the 2008 tax refund compensation portion of his claim that is currently a disputed contingent liability. The Debtor and all successors reserve the right to assert any and all defenses to this portion of

the Daugherty claim. The litigation of this claim shall be stayed until the IRS makes a final determination, provided, however, Daugherty may file a motion with the Bankruptcy Court seeking to have the amount of his tax claim determined for reservation purposes as a "disputed claim" under the Debtor's plan. The Debtor and all successors reserve the right to assert any and all defenses to any such motion.

So the Debtor's plan says that they can make estimations for disputed claims. There is not currently something reserving this particular claim, so we wanted to make sure we reserve our rights to be able to have that amount reserved under the Debtor's plan. And the Debtor obviously preserves their ability to object to that.

With that, Your Honor, it is going to be papered up in a 9019, and we'll have some further things to say at the 9019 hearing, but didn't want to derail the Debtor's confirmation hearing this morning.

THE COURT: All right. And --

MR. POMERANTZ: And Mr. Kathman is -- Mr. Kathman is correct. I neglected to mention that provision, but he is -- he read it, and that's agreed to.

THE COURT: All right. And I did not hear anything about Mr. Daugherty's vote on the plan. Is there an agreement to change or a motion to change the vote from no to yes?

MR. KATHMAN: Your Honor, that wasn't, I think,

directly -- and Mr. Pomerantz can correct me if I'm wrong, or Mr. Morris, actually, probably more could -- that wasn't directly addressed, but I think the answer to that is probably they don't need our vote.

THE COURT: Okay.

MR. KATHMAN: I think they have enough votes in that class to carry.

THE COURT: Okay.

MR. KATHMAN: But the answer directly is that that wasn't specifically addressed one way or the other.

THE COURT: All right.

MR. POMERANTZ: That is correct, Your Honor. We would, of course, not oppose Mr. Daugherty changing his vote, but as Your Honor saw in the ballot summary, we are way over the amount in dollar amounts of claims. But if they wanted to change their vote, we wouldn't oppose.

THE COURT: All right. Well, --

MR. KATHMAN: Your Honor, I have -- I have the benefit of Mr. Daugherty. He is on -- I should note, Mr. Daugherty is on the hearing this morning. He just let me know that he is willing to change his vote. If the Debtor were to so make a motion, we're fine changing our vote to in favor of the plan.

THE COURT: All right. All right. Well, we'll get the ballot agent declaration or testimony later. At one time

when I had checked, there was a numerosity problem but not a dollar amount problem. And it sounds like that is no longer an issue, perhaps because of the employee votes, or I don't know.

But, all right. Well, thank you.

MR. POMERANTZ: Your Honor, there is still a numerosity problem.

THE COURT: Okay.

MR. POMERANTZ: There's not a dollar amount problem.

THE COURT: Okay.

MR. POMERANTZ: But we'll address that and cram-down in closing.

THE COURT: All right. Very good.

All right. Well, I want to hear from the -- what we've called the Senior Employee group. Is Ms. Dandeneau going to confirm the announcement of Mr. Pomerantz?

MS. DANDENEAU: Yes, Your Honor. I confirm that Mr. Pomerantz's recitation of the terms to which we've agreed is accurate.

THE COURT: All right. Very good.

All right. I suppose I should circle back to UBS. We've, of course, heard in prior hearings the past few weeks that there was a settlement with UBS, but Mr. Clubok, could I get you to confirm what Mr. Pomerantz announced earlier about the UBS settlement?

MR. CLUBOK: Yes. Good morning again, Your Honor. Yes, we have reached a settlement, and it's just -- and it's been approved internally at UBS and obviously by the Debtor. It's just subject to the final documentation. And we are working very closely with the Debtor to try to do that as quickly as possible.

THE COURT: All right. Thank you.

All right. Well, let me go, then, to other opening statements. Is there anyone else who at this time wishes to make an opening statement? And, you know, for the pending objectors, please, no more than 20 minutes.

MR. CLEMENTE: Your Honor? Your Honor, if I may, it's Matt Clemente on behalf of the Committee.

THE COURT: Okay.

MR. CLEMENTE: I'd be very brief, but I would like to make some remarks to Your Honor. It'll be less than five minutes.

THE COURT: All right. Go ahead.

MR. CLEMENTE: Thank you, Your Honor.

OPENING STATEMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

MR. CLEMENTE: Again, for the record, Matt Clemente; Sidley Austin; on behalf of the Official Committee of Unsecured Creditors.

Your Honor, to be clear, the Committee fully supports confirmation of the Debtor's plan and believes the plan is

confirmable and should be confirmed.

Although it has taken us quite some time to get to this point, Your Honor, and as Mr. Pomerantz referred, the Debtor's business is somewhat complex, the plan is remarkably straightforward, Your Honor, and has only been made complicated by the various objections filed by Mr. Dondero's tentacles.

At bottom, Your Honor, the plan is designed to recognize the reality of the situation that the Committee has continually been expressing to Your Honor, and that is the overwhelming amount of creditors in terms of dollars are litigation creditors, creditors who are here entirely because of the fraudulent and other conduct of Mr. Dondero and his tentacles.

The other third-party creditors, Your Honor, by and large are those collateral to these litigation claims in terms of true trade creditors and service providers.

Recognizing this fact, Your Honor, the plan contains an appropriate convenience class, which, in the Committee's view, provides a fair way to capture a large number of claims and appropriately recognizes the distinction between those claims and the large litigation claims. And the holders of these large litigation claims, including now Mr. Daugherty, have voted in favor of allowing this convenience class treatment.

Your Honor, after distributions are made to the

administrative creditors, the priority creditors, the secured creditors, and the convenience creditors, the remainder goes to general unsecured creditors who will control how this value is realized. These are the large litigation creditors.

Additionally, Your Honor, recognizing the possibility of recovery in excess of general unsecured claims plus interest, and to thwart, from the Committee's perspective, what would have undoubtedly been an argument by one of the Dondero tentacles that the general unsecured creditors could be paid more than they are owed, the plan provides for a contingent interest to kick in after payment in full for interests of all prior claims.

Your Honor, this is the sum and substance of the plan. At bottom, fairly straightforward. And the true creditors, Your Honor, have voted overwhelmingly in favor of the plan. Class 8 has voted to support the plan. Class 7 has voted to accept the plan. And now I believe, with Mr. Daugherty's settlement, one hundred percent in amount of Class 8, non-insider, non-Dondero-controlled or (audio gap) have voted in favor of the plan.

To be clear, as Your Honor pointed out and as Mr. Pomerantz referenced, there is not numerosity in Class 8, Your Honor, but that is driven, as Your Honor will see, from approximately 30 no-votes of current employees who the Committee believes are not owed any amounts and therefore they

will not be receiving payments under the plan, yet they voted against the plan. So although we have a technical cram-down plan from the Class 8 perspective, Your Honor, the plan voting reflects the reality that the economic parties in interest overwhelmingly support the plan.

So, Your Honor, cutting through the machinations of the Dondero tentacles, we do have a fairly straightforward plan and a plan that the Committee believes is confirmable and should be confirmed.

Your Honor, since I've been in front of you for over a year now, I've referred to the goals of the Committee in this case, and the goals are straightforward in terms of expressing them but can be difficult in reality to implement them. The Committee's goals have been two-fold: to maximize the value of the estate and therefore the recoveries for its constituency, and to disentangle from the Dondero (audio gap).

As with all things Highland, although these goals are straightforward, they're remarkably difficult to achieve, given the Dondero tentacles. However, the Committee strongly believes the plan achieves these two goals.

First, the plan provides a credible path to maximize recovery with Mr. Seery, who has gotten to know the assets and who has performed skillfully and credibly throughout this very difficult process. It is a difficult set of assets and complex set of assets, as Your Honor knows very well.

To be sure, there is uncertainty associated with the Debtor's projections, but that is inherent in the nature of the assets of the Debtor, and frankly, is inherent in the nature of projections themselves. And Mr. Dondero and his tentacles will point to the downside, potentially, in those projections, but the Court will be reminded that there is also potential upside in those projections, an upside that would inure to the benefit of the general unsecured claims.

Second, Your Honor, although it is seemingly impossible to free yourself from the Dondero web until every single one of the 2,000 barbed tentacles is painfully removed, if that's even possible, Your Honor, the Reorganized Debtor, the Claimant Trust, the Claimant Trustee, the Litigation Sub-Trust, the Litigation Trustee, and the Oversight Board construct and mechanisms is a structure that the Committee believes provides the creditors with the best possibility to do so, and that is to deal with what will undoubtedly be a flurry of attacks from Mr. Dondero and his tentacles.

This is a virtual certainty, Your Honor. The creditors have seen this movie before and Your Honor has seen this movie before. They have seen Mr. Dondero make and break promises. They have seen Mr. Dondero attempt to bludgeon adversaries into submission in order to accept his offerings, and they have heard Mr. Dondero say that which he has said in this court during the preliminary injunction hearing --

specifically, that the Debtor's plan "is going to end up in a myriad of litigation."

The creditors are steeled in their will to be rid of Mr. Dondero, and they're confident in this structure to do so.

To be clear, Your Honor, what is before the Court today for confirmation is the Debtor's plan, not some other plan that no one supports other than Mr. Dondero and his tentacles. The question isn't whether Mr. Dondero has a better proposal -- and footnote, Your Honor, the answer is he does not, both from a qualitative and quantitative perspective -- but whether the plan before the Court is in the best interest of creditors and should be confirmed. The Committee strongly believes it is, and should, and all the Committee members support confirmation of the Debtor's plan.

Recognizing Mr. Dondero's behavior, Your Honor, and threats regarding how he will behave in the future, there are certain provisions in the plan that are of critical importance to the creditors. Of course, all provisions in the plan are extremely important, Your Honor, but as Mr. Pomerantz referenced, the creditors need the gatekeeper, exculpation, and injunction provisions.

The reason is obvious, and is emphasized by the supplemental objection filed just yesterday by some of Mr. Dondero's tentacles -- namely, the Dugaboy and the Get Good Trusts. And I quote, Your Honor: "It is virtually certain

that, under the Debtor's plan, there will be years of litigation in multiple adversary proceedings, appeals, and collection activities, all adding substantial uncertainty and delay."

Additionally, Your Honor has seen from the proceedings in this case and has expressed frustration at numerous times at the myriad and at times baseless and borderline frivolous and out of touch with reality suits and objections and proceedings that the Dondero tentacles bring. The creditors need the gatekeeper, exculpation, and injunction provisions to preserve and protect value. And the record, I think, to this point is clear, and will be further made clear through the confirmation proceedings, that the protections are appropriate and entirely within this Court's authority to grant.

In sum, Your Honor, the Committee fully supports confirmation of the plan. The Committee believes it is confirmable and should be confirmed, and two classes of creditors and the overwhelming amount of creditors in terms of dollars agree.

That's it, Your Honor. Unless you have questions for me, I have nothing further at this time.

THE COURT: All right. Thank you, Mr. Clemente.

MR. CLEMENTE: Thank you, Your Honor.

THE COURT: All right. Who else wishes to be heard?

MR. DRAPER: Your Honor, this is Douglas Draper. I'd

like to be heard. I have a few -- I'll take five minutes, at most --

THE COURT: All right. Go ahead.

MR. DRAPER: -- and just focus on a few things.

OPENING STATEMENT ON BEHALF OF THE GET GOOD TRUST AND DUGABOY INVESTMENT TRUST

MR. DRAPER: I'm going to focus my opening remarks on the releases, the exculpations, and channeling injunctions in the plan. I'm not waiving my other objections, but, rather, trying not to subject the Court to hearing the same argument from multiple lawyers.

The good thing about the law is that it's absolute in certain respects. It does not matter who is asserting a legal protection, the law applies it. For example, a serial killer is entitled to a *Miranda* warning and a protection against unlawful search and seizure. The law does not allow tainted evidence or an unlawful admission into evidence, notwithstanding the fact that the lack of admission of that evidence may lead to the freeing of that serial killer.

Today, you must make an independent evaluation as to whether the plan complies with 1129 and applicable law. The decision must be made notwithstanding the fact that it is being made by a Dondero entity. It's not being -- it must be applied notwithstanding the fact that it's being made by me.

We contend that the plan does not meet the hurdle and

confirmation should be denied, notwithstanding the fact that the infirmity with the plan is asserted by me and notwithstanding the fact that Mr. Pomerantz and the unsecured creditors have overwhelming support.

We all know 1141, the Barton Doctrine, and 544 -- 524 provide injunctions and protections for certain parties associated with the Debtor. Had the plan merely referenced these sections and stated that the injunction, et cetera, shall not exceed those allowed pursuant to *Pacific Lumber*, I would not be making this argument.

Instead, we see a plan that has a definition of Exculpated Parties, Released Parties, Related Parties, that exceed the protections afforded by the Bankruptcy Code, the Barton Doctrine, and 524.

We have a grant of jurisdiction and oversight that exceeds that allowed under *Craig's Store*, the *Craig's Store* line of cases.

We have releases of claims against non-debtor parties, such as Strand, who is, under the Bankruptcy Code, under 723, liable for the debts of the Debtor.

The plan, with its expansive releases, released parties, grant of injunctions, exculpations and channeling injunctions, are impermissible under Fifth Circuit case law. And I would ask the Court to look closely at those definitions, who is -- who the law allows to be exculpated and released and who the

law specifically prohibits being exculpated and released, and, in fact, apply the *Pacific Lumber* line of -- case, as well as 524 and the Bankruptcy Code when you look at these issues.

Notwithstanding the overwhelming so-called support by the creditors at issue, the law must be applied, and it must be applied pursuant to what the Fifth Circuit requires.

THE COURT: All right. Thank you, Mr. Draper.

Other Objectors with opening statements?

MR. RUKAVINA: Your Honor, Davor Rukavina. Briefly?

THE COURT: Okay.

OPENING STATEMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

MR. RUKAVINA: Your Honor, I represent various funds, including three of which have independent boards. The Debtor manages more than $140 million of those funds, and the Debtor manages around a billion dollars in CLOs.

Whether I am a tentacle of Mr. Dondero or not -- I'm not, since there's an independent board -- the fact remains that the Debtor wants to manage these assets and my clients' money post-assumption and post-confirmation with effective judicial immunity. So our fundamental problem with this plan is the assumption of those contracts under 365(c) and (b). I think we'll have to wait for the evidence to see what the Debtor proposes and has, and I will reserve, I guess, the balance of my arguments on that to closing, depending on what the evidence is.

But I don't want the Court to lose sight of the fact that what the Debtor wants to do is, in contravention of our desires, continue managing our assets post-confirmation, even as it liquidates, just to make a buck. It's our money, Your Honor, and whether we're Dondero or not, we're a couple hundred million, probably, or more, of third-party investment professionals, pension funds, et cetera, and we should not be all tainted without evidence as a tentacle of someone whom, I'll remind everyone here, built a multi-billion dollar company and made a lot of money for people.

The second objection, Your Honor, goes to the Class 8 rejection. It sounds like there's still a problem with the number of creditors, even though certain creditors have switched their votes. That raises now the fair and equitable standard, together with the undue discrimination and the absolute priority rule. I think we'll have to let the evidence play out, and I'll reserve the balance of my closing or the balance of my remarks to closing on that issue.

The third issue, Your Honor, is the same exculpation and release and injunction provisions that Mr. Draper raised. Those are legal matters that I'll discuss at closing, but I do note that the Debtor purports to prevent my clients from exercising post-assumption post-confirmation rights, period. And that's just inappropriate, because if the Debtor wants the benefits of these agreements, well, then of course it has to

comply with the burdens. And to say *a priori* that anything that my clients might do post-confirmation would be the result of a bad-faith Mr. Dondero strategy, there's no basis for that and that's not the basis on which my clients' rights in the future, when there is no bankruptcy estate and there is no bankruptcy jurisdiction, can be enjoined.

And the final point, Your Honor, entails this channeling injunction. I'll talk about it during closing. It is inappropriate under 28 U.S.C. 959. This is not a Barton Doctrine trustee issue, this is a debtor-in-possession, and a channeling injunction, the Court will have no jurisdiction post-confirmation.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Does Mr. Dondero's counsel have an opening statement?

MR. TAYLOR: I do, Your Honor. I'll keep it brief. This is Clay Taylor on behalf of Mr. Dondero.

THE COURT: Okay.

OPENING STATEMENT ON BEHALF OF JAMES D. DONDERO

MR. TAYLOR: Your Honor, the plan is clear in some respects, and I'm not going to belabor these points, as other objecting counsel have already addressed this. But the plan does provide for non-debtor releases, and it provides for non-debtor releases for parties beyond that which is allowed by *Pacific Lumber* and under the Code.

It also provides for exculpations of non-debtor parties in excess of that which is allowed under the Code and applicable case law.

Finally -- or, not finally, but third, it requires this Court to keep a broad retention of post-confirmation jurisdiction that could go on for years, and that is improper.

Finally, it requires the parties to submit to the jurisdiction of this Court via a channeling injunction, which we believe is beyond that which is allowed under applicable Fifth Circuit precedent.

What is clear, what the evidence will show -- and I thought it was interesting that none of the proponents of plan confirmation ever talk about what the evidence is going to show. They testified a lot before Your Honor, but they didn't ever talk about what the evidence would show. What the evidence will show is this plan was solicited via a disclosure statement that told all the unsecured creditors, we project that you're going to receive 87 cents on the dollar on your claim.

About two months later, and this was Friday of this past week, they changed those projections, and those projections then showed unsecured creditors, under a plan analysis, that they were going to receive 62 cents on the dollar. That is in contrast to the liquidation analysis that had been prepared just two months prior showing that, under a hypothetical

Chapter 7 liquidation analysis, that the unsecured creditors would receive 65 cents on the dollar. Obviously, 62 cents is less than 65 percent.

Realizing they had a problem, I guess, over the weekend, they changed last night, the night before confirmation, and sent us some new projections that now show that the unsecured creditors under a plan would receive 71 cents on the dollar.

Your Honor, what the evidence will show, and it is Highland's burden to show this, is that -- that they meet the best interests of the creditors. And part of that is that they will do better under a plan rather than under a hypothetical Chapter 7.

Quite simply, they don't have the evidence, nor have they done the analysis to be able to prove that to this Court.

What the evidence will also show is clear is that Mr. Seery, under the plan analysis, is scheduled to receive at least $3.6 million over just the first two years of this plan if it doesn't go any further. And that's just for monthly payouts of $150,000 per month. That's not including a to-be-agreed-upon success fee structure, which hasn't been negotiated yet. And if it hasn't been negotiated yet, it can't be analyzed yet to see if those costs would exceed their benefits and therefore drive the return down such that a hypothetical Chapter 7 trustee could do better.

There is also going to be additional costs for the

Litigation Trustee and the fees that they are going to charge. There's going to be an Oversight Committee, and those fees are also to be negotiated. There's also U.S. Trustee fees, which Mr. Seery tells us that he has calculated within the liquidation and plan analysis numbers, albeit both myself and Mr. Draper, as the evidence will show, have asked for the rollups that come behind the liquidation and plan analysis in each instance of the three iterations that have been done in two months, and we have been denied that information. That evidence is not going to come in before this Court, and without that rollup information, this Court can't make an independent verification that this meets the best interests of the creditor and better than a hypothetical Chapter 7 trustee.

What the evidence will also show, make an assumption that, under a plan analysis, that Mr. Seery will be able to generate higher returns on the sale of the assets of the Highland debtor and its subsidiaries, to the neighborhood of $60 million higher. There is no independent verification of this. There has been no due diligence done. It was merely an assumption done by Mr. Seery and his advisors, and we submit that they will not have the evidence to show that they can beat a Chapter 7 trustee.

This Court does have an alternative before it. There is an alternative plan that has been filed under seal. The Court is aware of it. And it guarantees that creditors will receive

at least 65 cents on the dollar. Moreover, those claims are guaranteed -- and they're going to be secured that they will be paid that money.

MR. POMERANTZ: Your Honor, this is under -- this is under seal. And I never interrupt somebody's argument, but this plan is under seal for a reason, Your Honor, and I object to any description of the terms of a plan that's not before Your Honor and is under seal.

THE COURT: Okay. I sustain that objection.

MR. TAYLOR: Your Honor has a means to cut the Gordian knot of the litigation and appeals before it and to ensure that there is certainty for creditors. It would massively reduce the administrative fee burn that is contemplated under the proposed plan before the Court. As I've mentioned, it's at least $3.6 million just in monthly fees for Mr. Seery alone. All of the rest of the fees are yet to be determined and to be negotiated. I don't see how any analysis could have been done regarding the administrative fee burn that is going to happen over the two years and potentially much further as this case draws on.

For those reasons alone, Your Honor, we believe that the plan confirmation should be denied and this Court should look at the alternatives before it.

MR. KATHMAN: Can I say something before --

MR. TAYLOR: Thank you, Your Honor.

THE COURT: All right. Thank you.

All right. Have I missed any Objectors?

MR. KATHMAN: Your Honor?

MS. DRAWHORN: Yes, Your Honor.

THE COURT: Okay. Ms. --

MR. KATHMAN: Your Honor, if I could spend just one minute, and I -- we -- I -- we filed a joinder on behalf of Mr. -- or, Jason Kathman on behalf of Davis Deadman, Todd Travers, and Paul Kauffman.

THE COURT: Uh-huh.

OPENING STATEMENT ON BEHALF OF DAVIS DEADMAN, TODD TRAVERS, AND PAUL KAUFFMAN

MR. KATHMAN: Mr. Pomerantz had noted, I think, at the front end that the Debtor amended their plan that resolved those objections. I just want to say for the record that those had been resolved.

And with that, Your Honor, may I be dismissed?

THE COURT: Yes, you may. Thank you.

MR. KATHMAN: Thank you, Your Honor.

THE COURT: All right. Was Ms. Drawhorn speaking up to make an opening statement?

MS. DRAWHORN: Yes.

THE COURT: Go ahead.

MS. DRAWHORN: Yes, Your Honor.

THE COURT: Go ahead.

OPENING STATEMENT ON BEHALF OF THE NEXPOINT PARTIES

MS. DRAWHORN: Just very briefly, Lauren Drawhorn on behalf of NexPoint Real Estate Partners, the NexPoint Real Estate entities, and NexBank.

Just a very brief opening. Just wanted to note that it seems that the Debtor's and the Committee's position seems to be if there's some way, any way, to connect an entity to Mr. Dondero, then they don't need to perform any true evaluation of potential claims or that party's rights or their concerns, and that results in ignoring not only the merits of many claims but also the basic requirements of due process and the statutes, the Bankruptcy Code, and the case law.

We filed objections that were focused largely on the injunctions and the releases, and then also the proposed subordination provisions.

Two of my clients, one of them has a proof of claim, and while it is being disputed, that claim is out there and should get -- be entitled to be pursued and defended, and many of the injunctions appear to prevent my client from doing so.

Similarly, it was mentioned that NexBank, in the demonstrative, had a terminated service agreement, but there's periods of time for which no services were provided but payment was made, and that's a potential admin claim that has been raised. And the injunction, again, appears to prevent my clients from pursuing these claims.

So I think, despite the general response to any connection to Dondero means there's no merit, that's not what we're here for today. We need to really look at the merits of all potential claims and all -- the rights of all parties and the -- how the injunction and release provisions prevent that and how they don't comply with the required law.

And, of course, we join in with many of the other objections, but that's my main point for the opening today.

THE COURT: All right. Thank you.

All right. I think I have covered all of the at least pending objections except the U.S. Trustee. I'll check again to see if someone is out there for the U.S. Trustee. (No response.) All right. If you're there, we're not hearing you. You're on mute.

Okay. Any other attorneys out there who wish to make an opening statement?

All right. Well, I'll turn back to Mr. Pomerantz. You may call your first witness.

MR. POMERANTZ: Okay. I will turn the virtual podium over to my partner, John Morris, who will be putting on our witnesses.

THE COURT: All right. Mr. Morris, you may call your first witness.

MR. MORRIS: Good morning, Your Honor. John Morris from Pachulski Stang Ziehl & Jones on behalf of the Debtor.

Can you hear me okay?

THE COURT: I can.

MR. MORRIS: Okay. Thank you very much.

The Debtor calls James Seery as its first witness.

THE COURT: All right. Mr. Seery, if you could say, "Testing, one, two," please.

MR. SEERY: Testing, one, two.

THE COURT: All right. Hmm, I've not picked up your video yet. Let's try it again.

MR. SEERY: Testing, one, two. Testing.

MR. MORRIS: We have the audio.

THE COURT: We have the audio.

MR. SEERY: Oh.

MR. MORRIS: There we go.

THE COURT: There you are.

MR. SEERY: The video should be working.

THE COURT: All right.

MR. POMERANTZ: Yeah. Actually, one -- Your Honor, one thing before we start. We have Patrick Leatham from KCC. He is prepared to sit on the line for the whole day until his time comes. I would just like to know if anyone intends to cross-examine him or object to his declaration. Because if they don't, we could excuse Mr. Leatham.

THE COURT: All right. What about that? Anyone want to cross-examine the balloting agent?

MR. RUKAVINA: Your Honor, Davor Rukavina. I do not. If the Debtor would just state, with the change of votes in Class 8, what the final tally is, I see no reason to dispute that, and then we can dismiss this gentleman. But I do think that we should all know, with the change of votes, what it now is.

THE COURT: All right.

MR. POMERANTZ: We will -- we will work on that, Your Honor, with the changes as a result of the settlements today, and including Mr. Daugherty's client. We can get that information sometime today.

THE COURT: All right. So, Mr. Rukavina, do you agree that he can be excused with that representation, or do you want --

MR. RUKAVINA: Yes, Your Honor.

THE COURT: Okay. All right. So, it's Mr. Leatham? You are excused if you want to drop off this video.

All right. Mr. Seery, please raise your right hand.

JAMES P. SEERY, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Thank you. Mr. Morris, go ahead.

MR. MORRIS: Thank you, Your Honor.

If I may, I'd like to just begin by moving my exhibits into evidence so that it'll make this all go a little bit smoother.

THE COURT: All right.

MR. MORRIS: And if you'll indulge me just a little patience, please, because the Debtor's exhibits are found in three separate places.

THE COURT: Uh-huh.

MR. MORRIS: And I would just take them one at a time.

First, at Docket No. 1822, the Court will find Debtor's Exhibits A through what I'm referring to as 6Z. Six Zs. So the Debtor respectfully moves into evidence Exhibits A through 6Z on Docket No. 1822.

THE COURT: All right. Are there any objections?

MR. RUKAVINA: Your Honor, I have a number of targeted objections to all of the exhibits. Did I hear Mr. Morris say 6Z?

THE COURT: Yes.

MR. MORRIS: Yes.

MR. RUKAVINA: Or six -- then, Your Honor, I can go through my limited objections, if that pleases the Court.

THE COURT: All right. Go ahead.

MR. RUKAVINA: Your Honor, Exhibit B, a transcript, B as in boy. Exhibit D, an email, D as in dog. Exhibit E as in Edward. Moving on, Your Honor, 4D as in dog. 4E as in Edward.

MR. MORRIS: Slow down, please.

THE COURT: Okay.

MR. RUKAVINA: I'm sorry.

THE COURT: You said 4D as in dog, correct?

MR. RUKAVINA: Then -- yes, Your Honor. Then 4E as in Edward.

THE COURT: Okay.

MR. RUKAVINA: 4G as in George. Your Honor, one, two, three, four, five T. 5T as in Tom. And then, Your Honor, one, two -- 6R. 6S. 6T as in Tom. And 6U as in under. That's it.

THE COURT: All right. Well, Mr. Morris, do you want to carve those out for now and just offer them the old-fashioned way and I can rule on the objections then?

MR. MORRIS: Why don't we do that? I may just deal with it at the end of the case. But subject to those objections, the Debtor then moves into evidence the balance of the exhibits on Docket 1822.

THE COURT: All right. So, for the record, the Court will admit all exhibits at Docket No. 1822 at this time except B, D, E, 4D, 4E, 4G, 5T, 6R, 6S, 6T, and 6U.

(Debtor's Docket 1822 exhibits, exclusive of Exhibits B, D, E, 4D, 4E, 4G, 5T, 6R, 6S, 6T, and 6U, are received into evidence.)

THE COURT: All right. Mr. Morris, continue.

MR. MORRIS: Thank you, Your Honor.

Next, at Docket 1866, you'll find Debtor's Exhibits 7A through 7E, and the Debtor respectfully moves those dockets -- documents into evidence.

THE COURT: All right. Any objection? (No response.) Are there any objections?

MR. RUKAVINA: Your Honor, not from -- not from me.

THE COURT: All right. Hearing no objections, the Court will admit all Debtor exhibits appearing at Docket Entry No. 1866.

MR. MORRIS: Thank you, Your Honor.

(Debtor's Docket 1866 exhibits are received into evidence.)

MR. MORRIS: And finally, at Docket 1877, the Court will find Debtor's Exhibits 7F through 7Q, and the Debtor respectfully moves for the admission of those documents into evidence.

THE COURT: All right. Any objection?

MR. RUKAVINA: Your Honor, I might have to talk about this with Mr. Morris, but I have 7F as any document entered in the case, 7G as any document to be filed, et cetera. Mr. Morris, am I wrong about that?

MR. MORRIS: I don't have that list in front of me. So I'll reserve on those documents and we can talk about them at a break, Your Honor.

THE COURT: All right.

MR. DRAPER: Your Honor, this is Douglas Draper. I object, and I don't have the number in front of me, it's the liquidation analysis and the plan summary. It's a summary exhibit, and we've not been given the underlying documentation with respect to them. I'd ask Mr. Morris to deal with that separately also.

MR. MORRIS: All right. Well, we're certainly going to be moving that into evidence, so we can deal with that at the time, Your Honor.

THE COURT: Okay. Which documents are they? Which exhibits are those?

MR. DRAPER: I don't have the number in front -- Mr. Morris, do you have the number for that exhibit?

MR. MORRIS: I do, but why don't we just deal with it when I -- when I get into --

THE COURT: Okay.

MR. MORRIS: -- into the testimony?

THE COURT: I just wanted the record clear what I am admitting at this time at Docket Entry No. 1877. Or do you want to just --

MR. MORRIS: Okay.

THE COURT: -- hold all those --

MR. MORRIS: Mr. Rukavina, other than F and G, which you noted, is there any objection to any of the other documents on that witness and exhibit list?

MR. RUKAVINA: Well, I also have H as impeachment/ rebuttal, I as any document offered by any other party. So I would suggest, Mr. Morris, that I have my associate confirm that I have the right -- the right stuff here, and we can take it up maybe during a break. But I have F, G, H, I as so-called catchalls, not any discrete exhibits.

MR. MORRIS: All right. All right, Your Honor. Let's, let's just proceed. We've got -- we took care of Docket No. 1822 and 1866, and the balance we'll deal with at a break, --

THE COURT: All right.

MR. MORRIS: -- unless they come up through testimony.

THE COURT: All right. That sounds good.

MR. MORRIS: Okay. Thank you very much. May I proceed?

THE COURT: You may.

MR. MORRIS: Okay.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good morning, Mr. Seery.

A (no response)

Q Can you hear me?

A Apologies. I went on mute. Can you hear me now? I apologize.

Q Yes. Good morning.

MR. MORRIS: So, let's begin, Your Honor, with just a little bit of background of Mr. Seery and how he got involved in the case.

BY MR. MORRIS:

Q Mr. Seery, what's your current position with the Debtor?

A I am the CEO, the CRO -- the chief restructuring officer -- as well as an independent director on the Strand Advisors board of directors.

Q Okay.

MR. MORRIS: Your Honor, I'm going to ask Mr. Seery to describe a bit for his background. For the record, you'll find that Exhibits 6X, 6Y, and 6Z, on the Debtor's exhibit list at Docket 1822, the resumes and *C.V.s* of the three independent members of the board. If Your Honor has any question about their qualifications and their experience, that evidence is already in the record.

THE COURT: Okay.

BY MR. MORRIS:

Q But Mr. Seery, without going into the detail of everything that's on your *C.V.*, can you just describe for the Court generally your professional background, starting, well, with your time as a lawyer?

A I've been involved in the restructuring, finance, investing and managing of assets and banking-type assets for

over 30 years.

I began in restructuring in real estate. Became a lawyer, and was a lawyer in private practice dealing with restructuring and finance for approximately ten years, in addition to time before that on the real estate side.

I joined Lehman Brothers on the business side in 1999, where I immediately began working on the -- with a distress team as a team member investing off the balance sheet, Lehman Brothers assets in various types of distressed financing investments. Bonds, loans, equities. In addition, then I became the head of Lehman's loan business globally. I ran that business for the number of years. Was one of the key players in selling Lehman Brothers to Barclays in a very difficult situation and structure.

After that, joined some of my partners, we formed a hedge fund called RiverBirch Capital, about a billion and a half dollar hedge fund in -- operating in -- globally, but mostly U.S. stressed/distressed assets that we invested in. Oftentimes, though, we would run from high-grade assets all the way down to equities, different types of investors, different types of investments.

Thereafter, I left -- was -- joined Guggenheim. I left Guggenheim, and shortly thereafter became a director at Strand.

Q Prior to acceptance of the positions that you described

earlier, were you at all familiar with Highland or Mr. Dondero?

A Yeah. I was, yes.

Q Can you just describe for the Court how you became familiar with Highland and Mr. Dondero?

A Highland was a customer of Lehman Brothers, and it was -- particularly in the loan business. And the CLO businesses. Highland was run by Mr. Dondero, and I knew of that business through that --

(Interruption.)

MR. MORRIS: Can somebody please put their device on mute?

A VOICE: That's Mr. Taylor.

THE COURT: Mr. Taylor, you were off mute, apparently, for a moment. Make sure you're staying on mute. Thank you.

MR. TAYLOR: Yes. Sorry, Your Honor. I thought we might have a hearsay objection. I wasn't sure what the answer was going to be, so I wanted to be prepared to object.

THE COURT: All right. Thank you.

BY MR. MORRIS:

Q Did you know or meet Mr. Dondero in the course of what you just described?

A Yes, I did. I believe we met once or twice over the years. There was a senior team member who handled the

Highland relationship. He was quite good, quite experienced, and he handled most of the Highland relationship issues. But Highland, we came across a number of times, whether it be in -- I came across a number of times, whether it be in specific investments we had where they would be either a competing party or holding a similar interest, whether they were a customer purchasing loans or securities, whether they were a potential CLO customer where we were structuring some assets for them.

Q Okay. And who are the two other members of the independent board at Strand?

A John Dubel and Russel Nelms.

Q And had you had any personal experience with either of those gentleman prior to this case?

A I knew of Mr. Nelms and his experience as a bankruptcy judge in the Northern District of Texas, and I had worked on one matter with Mr. Dubel, but very, very briefly, while he was the CEO of FGIC, which is a large insurer in the financial insurance space that he was responsible for reorganizing and ultimately winding down.

Q Okay. How did you learn about this particular case? How did you learn about the opportunity or the possibility of becoming an independent director?

A Initially, I was contacted by some of the creditors and asked whether I was interested, and I indicated that I was.

Subsequently, I received a call from the Debtor's representatives as well meeting the counsel as well as the financial advisor as well as specific members of the Debtor's senior management.

Q Do you know how long in advance of the January 9th settlement you were first contacted?

A Probably four, four or five days at the most, but started working immediately at that time because it was a pretty complicated matter and the interview process would be quick because of the hearing date that was coming up.

Q Do you recall the names of any of the creditors who reached out to you?

A I spoke to counsel for UBS. Certainly, Committee counsel. I don't recall if I spoke to anybody from Jenner Block in the initial interview. And then I spoke to representatives from your firm as well as Mr. Leventon and ultimately Mr. Ellington.

Q Did you do any due diligence before accepting the appointment?

A I did, yes.

Q Can you describe for the Court the due diligence you did before accepting your appointment as independent director?

A Well, I got the petition, I read the petition, as well as the first day, as well as the venue-changing motion. In addition, I went through the schedules. Ultimately, I took a

look at and examined the limited partnership agreement of the Debtor, with particular focus on the indemnity provisions. I then sat down with the Committee to get their views as part of the interview process, as well as the Debtor's counsel and Debtor's representatives.

Q Did you -- in the course of your diligence, did you come to an understanding or did you form a view as to why an independent board was being sought at that time?

A Yes, I did.

Q And what view or understanding did you come to?

A There was extreme antipathy from the creditors, as evidenced by the venue motion and the documents around that venue motion.

In addition, in the first day order, or affidavit, you could see the issues related to Redeemer and the length of time that litigation has been gone on, going on.

The creditors became extremely concern with Mr. Dondero having any control over the operations of the Debtor and wanted to make sure that either he was removed from that or that -- and someone else was brought in, or that the case was somehow taken over by a trustee.

Q Did you form any views as to the causes of the Debtor's bankruptcy filing?

A The initial cause was the entry or the soon-to-be-entered order related to the arbitration with Redeemer, but it was

pretty clear from looking at the first day that there was a number of litigations. The bulk of the creditor body was made up of -- on the liquidated side was made up of litigation creditors. And then the other creditors, the Committee members, other than Meta-e, were significant litigation creditors.

MR. MORRIS: Your Honor, I think Mr. Seery was sworn in, but unless -- unless you -- if you think there's a need, I'm happy to have you swear Mr. Seery in again just to make sure his testimony is under oath.

THE WITNESS: I was sworn in.

THE COURT: Yes, I swore him in.

MR. MORRIS: That's what I thought. That's what I thought. Somebody had made the suggestion to me, so I was just trying to make sure, because I didn't want any unsworn testimony here today.

THE COURT: We did.

MR. MORRIS: Okay.

THE COURT: We did.

MR. MORRIS: Thank you. Thank you.

BY MR. MORRIS:

Q Ultimately, sir, just to move this along a little bit, do you recall that an agreement was reached with the UCC and Mr. Dondero and the Debtor concerning governance issues?

A Yes, I do.

Q And did you accept your position as an independent director at Strand as part of that corporate governance settlement?

A That, that was part of the appointment. We -- the independent directors were brought in to take -- really, to take control of the company as independent fiduciaries. And the idea, I think, was that there was a Chapter 7 motion that was about to be filed by the Committee, or at least that was the representation, and the Debtor had a choice, they could either accept the independent directors or they could face the motion.

What actually happened was a little bit more complicated. The creditors and the Debtor agreed on the selection of Mr. Dubel and myself. And then because they couldn't agree on the third member of the independent board, they left it to Mr. Dubel and myself to actually come up with a process, interview candidates, and make that selection, which we did, which ultimately became Mr. Nelms.

Q And did all of this take place during that four- or five-day period prior to January 9th?

A It did, yes.

Q Okay. And let's talk about the makeup of the board. You've identified the other individuals. How would you characterize the skillset and the capability of the individual?

A Well, on paper, I think it's a pretty uniquely-constructed board for this type of asset management business with the diversity of these types of assets and the diversity of issues that we had.

So, former Judge Nelms, obviously skilled in bankruptcy and the law around bankruptcy, but also very skilled in mediation, conflict resolution, and in particular his prepetition or maybe pre-judicial experience in litigation and litigation involving fiduciary duties we thought could be very, very important because of the myriad of interrelated issues that we could see that might arise.

John Dubel is an extremely well-known and respected restructuring professional. He has been dealing these kinds of assignments as an independent fiduciary for, gosh, as long as I can recall, but at least going back 15 to 20 years. He had experience in accounting, but he's also been the leader of these kinds of organizations going through restructuring in many operational type roles, and so he was a perfect fit.

And my experience in both restructuring as well as asset management and investment I think dovetailed nicely with the experience that Mr. Nelms and Mr. Dubel have.

Q Okay. Let's talk for just a moment at a high level of the agreement that was reached. Do you remember that there were several documents that embodied the terms of the agreement?

A Yes, I do.

Q And do you remember one of them was an order that the Court entered on January 9th?
A Yes.
MR. MORRIS: All right. Your Honor, just for the record, and we'll be looking at this, but that would be document Exhibit 5Q as in queen, and that's at Docket No. 1822.
BY MR. MORRIS:
Q Do you remember there was a separate term sheet, Mr. Seery, that was also part of the agreement among the constituents?
A Yes. There were -- I think there were a couple of term sheets and stipulations, but I do recall that there was some very specific term sheets with the terms.
MR. MORRIS: All right. And we'll look at that one as well, Your Honor, but that can be found at Exhibit 5O as in Oscar.
BY MR. MORRIS:
Q And then, finally, do you recall that Mr. Dondero signed a stipulation that was also part of the agreement?
A Yes. That was absolutely key to the agreement for the creditors and perhaps the Court. But it was really -- it needed to be clear that he was signed on to this transaction.
MR. MORRIS: Okay. And we'll look at that as well. That's Exhibit 7Q. And remind me, we'll move that one into

evidence.
BY MR. MORRIS:
Q Did you and the other prospective independent directors actually participate in the negotiation of any aspect of this agreement that you've generally described?
A Absolutely. Although we hadn't been appointed yet, these agreements were going to be the structure with which -- or under which we would come in as independent fiduciaries. They would govern a lot of our relationships. They would provide for the protections that we required and that I required. So they were exceedingly important to me.
Q Can you describe for the Court at a general level your understanding of the overall structure of the corporate governance settlement?
A From a very high level, the settlement was -- Highland Capital Partners is a limited partnership. It's managed by its general partner, Strand Advisors. Although Strand is the GP, its effective interest in Highland is minimal, about .25 percent of the effective partnership interest. But it is the general partner. So it does govern the -- the partnership.
We came in as an independent board that would oversee and control Strand Advisors and thereby, through the general partner position, oversee and control HCMLP, the Debtor.
In addition, the Committee then overlaid what we could do with respect to how we operated the business in the ordinary

course in Chapter 11 with a specific set of protocols that governed certain transactions that we would have to get permission from either the Committee or the Court to engage in.

And in addition, Mr. Dondero, notwithstanding the insertion of the independent board at Strand, also had a set of restrictions around him, because, of course, not only was he the former control entity at Highland and Strand, he also had a hundred percent of the ownership -- indirectly, of course -- of Strand and could have removed the board. So there were restrictions around what he could do with respect to the board. There were also restrictions around what he could do through various entities to terminate contracts and --

Q All right. We'll look at some of those in detail. Did, to the best of your recollection, did Mr. Dondero give up his position as president or CEO of the Debtor?

A He did, yes.

Q And did he nevertheless stay on as an employee of the Debtor and retain a position as portfolio manager?

A He did. At the last second, I believe it was the night before, when we were actually in Dallas preparing for the hearing, but Mr. Ellington raised the concern that if Dondero was removed from not only the presidency but also the portfolio management position, potentially there would be some

agreements that might or might not be subject to Court approval that could be terminated and value would be lost. So this was a very last-second provision. Obviously, the -- as new estate fiduciaries, we didn't want value to be lost instantly for key man or some other reason. And the Committee ultimately, or I guess you'd say reluctantly, agreed to that because we just didn't have time to look at any of -- any such agreements.

MR. MORRIS: All right. Let's -- can we put up on the screen, Ms. Canty, Debtor's Exhibit 5Q?

And this is in evidence, Your Honor. This is the January 9th order.

And can we please go to Paragraph 8?

BY MR. MORRIS:

Q Mr. Seery, you had mentioned just a few minutes ago that there were certain restrictions that were placed on Mr. Dondero. Does Paragraph 8, to the best of your recollection, provide for the substance of at least some of those restrictions?

A It does, yes.

Q And can you just describe for the Court your understanding of the restrictions that were imposed on Mr. Dondero pursuant to Paragraph 8?

A Well, as I recall, when Mr. Ellington came in with the last-minute request, the Committee was extremely upset about

it. We talked about it. Obviously, we, as an independent board that was going to come in, didn't know the underlying contracts and couldn't really render any judgment as to whether there would be value lost. So, the Committee agreed, but they wanted to make sure that Mr. Dondero still reported to -- directly to the board, and if the board asked Mr. Dondero to leave, he would do so.

Q Okay. Just looking at this paragraph, is it your understanding that the scope and responsibilities of Mr. Dondero would be determined by the board?

A Yes.

Q And was it your understanding that Mr. Dondero would serve without compensation?

A Yes.

MR. DRAPER: Objection. Leading, Your Honor.

THE COURT: Overruled.

BY MR. MORRIS:

Q Was it your understanding that Mr. Dondero's role would be subject to the direct supervision, direction, and authority of the board?

A That's, you know, that's what the order says and that's what the agreement was. In practice, that was really going to have to evolve because we were coming in very cold and obviously he'd been there for --

(Interruption.)

THE COURT: All right. Someone needs to put their phone on mute. I don't know who it is.

BY MR. MORRIS:

Q Was it also part of the agreement that Mr. Dondero would (garbled) upon the board's request?

A I think I got you, but yes, that's contained in this paragraph, and Mr. Dondero agreed to that.

THE COURT: All right. Whoever LC is, your phone needs to be put on mute. Okay. Please be sensitive to keeping your device on mute except for Mr. Morris and Mr. Seery.

All right. Go ahead.

BY MR. MORRIS:

Q Do you recall, Mr. Seery, whether there were any restrictions placed on Mr. Dondero's ability to terminate agreements with the Debtor?

A Yes. That was a very specific provision as well.

Q Can we take a look at Paragraph 9 below? Is that the provision that you're referring to?

A That's the provision in the order. I believe there were other agreements -- certainly, discussion around it -- because it was an important provision because it had been borne out of some experience that Acis and Mr. Terry had had in particular. So it was supposed to be broad and prevent both direct and indirect termination of agreements.

Q Okay. And do you know, do you recall that the definition of related entity is contained within the term sheet that you referred to earlier?

A It's a pretty extensive -- I recall the definition not specifically, but it's a pretty extensive definition. It includes any of the entities that he owns, that Mr. Dondero owns, that Mr. Dondero controls, that Mr. Dondero manages, that Mr. Dondero owns indirectly, that Mr. Dondero manages indirectly, and it really covers a wide swath of those entities in which he has interests and control.

MR. MORRIS: All right. Let's see if we could just look at the definition specifically at Exhibit 50 as in Oscar. And if we could just scroll down to the next page.

Now, this was -- this is part of the term sheet that was filed at Docket 354.

BY MR. MORRIS:

Q At Definition I(d), is that the definition of related entity that you were referring to?

A That's correct.

Q Okay. In addition to what you've described, I think you also mentioned that there was a separate stipulation that Mr. Dondero entered into as part of the corporate governance settlement. Do I have that right?

A That's my recollection, yes. And I believe he signed it, and that was a key gating issue to the hearing that we had on

January 9th.

Q And what do you recall about that document as being a key gating issue?

A The key gating issue that I recall is that it had to be signed. And I don't believe it was signed until that very morning.

MR. MORRIS: All right. Can we call up Exhibit 7Q as in queen?

BY MR. MORRIS:

Q All right. Is this the stipulation that you were referring to? We can scroll down to any portion you want.

A I believe that is, yes.

MR. MORRIS: Okay. Can we just scroll down to see Mr. Dondero's signature? Yeah. That's -- okay.

So, that's dated January 9th. This was filed at Docket 338. It's on the Debtor's exhibit list as Exhibit 7Q. And the Debtor would respectfully move Exhibit 7Q into evidence.

THE COURT: Any objection? All right. 7Q is admitted.

(Debtor's Exhibit 7Q is received into evidence.)

MR. MORRIS: Okay. And if we could just scroll up a page or two to the four bullet points. Yeah, right there. A little more.

BY MR. MORRIS:

Q Okay. So, do you see Paragraph 10 contains the

stipulation?
A Yes.
Q And as you recall, Mr. Seery, in the events leading up to the entry of the order approving the settlement, was this one of the documents that was being negotiated among -- among the parties?
A Yes, it was.
Q Okay. You mentioned that there were certain provisions of the January 9th order that were important to you and the other independent directors. Do I have that right?
A Yes.
MR. MORRIS: Let's see if we can back to Exhibit 5Q, please, Paragraph 4.
BY MR. MORRIS:
Q Okay. Paragraph 4, can you tell me what Paragraph -- what Paragraph 4 is and why it was important to you?
A Well, there really were four key, I guess I'll use the term gating items again, for my involvement, and ultimately in discussions with Mr. Nelms and Mr. Dondero -- Mr. Dubel, their involvement in the matter.
Because of the litigious nature of the Highland operations and the expectations we had for more litigation after taking a look at the Acis case, we wanted to make sure that, as independents coming into a situation with really no stake in the particular outcome, other than trying to achieve a

successful reorganization, that we were protected. So, number one, I looked at the limited partnership agreement. I wanted to make sure that the LPA contained broad and at least standard indemnification provisions and that they would apply to the board.

Number two, because -- that then requires you to look at the indemnification provisions at Strand, because you're a director of Strand, the GP. So then we looked at those. I took a close examination of those. They looked okay, except Strand didn't have any assets other than its equity interest in Highland, and if that equity interest turned out to be zero, that indemnity wouldn't be very valuable.

So I wanted to make sure that Highland, the Debtor, guaranteed the indemnity (garbled) on a postpetition basis, so that if there were a failure of D&O, which I'll get to in a second, or it wasn't enough, that we would have a senior claim in the case, an admin claim in the case.

I then, of course, wanted to make sure that we had D&O insurance. This was very difficult to get, because, frankly, there's a Dondero exclusion in some of the markets, we've been told by our insurance brokers, and so getting the right policy that would cover the independent board was difficult. We did get that.

And then ultimately there'll be another provision in the agreement here -- I don't see it off the top of my head -- but

a gatekeeper provision. And that provision --

Q Hold on one second, Mr. Seery, because we'd want to scroll. So Paragraph 4 and Paragraph 5, were those, were those provisions put in there at the insistence of the prospective independent directors?

A Yes. And remember, so the Paragraph 4, as I said, is the guarantee of Strand's obligations for its indemnity. Again, Strand didn't have any money, so the Debtor had to be the one purchasing the D&O for the directors and for Strand. So those are the two provisions that really worked to address my concerns about the indemnities and then the D&O.

MR. MORRIS: Okay. Can we go to Paragraph 10, please? There you go.

BY MR. MORRIS:

Q Is this the other provision that you were referring to?

A This is. It's come to be known as the gatekeeper provision, but it's a provision that I actually got from other cases. Again, another very litigious case that I thought it was appropriate to bring in to this case.

And the concept here is that when you're dealing with parties that seem to be willing to engage in decade-long litigation in multiple forums, not only domestically but even throughout the world, it seemed important and prudent for me and a requirement that I set out that somebody would have to come to this Court, the court with jurisdiction over these

matters, to determine whether there was a colorable claim. And that colorable claim would have to show gross negligence and willful misconduct, *i.e.*, something that would not otherwise be indemnified.

So it basically sets an exculpation standard for negligence. It exculpates the directors from negligence. And if somebody wants to bring a cause against the directors, they have to come to this Court first and get a finding that there's a colorable claim for gross negligence or willful misconduct.

Q Would you have accepted the engagement as an independent director without the Paragraphs 4, 5, and 10 that we just looked at?

A No. These were very specific requests. The language here has been 'smithed, to be sure, but I provided the original language for 10 and insisted on the guaranty provision above to assure that the indemnity would have some support.

Q And ultimately, did the Committee and the Debtor agree to provide all of the protection afforded by Paragraphs 4, 5, and 10?

A Yes.

Q Okay.

MR. MORRIS: Your Honor, we're going to move on now to good faith, Section 1129(e)(3), just to give you a little bit of a roadmap of where we're going.

BY MR. MORRIS:

Q Let's talk about the process that led to the plan that the Debtor is asking the Court to confirm today. Real basic stuff at the beginning. Can you tell me your understanding of the makeup of the UCC, of the Creditors' Committee?

A The Creditors' Committee in this case has four members. It's UBS, the Redeemer Committee, which are former holders of interests in a fund called the Crusader Fund, which was a Highland fund, who had redeemed and then had a dispute with Highland.

And the next creditor is Mr. Terry and Acis. We generally group them as one, but the creditor is Acis.

And the fourth creditor is an entity called Meta-e, and they provide litigation support and technical support and discovery support in litigations for the Debtor, including in this case now.

Q All right. Just focusing really on the early period, the first few months, can you describe the early stages of the negotiations with the UCC as best as you can recall?

A Well, I think the early stage of the case wasn't directly a negotiation; it was really trying to understand as best we could the myriad of assets that we had here, the various businesses that the Debtor either owned, controlled, or managed, as well as the claims.

We went through a process of trying to understand each of

the claims that the Debtor -- or against the Debtor that were represented by the Committee, as well as some other claims that were not on the Committee.

Q Was the Debtor -- I mean, was the Committee initially pushing the independent board to go to a monetization plan, an asset monetization plan?

A Very quickly and early on, the Debtor -- the Committee took a pretty aggressive approach with the Debtor and the independent board. I think the Committee's perspective, as articulated to me, and where -- at least how we took it, was that they'd been litigating for years and they sort of knew the situation and the value of their claims, that the Debtor was insolvent, in their view, and that we should be operating the estate in essence for the benefit of the creditors.

Q And what was the board's view in reaction to that?

A We disputed it. And the reason we disputed it was very straightforward. Save for the Redeemer claim, which at least had an arbitration award, Acis and Mr. Terry didn't have any specific awards, notwithstanding the results of the Acis bankruptcy, and UBS, while it had a judgment, that judgment was not against the Debtor.

So our view was, until we have our hands around these claims and we determine what the validity is in our estate, that we would treat the Debtor as if it were solvent. We also wanted to assess the value of the assets. So, looking at the

assets not just from a book value but what they might be really worth in the market.

Q And did the board in the early portion of the case consider all strategic alternatives?

A I don't know if we considered every strategic alternative, but we certainly considered a lot of alternatives.

Q Can you describe for the Court the alternatives that were considered by the board before settling on the asset monetization plan?

A Well, early on, you know, we looked at each of the -- what we would think of the large category types of ways to resolve a case. Number one, could we go through a very traditional reorganization with either stretching out claims to creditors after settlement or converting some of those to equity, getting new equity infusions? We considered those alternatives.

Number two, we considered whether we should simply sell the assets. That's one of the things that the Committee was pushing for. They could be sold to third parties. They could be sold individually. Mr. Dondero potentially could buy some of the assets. That'd be a reasonable reorganization in this case.

We also considered whether that, you know, we would just do a straight liquidation. Is there some value to doing -- converting the case to a 7 and doing a straight liquidation?

We also considered a grand bargain plan, and this was something that I worked on quite a bit. The phrase is mine, although no pride of authorship, certainly, since it didn't work out. But that perhaps we could come to an agreement with the major creditors and with Mr. Dondero and then shift some of the expenses in the case out further to litigate some of the other claims while reorganizing around the base business.

And then, finally, we considered the asset monetization plan, and ultimately that evolved into what we have today.

Q Were there guiding principles or factors that the board was focused on as it assessed these different options?

A Well, the number one guiding principle was overall fairness and equitable treatment of the various stakeholders. So, again, at that point, we didn't know exactly what, if anything, we would owe to claimants like UBS or HarbourVest or even Mr. Terry and Acis. We had a good sense of where we would end up with Redeemer, I think, but we still had some options and wanted to negotiate the issues related to potential appeal rights that we had. So I think that was the number one overall concern.

But that did evolve over time. Costs of the case were exceptionally high. And the reason they're so high is that Highland was run for a long time, at least from what we can tell, at an operating deficit. Typically, what it would do is run at a deficit and then sell assets to cover the shortfall,

and it would defer a whole bunch of employee -- potential employee compensation. And because of the way the environment was going, particularly in the first half of the year, it didn't look to us like there was going to be any great asset increase that would somehow save us from the hole that was being dug, the considerable amount of expenses to run the case.

Q Did changing the culture of litigation factor into the path that the board considered?

A Well, we certainly looked at the way the company had run and why it got to where it is in terms of litigating. And not just litigating valid claims, but litigating any claim to the *nth* degree. And stories are legion, I won't talk about them, but of Highland taking outrageous positions and then pursuing them, hoping that the other side caves.

We determined that this estate couldn't bear that kind of expense, and it wasn't fair and equitable to do that anyway. So we wanted to attack the claims that we could -- and I say attack; try to resolve them as swiftly as we could -- protecting the Debtor's interests but trying to find an equitable resolution.

I'm not averse to litigating. And I think when there are claims that are legitimate, the Debtor should pursue them. There's always -- a good settlement is always better than a bad litigation. But if there (indecipherable) to resolve

them, we should -- we should pursue those. And if we have defenses, we should pursue those, and not just be held up because someone else is willing to, you know, take a more difficult position than we are.

But in this case, it really did cry out for some sort of resolution on many of these cases because they were far beyond -- far beyond the facts and far beyond the dollars. There was personal antipathy involved in virtually every one of the unlitigated or unliquidated Committee cases.

Q Did the board, as it was assessing the various strategic alternatives, consider maximization of the value?

A Always number one was, can we maximize value? But that has to be done within the context of the risk you're taking and the time it takes. So, not all wine ages well in a cave and not all investments get to be more valuable over time. We wanted to look at each individual asset that the Debtor had, each claim that the Debtor had, each defense that the Debtor had, and consider the time and the costs and then try to find the best way to maximize value with those multiple considerations.

Q How about the role and support of the UCC, how did that factor into the decision-making, the Debtor's decision-making as to what plan to pursue?

A Well, you know, the decision-making with the UCC was cumbersome and oftentimes difficult. Sometimes our relations

were very contentious, and sometimes they continue to be. But the Committee had significant oversight because of the protocols that had been agreed to. Some of the disputes we had with the Committee found their way into the court. Those time and that cost, some of which we won, some of which we lost, but those factored into our analysis.

But eventually we knew that we were going to need to get, you know, some significant portion of the Committee to agree, because, at minimum, Meta-e had a liquidated claim, and Redeemer was very close to fully liquidated, so we were going to need support from the Committee with whatever we tried to push through. And so that's how we negotiated with the Committee from that perspective.

Q Is it fair to say that the Debtor and the Committee's interests because aligned upon approval of the disclosure statement back at the end of November?

A I don't think they became perfectly aligned, because we still have, you know, some disputes around, you know, implementation and things like the employee releases, which were very important to me. But I think we're largely aligned and that the Committee is supportive, as Mr. Clemente said at the start of this hearing, of the plan. We negotiated at arm's length with them about most of the provisions. I would say virtually everything was a relatively significant negotiation, or at least there was a good faith exchange of

views on each side and assessment of legal and financial risks. And I think at this point they're largely in support of the plan.

Q All right. Let's -- you mentioned the grand bargain, and I just want to spend a few minutes talking about that, how that evolved. Focusing your attention in the kind of late spring/early summer, can you tell me what efforts you and the board made in trying to achieve a grand bargain in that early part of the case?

A Well, we had -- at that point, we had reached agreement, at least in principle, with Redeemer. And the thought was -- my thought was that we could construct a plan, understanding what the cash flows looked like and what we thought the base value of the asset looked like -- and those are not just the assets that are tangible assets, but the notes that are collectible by the Debtor as well -- and then engage with UBS in particular. Redeemer. To some degree, Mr. Terry. We had not yet reached any agreement with him. But UBS, we thought of as a slightly -- I don't mean this to be disparaging -- but a slightly more commercial player than Acis because of the history that Acis had to deal with and endure.

And we were hoping that we could get some sort of coalescence around an agreed distribution that would require those creditors to take a lot less than they might have otherwise agreed, Mr. Dondero to put in more than he otherwise

thought he could put in or would be willing to put in, and then we would get out to Acis and the other creditors with a plan.

And so I built, with the team at DSI, a detailed model on how the distributions could work and what the potential timing could be, trying to, each time, move in a multidimensional way with UBS, Redeemer, Mr. Dondero, and to some degree Acis, around the respective issues for their claims.

Again, UBS and Acis had not been resolved and weren't close, but the thought was if we could get dollar agreements for distribution, perhaps we could then figure out how to construct settlements of their claims.

Q During this time period, did you work directly with Mr. Dondero in the formulation of a potential grand bargain?

A I did, yes.

Q And the model that you described, did that go through a number of iterations?

A It went through multiple iterations. I don't believe I ever shared the model with anybody. One of the reasons for that is I didn't want -- I felt I had -- if I was going to share it with Mr. Dondero, for example, I'd have to share it with UBS and I'd have to share it with Redeemer. And I wanted it to be -- I wanted it to be a working model with the team at DSI. In particular, we would make, you know, adjustments on an almost-daily basis.

Mr. Dondero had -- remember, he was still portfolio manager at that time. He also had a related-party interest, as people have seen from some of the litigation around the sales of securities. He had access and was receiving emails from the team as well as from the finance team. So he had access to the information at that point and had a view around the value. And this was more trying to adjust what those distributions would look like depending on the amounts that he would be willing to contribute.

Q Moving on in time, did there come a time when the Debtor participated in a mediation with certain of the major constituents in the case?

A Yes. That was towards the end of the summer.

Q And during that mediation, did the concept of a grand bargain, was that put on the table? Without discussing any particulars about it, just as a matter of process, was the grand bargain subject to the mediation discussions?

A Well, the mediation had multiple components, so the answer to the question in short is yes, but I'll go longer because I tend to. The grand bargain plan stayed in place, and that was going to be an overall settlement. The mediation was initially, I think, as a main course, focused on Acis, UBS, and then the third piece being the grand bargain. And if you could settle one of those claims, perhaps -- obviously, if you could settle both of them, you could get to then focusing on

the grand bargain.

But even before we got to mediation, the idea of the monetization plan had also been put forth. Notwithstanding that it wasn't my idea, I actually thought that it was a good idea, ultimately. Didn't initially. And the reason for that is that it set a marker for what a base expectation could be for the creditors and just for Mr. Dondero. And knowing that that was out there, at least with them, that could hopefully be a catalyst in the mediation for folks to say, let's see if we can get our claims done and get a grand bargain done, because if we don't we have this Debtor monetization plan. And by that -- at that point, I don't think we had much agreement with the Committee on anything, and certainly with Mr. Dondero, on -- on a monetization plan.

Q All right. And let's just bring it forward from the fall, post-mediation, to the present. Has -- has -- have you and the board continued discussing with Mr. Dondero the possibility of a grand bargain?

A Well, it's shifted. So, the grand bargain discussions really -- you had multiple phases. So, you had pre-mediation. There was the grand bargain discussions that I just described previously that also involved UBS and Redeemer, and to some degree Acis and Mr. Terry. Then you have the mediation, which is much more focused on the claims and whether they can fit into the grand bargain with Mr. Dondero.

And the way that was conducted was a little bit more separated, meaning the parties would talk to the mediator, the mediator would then go and talk to other parties and try to work a settlement on each of those components.

Subsequent to the mediation where we reached the agreement with Acis and Mr. Terry, and we ultimately in that timeframe banged out the final terms of our agreement with Redeemer, we engaged with Mr. Dondero around -- I wouldn't call it the grand bargain, but a different plan. By that point, the monetization plan had started to gain some traction with the creditor group, and Mr. Dondero and his counsel, I believe, focused on the potential of what was referred to as a pot plan. And while it has the -- it could have the ability of being a resolution plan, it wasn't the grand bargain plan that I had initially envisioned. And pot plan was really a misnomer, because it didn't have a whole pot, so -- so it's a little bit of a hybrid.

Q Did the board spend time during its meetings discussing various pot plan proposals that had been put forth by Mr. Dondero?

A Oh, absolutely. And not only the board. I mean, we did our own work as an independent board and then brought in our professional advisors, both your firm and the DSI folks, to go through analytics around the pot plan, and even before that, the other plan alternatives, but we had direct discussions

with Mr. Dondero and his counsel.
Q And in the last couple of months, has the board listened to presentations that were made by Mr. Dondero and his counsel concerning various forms of the pot plan?
A Yes. At least two or three.
Q And during this time, has the board and the Debtor communicated with the Committee concerning different iterations of the proposed pot plan?
A Yes. We've had continual discussions with the Committee regarding the various iterations of the potential grand bargain all the way through the pot plan.
Q And during this process, did the Debtor provide Mr. Dondero and his counsel with certain financial information that had been requested?
A Yes. As I said, up 'til the point where he resigned and was then ultimately, at the end of the year, removed from the office, he had access to financial information related to the Debtor and even got the information from the financial group. Subsequent to that, we've provided him with requests -- with financial information that was requested by his counsel.
Q Okay. Were your efforts at the grand bargain or the pursuit of the pot plan successful?
A No, they were not.
Q Do you have an understanding as to -- just, again, without going into -- into details about any particular proposal, do

you have an understanding as to what the barrier was to success?

A The grand bargain, we just never got the traction that we needed to get that going and the sides were just far -- too far apart. And the pot plan, similarly. Our discussions with Mr. Dondero and the Committee, they're -- they're very far apart.

Q And is it fair to say that the Committee's lack of support in either the grand bargain or the pot plan is the principal cause as to why we're not talking about that today?

A Well, it's -- it -- right now, we've got the plan that's on file, the monetization plan. The monetization plan has gone out for creditor vote and has received support. It distributes, we think, equitably, as well as a significant amount of distributions to unsecured creditors. And there really isn't an alternative that we see, based upon the numbers I've seen, that competes with it or has any traction with the largest creditors.

Q All right. So, now we've talked about various proposals or alternatives that were considered by the board, including the grand bargain and the pot plan. Let's spend some time talking about the plan that is before the Court today and how we got here. And I'd like to take you really back to the beginning, if I may.

Tell us, tell the Court just what the board was doing in

the early months after getting appointed, because I think context is important here. What were you all doing the first few months of the case?

A Well, the first few months, we really were drinking from the proverbial fire hose, trying to get an understanding of the business, how it had been managed previously, what the issues related to the different parts of the business were. And then an understanding of each of the employees that were working under us, what their roles were, how they performed them, who sat where with respect to each of the assets, what the contracts looked like, whether they be shared service or management agreements. And then we started looking at the individual assets in terms of value.

At the same time, we were trying to get up to speed on the complex nature of the claims that were in the case. The liquidated claims were relatively easy, but there had been a significant amount of transfers in and out of the Debtor, and then there's a myriad of relationships involving related entities that we had to understand, both with respect to the claims as well as with respect to the assets.

And so that -- those were the main things we were doing for those first few months in the case.

Q Just a couple months into the case, the COVID pandemic reared its head. Do you recall that?

A Yes. We had been in Dallas every day working up 'til the

time of the COVID and some of the shutdown orders, particularly in the Northeast, and so that changed the dynamic of how we could function every day.

Notwithstanding that, we -- we were able to manage from afar, and ultimately, when there were some cases in the office of COVID, we -- on the Highland side, not the related entity side, but on the Highland side -- we determined that the staff and the team should work from home, which they were able to do quite well.

Q Okay. In those early months, do you recall that there was a substantial erosion of value, at least as of the time you were appointed in those first three or four months?

A There was. And I think we've heard some -- some noise about what that value was and the drop in the asset value as opposed to net value. But the asset value did, did drop significantly.

Q Can you describe for the Court your recollection as to the causes of the drop in the value that you just descried?

A Yes. The number one drop was a reservation that the board took for a receivable from an entity called Hunter Mountain. The quick version of this is that Hunter Mountain owns Highland. As I mentioned, while Strand is the GP, it only has a quarter-percent interest in Highland. The vast majority of the interests are owned by an entity called the Hunter Mountain Investment Trust in a very complicated, tax-driven

structure.

Dondero and Okada transferred their interests in Highland at a high valuation to Hunter Mountain. Hunter Mountain then didn't have the money, so it, in essence, borrowed the money from the Debtor in a note to pay for those interests. There's a circular running of the cash, but we were not sure where, if any, where any assets are, if they would be sufficient. So we took a reservation of $58 million for that note.

The second biggest piece of the reduction in value was the equity that was lost in the Select Equity account. This is a Debtor trading account that was managed by Mr. Dondero. $54 million was lost in that account. Basically, it was really highly margined, very high leverage in that account when the market volatility came in. As it grew through January, February, March, more and more margin calls. Ultimately, Jefferies, which had Safe Harbor protections -- technically, the account was not a Debtor account, but they would have had it anyway -- they seized that account. $54 million in equity was lost in that account.

The next highest amount is about $35 million, but it's higher now. That's just the bankruptcy costs, where we have spent cash and Debtor assets in the case. It was about $36 to $40 million through the end of the year. That's now higher.

About $30 million was lost in paying back Jefferies on the asset side of the ledger in the Highland internal equity

account. This was similar to the equity -- the Select Equity account, also managed by Mr. Dondero. Extremely highly-levered coming into the market volatility of the first quarter, which was exacerbated, obviously, by the COVID. That was about $30 million that was repaid in margin loan in that account.

In addition, $25 million of equity was lost in that account while Mr. Dondero was managing it. I took over effectively managing it in mid-March and worked with Jefferies to keep them from seizing the account. We've since gotten a bunch of value coming back from that account, but that was the amount that was lost.

About $10 million was lost in the Carey Limousine loan transaction. That is a -- an interesting little company. Has done a nice job -- management did a very good job coming into the year, and it actually had real value, notwithstanding the changeover to Uber in people's preferences. But with the COVID, it really relied on events, airport travel, executive travel, and that really took a bite out of it, although, you know, we're hoping to be able to restructure, we have restructured it to some degree, and we're hoping that there could be value there.

And then about $7 million was lost in equity in an entity called NexPoint Hospitality Trust. This is another extremely highly-levered hospitality REIT that NexPoint manages. It

trades on the Toronto Stock Exchange. And I think likely that -- it's got a lot of issues with respect to its mortgage debt. And because it was hospitality, it was really hurt by the COVID.

And I think that's probably -- those numbers add up to north of $200 million of the loss.

Q All right. Thank you for that recitation, Mr. Seery. So, turning to the spring, after all of those issues were addressed, at the same time you were working on the grand bargain, did the Debtor and its professionals begin formulating the monetization plan that we have today?

A I'm sorry, in the spring? I lost that question. I apologize.

Q That's okay. After you dealt with everything that you just described, were you doing two things at once? Were you working on the grand bargain and the asset monetization plan at the same time?

A Yes, that's correct.

Q All right. Can you just describe for the Court kind of, you know, how the asset monetization plan evolved up until the point of the mediation?

A Yes. I alluded to it earlier, but because the Debtor was running an operating deficit, we were very concerned about liquidity. Highland typically runs, from a liquidity perspective and a cash perspective, very close to the edge. I

don't feel particularly comfortable helping lead an organization that's running that close to the edge. And I was very focused on the burn that we had on an operating basis, as well as the professional cost burn, because for a case this size it was significant.

The rest of the board felt similarly, and one of the directors, and I'm not sure if it was Mr. Nelms or Mr. Dubel, came up with the idea that we needed an alternative to continuing to just burn assets while we were in this case. There had to be some sort of catalyst to get the parties, both Mr. Dondero as well as the creditors -- at that point, as I said, we weren't settled with Acis or UBS, and we weren't, frankly, close with either of them. And so we needed what -- what I think the -- the idea was that we needed a catalyst to have people focus on what the alternative was. Because continuing to run the case until we ran out of money was not an acceptable alternative.

What I didn't like about the plan was it didn't have anybody's support, and so I wasn't sure how we made progress with it without having some Committee member or Mr. Dondero in support of it. I was outvoted, although maybe I came around in the actual vote. But ultimately, I think it was actually a quite smart idea, because it did set the basis for what the case would be. Either there would be some resolution or it would push towards the monetization plan, and parties could

then assess whether they liked the monetization plan or not. That if I was going to be the Claimant Trustee or the -- defending the, you know, against the claims, they would have the pleasure of litigating with me for some period of time. Or they could come to some either grand bargain or ultimately some other resolution.

And as we started to develop a plan and put more of a framework -- more flesh around the framework, it actually started to look more and more like a real viable alternative to either long-term litigation or some other grand bargain if we couldn't get there.

Q And ultimately, did the board authorize the Debtor to file its initial version of the asset monetization plan at around the time of the mediation?

A Yeah. We developed it over the summer and really fleshed it out in terms of how the structure would work, what the tax issues were, what the governance issues were. We did that largely negotiating with ourselves, so we -- we were extremely successful. And then we filed, we filed that plan right before the mediation.

And my recollection is that there was some concern from the mediators that they thought that putting that plan out in the public could upset the possibility of a grand bargain, so we ended up filing that under seal.

Q Do you recall what the Committee's initial reaction was to

the asset monetization plan that you filed under seal?
A Well, initially, they -- the Committee didn't like it. They didn't like the governance. They didn't like the fact that it set up for those creditors who didn't litigate the prospect of litigations to try to resolve their claims. It effectively cut out some of the advisory that the Committee currently had. The -- one of the driving forces behind the asset monetization plan and how we initially started it is we can't continue these costs, as I said. Well, an easy way to get rid of -- to reduce the costs is to get rid of half of them.

So if you could get rid of the Committee, effectively, and coalesce around an asset monetization vehicle, then if folks wanted to resolve their claim, you could. If you had to litigate it, you could, but you'd have one set of lawyers that the estate was paying for, one set of financial advisors the estate was paying for, as opposed to multiple sets.
Q In addition to the corporate governance issues that you just described, did the Committee and the Debtor quickly reach an agreement on the terms of the treatment of employee claims and the scope of the releases for the employees?
A No. Not very quickly at all.
Q Yeah.
A You know, again, one of the issues in this case that drives perspectives is the history that creditors have in

dealing with Highland and in dealing with many of the employees at Highland, you know, who had worked for Mr. Dondero and served at his pleasure for a long time, and how they had been treated in various of their attempts to collect their claims. So the idea of giving any sort of releases to the employees was anathema to -- to many of the Committee members.

From my perspective, you know, releases are particularly important because there's a *quid pro quo* leading up to the confirmation of a plan, particularly with a monetization plan where it's clear that the employees are all going to be or largely going to be either transitioned or terminated. If they're going to keep working towards that, we either have to have some sort of financial incentive or some sort of assurance that their actions which are done in good faith to try to pursue this give them the benefit of more than just their paycheck.

And so we thought we were setting up the *quid pro quo* in terms of work towards the monetization, bring the case home, and you're entitled to a release, so long as you haven't done something that was grossly negligent or willful misconduct. And the Committee, I think, wanted to have a more aggressive posture.

Q And did those disagreements over corporate governance and the employee releases kind of spill out into the public at

that disclosure statement hearing in October?
A I think they spilled out at that hearing as well as in the hearing either the next day or two days later around Mr. Daugherty's claim. And again, it was -- it was contentious. I tend to try to reach resolution, but I tend to hold firm when I think that there's a good reason, an equitable reason to do so, and compromising that issue was very difficult for me.
Q But in the weeks that followed, did the Committee and the Debtor indeed negotiate to resolve to their mutual satisfaction the issues surrounding corporate governance and employee releases?
A We did, yes.
Q And were -- was the Debtor able to get its disclosure statement approved with Committee support in late November?
A We did, yes.
Q Can you describe for the Court generally kind of the process by which the Debtor negotiated with the Committee? I'll ask it as broadly as I can, and I'll focus if I need to.
A Yeah. The process was usually in group settings with the independent directors, professionals, and the Committee members and their professionals. Oftentimes, then, there would be certain one-off conversations if there was a particular issue that was more important to one Committee member or another, or if they were designated by the Committee

to be the point on that. And so I negotiated on behalf of the Debtor, both collectively and individually, around these points.

The biggest issues related to governance of the Claimant Trust, the separation of the Claimant Trust and the Litigation Trust, which was important to me, the treatment of employees between the filing -- the time we came up with the case and when we were going to exit, and then how that release provision would work.

Q Is it fair to say that numerous iterations of the various documents that embodied the plan were exchanged between the Debtor and the Committee?

A Yes. There were -- there were dozens.

Q Fair to say that the negotiations were arm's length?

A Absolutely. Often contentious, always professional, but I do think that there were, you know, well -- good-faith views held by folks on both sides. And I think we were fortunate to be able to get resolution of those, because they were strongly-held views.

Q Okay. And ultimately, I think you've already testified, and Mr. Clemente certainly made it clear: Is the Debtor -- does the Debtor have the Committee on board for their plan today?

A My understanding is again -- and you heard Mr. Clemente -- both the Committee and each of the individual members are

supportive of the plan.

Q All right. Let's switch to Mr. Dondero and his reaction to the asset monetization plan. Can you describe for the Court based on your experience and your interaction with him what you interpreted Mr. Dondero's position to be?

A VOICE: Objection, hearsay, or --

MR. DRAPER: Objection, hearsay. Calls for speculation, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yeah. I had direct discussions with Mr. Dondero regarding the plan, the asset monetization plan, as I mentioned, direct discussions regarding a potential grand bargain. The initial view from Mr. Dondero was, and he told me, that if he didn't get a plan that he agreed to, if he didn't have a specific control or agreement around what got paid to Acis and Mr. Terry and what got paid to Redeemer specifically, that he would, quote, burn the place down. I know that because it is, excuse the pun, seared into my mind, but I also wrote it down. And that was, you know, in the early summer.

We had subsequent discussions around the plan, and as we were talking about the -- about the grand bargain or -- the pot plan hadn't come out at that point -- even on a large call -- the plan initially called for a transition, and still does, of employees of the Debtor to a related entity to continue

performing services that were under the prior shared service agreements that we were going to terminate.

But that transition is wholly dependent on Mr. Dondero. And we had a call with at least five to seven people on it where I said to Mr. Dondero, look, this is going to be in your financial interest to agree to a smooth transition. These people have worked for you for a long time. It's for their benefit. You portfolio-manage these funds. It's to the benefit of those funds to do this smoothly. And if there's litigation between you and the estate later, then those chips will fall where they may.

And he told me to be prepared for a much more difficult transition than I envisioned.

And I specifically said to him, and this one sticks in my mind because I recall it, I said, don't worry, Mr. Dondero -- I think I used Jim -- I will be prepared. I was a Boy Scout and we spend time preparing for these kinds of things. So we're -- we would love to get done the best transition we can, but we will be prepared for a difficult one.

So, from the start, the idea of the monetization plan was not something that obviously he supported. We did agree with -- after his inquiry or request with the mediators, to file it under seal while we went into the mediation.

BY MR. MORRIS:

Q And after, after that was filed in September, early

October, did Mr. Dondero start to act in a way that the board perceived to be against the Debtor's interests?

A Certainly. I mean, he previously had shown inclinations of that, but that -- it got very aggressive as he interfered with the trades we were trying to do in terms of managing the CLO assets. He took a position that postpetition, which was really one of his entities taking a position, that postposition a sale of life policy assets was somehow not in the best interests of the funds and that we had abused our position, notwithstanding that he turned it over to us with no liquidity to maintain those life policies. There were several other instances. And those led to the decision to, one, have him resign, and then ultimately, after the text to me that I perceived as threatening, and we've had subsequent hearings on it, we asked him to leave the office.

Q Okay. Let's move back to the plan here. Can you describe, you know, generally, if you can, the purpose and intent of the asset monetization plan?

A Well, very simply, the main purpose is to maximize value. This is not a competition between Mr. Dondero and myself. I have no stake in getting more money out of the maximization other than my duty to do the job that I was hired to do.

So our goal is to manage the assets in what we think is the best way to do that over time, and find opportunities where the market is right to monetize the assets, primarily

through sales. There may be other instances, depending on the type of asset, whether a sale makes sense, if we can structure it through some kind of distribution that's more structured.

Q We've used the phrase a bunch of times already. Can you describe in your own words what an asset monetization plan is in the context of the Debtor's proposal?

A Well, it may be slightly an awkward moniker, but I think it's not completely different than what you'd see, in some respects, to a regular plan, where you equitize debt and you operate the business for the benefit of the equitized debt. Here, it's a little different in that we know exactly how we're going to move forward. We've effectively -- we'll effectively turn the debt obligations into trust interests and we will pay those as we sell down assets. So we've got it structured in a way where we can pivot depending on market conditions and we'll be managing certain funds that the assets sit in.

So there's really four assets where the assets sit, and we'll manage those. First are the ones that the Debtor owns directly. Second will be the ones that are in Restoration Capital -- Restoration Capital Partners. Third are the assets in a fund called Multi-Strat. Fourth is the direct ownership interest in Cornerstone, and technically (garbled) would be the -- would be the next one.

So we have the ability to manage these individual assets

and then be able to sell them in what we determine to be the best way to maximize value, depending on the timing.

Q And when you say that you're going to continue to operate the business, do you mean that the Debtor will continue to manage the assets you've just described in the same way that it had prior to the petition date?

A It'll be a smaller team, but that's the Debtor's business. So what we won't be doing are the shared services anymore. That was part of the Debtor's business. But we will be managing the assets. So the 1.0 CLOs, we'll manage those assets. The RCP assets, we'll manage those assets. The Trussway Holdings assets, we'll managing those assets. Each of them is a little bit different. There's things as diverse as operating companies to real estate. We'll operate, subject to final agreement, but the Longhorn A and B, which are separate accounts that are -- were funded and are controlled by the largest -- one of the largest investors in the world. And so they have agreed that we should manage those assets for them.

So we're -- that's the business that the Debtor is in. It won't be doing all of the businesses that the Debtor was in before, like the shared services, but the management of the assets will be very similar.

Q And why do these funds and these assets need continued management? Why aren't you just selling them?

A Well, in some respects, they could just be sold, but the -- we believe that the value would be a lot lower. So, a lot of them are complex. The time to sell them may not be now. Some will require restructuring in some way, whether -- not through a reorganization process, but some sort of structural treatment to how the obligations at the individual asset are treated, or the equity at the individual asset. So we're going to manage each of them and look for market opportunities where we think the value can be maximized.

MR. MORRIS: Your Honor, I'm about to switch to another topic. We have been going for a little bit more than two and a half hours. I'm happy to just continue if you and the witness are, but I just wanted to give you a head's up that I'm about to switch topics. If you wanted to take a short break, we could. If you want me to continue, I'm happy to do that, too.

THE COURT: Well, let me ask you, how much longer do you think you're going to take overall with Mr. Seery?

MR. MORRIS: I think I'll probably have another hour to an hour and a half, Your Honor. We want to make a complete factual record here.

THE COURT: All right. Well, it's 12:07 Central time. Why don't we take a 30-minute lunch break, okay? Can everybody do their lunch snack that fast?

MR. MORRIS: Sure.

THE COURT: I think that would probably be the way to go. So we'll come back -- it's now 12:08. We'll come back at 12:38 Central time and resume --

MR. MORRIS: Okay.

THE COURT: -- resume this direct testimony, okay? So, see you in 30 minutes.

MR. MORRIS: Thank you very much.

THE COURT: Okay.

THE CLERK: All rise.

(A recess ensued from 12:08 p.m. to 12:44 p.m.)

THE COURT: We are going back on the record in the Highland confirmation hearing. It's 12:44 Central time. I took a little bit longer break than I said we would.

Mr. Morris and Mr. Seery, are you ready to resume?

MR. MORRIS: I am, Your Honor.

THE WITNESS: Yes, Your Honor.

THE COURT: Okay, good. A couple of things. I'm required to remind you you're still under oath, Mr. Seery. And also, just for people's planning purposes, what I intend to do is, when the direct examination of Mr. Seery is finished, I'm going to allow cross-examination of the Objectors in the same amount of time in the aggregate that the Debtor got, okay? So, Objectors, in the aggregate, you can spend as long cross-examining as the Debtor spent examining. I can figure out this is the most significant witness, so I'm

assuming that Debtor's other witnesses are going to be a lot shorter than this, but --

MR. MORRIS: Yes, I promise.

THE COURT: -- that's how we'll proceed. And I expect to finish Mr. Seery today.

So, all right. With that, you may proceed, Mr. Morris.

MR. MORRIS: Okay.

DIRECT EXAMINATION, RESUMED

BY MR. MORRIS:

Q Can you hear me okay, Mr. Seery?

A Yes, sir.

Q Okay. Before we move on to the next topic, you spent some time describing the asset monetization plan. Would it be fair to describe that as a long-term going-concern liquidation?

A Long-term is subjective. We anticipate that we'll be able to monetize the assets in two years. We could go out longer to three. There's no absolute restriction that we couldn't take longer, depending on what we see in the market, but the objective would be to find maximization opportunities within that time period.

Q Okay. So let's turn now to the post-confirmation corporate governance structure.

(Interruption.)

THE WITNESS: Mr. Golub (phonetic), you should mute.

THE COURT: Yes. I don't know -- I didn't catch who

that was. But anyway, anyone other than --

A VOICE: It's someone named Garrett Golub.

THE COURT: -- Morris and Seery, please mute. All right. Go ahead.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q At a high level, Mr. Seery, can you please describe for the Court the post-confirmation structure that's envisioned under the proposed plan?

A At a high level, we anticipate reorganizing HCMLP such that the current parties of interest will be extinguished and, in exchange, creditors will get trust interests. There'll be a trust that will sit on top of HCMLP and it will have an overall responsibility for the Claimant Trust, which will be the HCMLP assets plus the assets that we move into the Claimant Trust, depending on structural considerations. And then a Litigation Trust, which will be a separate trust, and that will roll up into the main trust. And the main trust will be where the creditors hold their interests. And those interests take the form of senior interests or junior interests.

Q All right. You mentioned a Claimant Trust. Who is proposed to serve as the Claimant Trustee?

A I am.

Q And you mentioned a Litigation Trust. Is there someone

proposed to serve as the Litigation Trustee?
A A gentleman named Marc Kirschner. He's been doing these kinds of things for a long time.
Q Is there going to be any kind of oversight group or committee?
A There is an oversight committee that sits at the main trust. Into it will report Mr. Kirschner and myself. It has oversight responsibilities similar to a board of directors in terms of the operations of the Claimant Trust and the Litigation Trust.
Q Do you have an understanding as to who the initial members of the Claimant Oversight Committee?
A The initial members will be each of the members of the Creditors' Committee. So, UBS, Acis, Redeemer, a representative from Redeemer, and Meta-e, as well as an independent named David Pauker. So that's the initial structure.
Q And can you describe for the Court, how did Mr. Pauker get involved in this?
A He was selected by the Committee.
Q Okay. Is there -- Meta-e is a convenience class claim holder. Do I have that right?
A Yeah. They're -- they -- as I went through earlier, they had a liquidated claim for litigation services. So we expected that they'll be paid off rather early in the process.

At that point, we suspect they wouldn't -- they would no longer be an Oversight Committee member and they would be replaced by an independent.

Q And do you have any understanding as to how that independent will be chosen?

A I believe it's chosen by the other members.

Q Okay. Can you describe your proposed compensation structure as the proposed Claimant Trustee?

A My compensation will be $150,000 a month, which is the same compensation I have now. In addition, we'll negotiate a bonus structure with the Oversight Committee. And that will likely be a bonus not just for myself but for the entire team, depending on performance.

Q Okay. And that -- and who is that negotiation going to be had with?

A The Oversight Committee.

Q Okay. Are you familiar with Mr. Pauker's compensation structure?

A I -- I've seen it. I don't recall specifically. I think his -- from the models, I think he's about 40 or 50 grand a month, something along those lines.

Q Okay. How about Mr. Kirschner? Do you recall -- let me just ask you this. Does it refresh your recollection at all if I said that 250 in year one for Mr. Pauker?

A Yeah. So maybe closer to $20,000 to $25,000 a month. And

then Mr. Kirschner is a lower amount, but he would get a contingency fee arrangement somewhere dependent on the recoveries from his litigations.

Q Okay. You mentioned earlier that the Debtor intends to continue operations at least for some period of time post-effective date. Do you have a view as to whether the post-confirmation entity will have sufficient personnel to manage the business?

A I do, yes.

Q And why is that? What makes you believe that the Debtor will have -- the post-confirmation Debtor will have sufficient personnel to manage the business?

A Well, we've gone through and looked at each of the assets and what is required to manage those assets. We have a lot of experience doing it during the case. The bulk of the employees, who do a fine job, are really doing shared service arrangements. The direct asset management group is a smaller group, and we'll be able to manage those with the team we're putting together.

Q Okay. How does the ten employees compare to the original plan that was set forth in the disclosure statement, if you recall?

A Well, we had less, and I believe the number was either two or three, along with me, and then using a lot of outside professional help. But we determined that we wanted to have a

much more robust team, based on the litigation that we're seeing around the case and we expect to continue post-exit, so that the team can manage those assets unfettered.

In addition, we were taking on the CLO management, the 1.0 CLO contracts. These one -- as I've mentioned before, they're not traditional CLOs in the sense that they require the same hands-on management, but they do require an experienced team to help manage the exposures, most of which are cross-holdings in different -- in different entities or different investments that Highland also has exposure to.

Q In addition to the assumption of the CLO management agreements, has the Debtor made any decisions regarding the possibility of hiring a sub-servicer?

A We have, yes.

Q And did that factor into the Debtor's decision to increase the number of personnel it was going to retain?

A Well, we determined we weren't going to hire a sub-servicer. And I'm not sure exactly when we made that determination. We do have a TPA, which is SEI, and that's a third-party administrator, to sift through the funds and provide accounting supporting to those, to those funds. So that -- they will help. We also have an outside consultant that we're using, Experienced Advisory Consultants, who are financial consultants who've worked in the business. So we do have those.

But we didn't think that we would get a third-party sub-servicer, as was the case in Acis, and determined that wasn't in the best interest of the estate.

Q Can you just shed a little light on what factors the Debtor took into account in deciding not to hire a sub-servicer?

A Well, we primarily looked at cost, as well as control of the assets, and determined that that was -- those were in the best interests of the estate, to keep them managed internally. We reviewed that with the Committee, and they agreed.

Q Okay.

MR. MORRIS: Let's turn now to the best interests of creditors' test, Your Honor, 1129(a)(7), and let's talk about whether the plan is in the best interests of creditors.

BY MR. MORRIS:

Q Has the Debtor done any analysis to determine the likely value to be realized in a Chapter 7 liquidation?

A We have, yes.

Q And has the Debtor done any analysis to determine the likely recoveries under the plan?

A Yes.

Q Okay. Do you recall when these projections were first prepared?

A We started working on projections in the fall, as we were developing the monetization plan. We filed projections, I

believe, in November. We've subsequently updated those projections based on the claims, market condition, and value of the assets.

Q And were those updates provided to plan objectors last week?

A Yes, they were.

Q Okay. Can we refer to the projections that were in the disclosure statement as the November projections?

A That'd be fine.

Q And can we refer to the projections that were provided to the objectors last week as the January projections?

A Yes.

Q And as --

A I think they're actually -- I think they're actually dated February 1, is the most recent update.

Q Okay. And then was a further update provided yesterday and filed on the docket, to the best of your knowledge?

A Yes.

Q All right. We'll talk about some of the changes in those projections.

MR. MORRIS: Can we call up on the screen Debtor's Exhibit 7D as in dog? And this document is in evidence. Um, --

THE COURT: No, this is -- oh, wait. How many Ds is it? Seven?

MR. MORRIS: It's 7D, so that would be on Docket 1866, all of which has been admitted.

THE COURT: Okay. You're right.

MR. MORRIS: Okay.

And if we could just, I'm sorry, go to Page 3.

BY MR. MORRIS:

Q Is there any way to look at this, Mr. Seery? Is this the January projections that were provided last week?

A Yes.

Q Okay. Can you describe for the Court the process by which this set of projections and the November projections were prepared? How did the Debtor go about preparing these projections?

A Yeah. These are prepared what I would call bottoms-up. So what we did was we looked at each of the assets that the Debtor owns or manages or has a direct or indirect interest in, used the values that we have for those assets, because we do keep valuations for each of the assets that the Debtor owns or manages in the ordinary course of business. We then adjusted those depending on what we saw as the outcomes for the case, either a plan outcome or a liquidation outcome, and then rolled those into the -- into the numbers that you see here.

So the 257 and change. And please excuse my eyesight. I'm going to make this bigger. The 257 is the estimated

proceeds from monetization. Above that, you see cash. That's our estimated cash at 131. And we monitor those, those values daily.

Q And were these projections prepared under your supervision?

A They were, yes.

Q Okay. And who was involved in the preparation of this document and other iterations of the projections?

A The team at DSI. Obviously, myself; the team at DSI; as well as the, at least from a review perspective, counsel.

Q All of these contain various assumptions. Do I have that right?

A Yes.

MR. MORRIS: Can we go to the prior page, please, I think is where the assumptions are? And let's just look at a few of them. Okay. Can we make that a little bigger, La Asia? Okay. Good.

BY MR. MORRIS:

Q Why does the Debtor's projections and liquidation analysis contain any assumptions? Why, why include assumptions?

A Well, all projections contain assumptions. So an assumption -- I was strangely asked the question at deposition, what does that mean? It's a thing or fact that one accepts as true for the purposes of analysis. And so in terms of looking out into the future as to what the potential

operation expenses will be and what the potential recoveries will be, one has to make assumptions in order to be able to compare apples to apples.

Q And do you believe that these assumptions are reasonable?

A Yes. It would make no sense to have assumptions that aren't reasonable. I mean, and we've all seen that with analysis through our respective careers. It really should be grounded in some fact and a reasonable projection on what can happen in the future, based upon experience.

Q Okay. And have you personally vetted each of the assumptions on this page?

A Yes.

Q Okay. Let's just look at a few of them. Let's start with B. It says, All investment assets are sold by December 31, 2022. Do you see that?

A Yes.

Q Why did the Debtor make that assumption?

A We looked at a two-year projection horizon. We thought that that was a reasonable amount of time, looking at these assets, to monetize the assets. Remember that we did go through a process of the case over the last year, and we did consider monetization asset events for certain of the assets throughout the case, some of which we were successful on, some of which we weren't, some we just determined to pull back. But we do believe that, based upon our view of the market and

where we think these assets will be positioned, that monetizing them over a two-year period makes sense.

Q And is it possible that it takes longer than that?

A It's possible. The -- you know, we would be wrong about the market. The -- we could go into a full-blown recession. Capital could dry up. The financing markets could turn negative. But they're extremely positive right now. Those things could happen. But we're assuming that they won't.

Q And is it possible that you complete the process on a more accelerated timeframe?

A That's always possible. It's not, in my experience, a good way to plan. Luck really isn't a business strategy. But if good opportunity shows up and folks want to pay full value for an asset, we certainly wouldn't turn them away just so we could stretch out the time period.

Q Is it fair to say that this projected time period is your best estimate on the most likely timeframe needed?

A It's -- I think it's the best estimate that we have based upon our experience with the assets, again, and our projection of the marketplace that we see now. If things change, we'll adjust it, but this is a fair estimate of when we can get the monetization accomplished.

Q Okay. The next assumption relates to certain demand notes. Do you see that?

A Yes.

Q Can you explain to the Court what that assumption is and why the Debtor believed that it was reasonable?

A Well, the Debtor has certain notes that are demand notes. These are all from related entities. Most of the notes, the demand notes, we have demanded, and we've commenced litigation to collect. And we assume that we're going to be able to collect those.

Three notes that were long-term notes -- these were notes with maturities in 2047 that had been stretched out a couple years ago -- were defaulted recently. And we have accelerated those notes and we've asserted demands and we have commenced litigation, I believe, on each of those last week to collect. So we do estimate that we will collect on all of the notes that we've demanded and that we've commenced action on. So the demand notes as well as the accelerated notes.

The next, the next bullet shows there's one Dugaboy note that has not defaulted. That also has a 2047 maturity. I believe it's about $18 million. And we expect that one to stay current, because now I think the relater parties learned that when you don't pay a long-dated note, it accelerates, provided the holder, which is us, wishes to accelerate it, which we did. And so that note we do not expect to be collected in the time period.

Q Okay.

MR. MORRIS: Let's go down to M.

BY MR. MORRIS:

Q M relates to certain claims. Do you see that?

A Yes.

Q Can you just describe at a high level what assumption was made with which -- with respect to which particular claims?

A Well, we've summarized them there. And what we've assumed is that, with respect to Class 8, IFA, which is a derivative litigation claim that seeks to hold, loosely, HCMLP liable for obligations of NexBank, is worth zero. I think that's pretty close to settling. We assumed here $94.8 million for UBS, which was the estimated amount, and $45 million for HarbourVest.

Q And when you say the estimated amount, are you referring to the 3018 order on voting?

A Yes. We just use the estimated amount in this projection based upon the 3018 order.

Q Okay. And finally, let's look at P. P has a payout schedule. Do I have that right?

A That's an estimated payout schedule, yes.

Q And what do you mean by that, that it's estimated?

A Based upon our projections and how we perceive being able to monetize the assets and reach the valuations that we want to reach, we believe we could make these distributions. However, there's no requirement to make them.

So the first and foremost objective we have, as I said

earlier, is to maximize value, and not -- it's not based on a payment schedule, it's based upon the market opportunity. And we've estimated for our purposes here that we'll be able to meet these distribution amounts, but there's no requirement to do so.

Q Okay.

MR. MORRIS: Let's go to Page 3 of the document, please.

BY MR. MORRIS:

Q Can you just describe generally what this page reflects?

A This is a comparison of the plan analysis and what we expect to achieve under the plan and the liquidation analysis if a trustee, a Chapter 7 trustee, were to take over. And it compares those two distribution amounts based upon the assumptions on the prior page.

Q All right. Let's just look at some of the -- some of the data points on here. If we look at the plan analysis, what is -- what is projected to be available for distribution, the value that's available for distribution?

A $222.6 million.

Q Okay. So, 222? And on a claims pool that's estimated to be, for this purpose, how much?

A $313 million.

Q And what is the distribution, the projected distribution to general unsecured creditors on a percentage basis?

A On this analysis, to general unsecured creditors, it's 62.14 percent. But remember, that backs out the payment to the Class 7 creditors of 85 cents above.
Q Okay. And does this plan analysis include any value for litigation claims?
A No, it does not.
Q And is that true for all forms of the Debtor's projections?
A That's correct, yes.
Q Okay. And let's look at the right-hand column for a moment. It says, Liquidation Analysis. What does that column represent?
A That represents our estimate of what a Chapter 7 trustee could achieve if it were to take over the assets, sell them, and make distributions.
Q Okay. And let's just look at the comparable data points there. Under the liquidation analysis, as of -- the January liquidation analysis as of last week, what was projected to be available for distribution?
A A hundred and -- approximately $175 million.
Q Okay. And what was the claims pool?
A The claims pool was $326 million. Recall that that's a slightly larger claims pool because it doesn't back out the Class 7 claims.
Q Okay. The convenience class claims?

A Correct.
Q Okay. And what's the projected recovery for general unsecured claims under the liquidation analysis?
A Based on this analysis and the assumptions, 48 (audio gap).
Q Okay. Based on the Debtor's analysis, are creditors expected to do better under this analysis in the -- under the Debtor's plan versus the hypothetical Chapter 7 liquidation?
A Yes. Both -- both Class 7 and Class 8.
Q Okay. Now, this set of projections differs from the projections that were included in the disclosure statement; is that right?
A That's correct.
Q Okay. Can we just talk about what the differences are between the November projections that were in the disclosure statement and the January projections that are up on the screen? Let's start with the monetization of assets, the second line. Do you recall if there was an increase, a decrease, or did the value from the monetization of assets stay the same between the November projections and the January projections?
A They increased from November 'til -- 'til now.
Q Okay. Can you explain to the judge why the value from the monetization of assets increased from November to January?
A Well, really, it's the composition of the assets and their

value. So there's four main drivers.

The first is HarbourVest. We had a settlement with HarbourVest, which include HarbourVest transferring to the Debtor $22-1/2 million of HCLOF interests. Those have a real value, and we've now included them in the -- in the asset pool. We've also included HarbourVest in the claims pool.

The second was we talked a little bit earlier on the assumptions on the notes. We previously had anticipated that, on the long-dated notes, a collection, we -- we'd receive principal and interest currently, but we wouldn't receive the full amount of the principal that was due well off in the future, and we would sell it a discount.

So the amount of the asset pool has been increased by $24 million, and that reflects the delta between or the change between what was in the prior plan, the notes paying and then being sold at a discount, and what's in the current plan, which include the accelerated notes, which is a $24 million note that Advisors defaulted on that we have accelerated and brought action on, as well as two six -- roughly $6 million notes, one from Highland Capital Real Estate and the other from HCM Services. So that's, that's additional 24.

In addition, Trussway, we've reexamined where Trussway is in the market, both its marketplace and its performance, and reassessed where the value is. So that has increased by about $10.6 million.

That doesn't mean that we would sell it today. It means that, when you look at the performance of the company, what we think are the best opportunities in the market. As we see the marketplace with managing the company over time, we think that that asset has appreciated considerably since November.

And then, finally, there were additional revenues that flow into the model from the November analysis which would be distributable, and those include revenues from the 1.0 CLOs.

Q Okay. So that accounts for the difference and the increase in value from the monetization of assets. Is there also an increase in expenses from the November projections to the January projections?

A Yeah. It's -- it's about -- it's around $25 million additional increase.

Q And can you explain to the Court what is the driver behind that increase in expenses?

A Yeah. There's several drivers to that. The first one is head count. So our head count, we've increased. As I mentioned earlier, we determined that we wanted to have a much more robust management presence. So we've increased the head count, so we have a base comp, compensation, about $5 million more than we initially thought.

Secondly, we have bonus comp. So we've back-ended -- structured a backend bonus performance bonus for the team, and that will run another $5 million, roughly.

Previously, we had thought about, as you mentioned earlier, the sub-servicing, but we've now talked about and we have engaged a TPA, SEI, as well as experienced advisors. That's another $1 to $2 million.

Operating expenses have increased by about $8 million, based upon our assessment. The biggest driver there is D&O, which is up about $3 million. In addition, we've gotten -- we determined to keep a bunch of agreements related to data collection and operations. Those were requested by the Committee, but they also serve us in performing our functions. That's another couple million dollars.

My comp, my bonus comp was not in the prior model. So I have a bonus that has not been agreed to by the Court for the bankruptcy performance. This is not a future bonus. And we built that into the model. Obviously, it's subject to Court approval and Committee objection, and I suppose anybody else's objection, but we'll -- we'll be before the Court for that. But we wanted to build that into the model so that we had it covered in the event that it was approved.

Q Was there also a change in the assumption from November to January with respect to the size of the general unsecured claim pool?

A Yes. There have been -- there have been several changes that have happened, and we've added those and refined the claim pool numbers.

Q And are those changes reflected in the assumption we looked at earlier, Exhibit -- Assumption M, which went through certain claims that have been liquidated?
A Some, some are. That assumption, I don't believe, was -- it's not in front of me, but wasn't up to date. So, that one, for example, assumed UBS at the 3018 estimated amount. We've since refined that number to reflect the agreed-upon transaction with UBS, which is subject to Court approval.
Q Right. But before we get to that, for purposes of the January model, the one that's up on the page -- and if we need to look at the prior page --
MR. MORRIS: Let's go to the prior page, the assumption. Assumption M.
BY MR. MORRIS:
Q Assume the UBS, the UBS claim at the $94.8 million, the 3018 number. Do you remember that?
A Yeah. That's, that -- that's the assumption in this model. I think back in November we assumed HarbourVest at zero and UBS at zero. So we've since -- we've since refined those numbers, obviously, through both the 3018 process as well as the settlement with HarbourVest.
Q And did the -- did the inclusion -- withdrawn. At the time that you prepared the November model -- withdrawn. At the time the Debtor prepared the November model, did it know what the UBS or the HarbourVest claims would be valued at?

A No. We just had our assumption back then, which was zero. And now, obviously, we know.
Q And so the January model took into account the settlement with HarbourVest and the 3018 motion; do I have that right?
A That's correct. That's in the assumptions.
Q And what was the impact on the projected recoveries to general unsecured creditors from the changes that you've just described, including the increase in the claims amount?
A Well, when -- like any fraction, the distribution will go down if the claimant pool goes up. So, with the denominator going up by the UBS and the UBS amount -- the UBS and the HarbourVest amounts, the distribution percentage went down.
Q Okay. I want to focus your attention on the second line where we've got the monetization of assets under the plan at $258 million but under the liquidation analysis it's $192 million. Do you see that?
A Yes.
Q Can you tell Judge Jernigan why the Debtor believes that under the plan the Debtor or the post-confirmation Debtor is likely to receive or recover more for the --
(Interruption.)
THE COURT: All right. Hang on a minute. Where is that coming from, Mike?
THE CLERK: Someone is calling in.
THE COURT: Okay.

MR. MORRIS: Thank you.

THE COURT: Mr. --

MR. MORRIS: Let me restate the question.

THE COURT: Yes. Restate.

BY MR. MORRIS:

Q Can you explain to Judge Jernigan why the Debtor believes that the -- under the plan corporate structure, the Debtor is likely to recover more from the monetization of assets than a Chapter 7 liquidation trustee would?

A Sure. My experience is that Chapter 7 trustees will generally try to move quickly to monetize assets. They will retain their own professionals, they will examine the assets, and they will look to sell those assets swiftly.

The monetization plan does not plan to do that. I've got a year's of experience -- a year now of experience with these assets, as well as we'll have a team with several years at least each of experience with the assets. We intend to look for market opportunities, and think we'll be able to do it in a much better fashion than a liquidating Chapter 7 trustee.

The nature of these assets is complex. Many of them are private equity investments in operating businesses. Certain of them are complicated real estate structures that need to be dealt with. Some of them are securities that, depending on when you want to sell them, we believe there'll be better times than moving quickly forward to sell them now.

So, with each of them, we think that we'll be able to do better than a Chapter 7 trustee based upon our experience. The only thing that we're level-set with a Chapter 7 trustee on is that cash is cash.

Q Do you have any concerns that a Chapter 7 trustee might not be able to retain the same personnel that the Debtor is projected to retain?

A Well, again, in my experience, it would be very difficult for a Chapter 7 trustee to retain the same professionals, and typically they don't.

Secondly, retaining the individuals, I think, would be very difficult for a Chapter 7 trustee, would not have a relationship with them, and that gap of time and the risks that they would have to take to join a Chapter 7 trustee I think would lead most of them to look for different opportunities.

Q Okay. One of the other things, one of the other changes I think you mentioned between the November and the January projections was the decision to assume the CLO management contracts. Do I have that right?

A That's correct.

Q And why has the Debtor decided to assume the CLO management contracts? How does that impact the analysis on the screen?

A Well, it does add to the expense, but it also adds to the

proceeds.

When we did the HarbourVest settlement, we ended up with the first significant interest in HCLOF. HCLOF owns the vast majority of the equity in Acis 7, and also owns significant preferred share interests in the 1.0 CLOs. And we think it's in the best interest of the estate to keep the management of those assets where we have an interest in the outcome of maximizing value with the estate.

In addition, we're going to have employees who are going to work with us to manage those specific assets, so we feel like that will be something where we can control the disposition much better.

There's also cross-interests that these CLOs have in -- the 1.0 CLOs have in a number of other investments that Highland has. As in all things Highland, it's interrelated, and so many of the companies have direct loans from the CLOs. We intend to refinance that, but we feel much more comfortable and feel that there would be value maximization if we're able to work directly with the Issuers as a manager while we seek in those underlying investments to refinance the CLO debt.

Q Has the Debtor -- has the Debtor reached an agreement with the Issuers on the assumption of the CLO management agreements?

A Yes, we have.

Q Can you describe for the Court the terms of the

assumption?

MR. RUKAVINA: Your Honor, this --

THE WITNESS: Yes.

MR. RUKAVINA: Your Honor, this is Davor Rukavina. I would object to this as hearsay.

THE COURT: Well, he has not --

MR. MORRIS: It's --

THE COURT: He's not said an out-of-court statement yet, so I overrule.

Go ahead.

THE WITNESS: Yeah, we -- we are going to assume the CLO contracts. We have had direct discussions with the Issuers. They have agreed.

The basic terms are that we're going to cure them by satisfying about $500,000 of cure costs related to costs that the CLO Issuers have incurred in respect of the case, and we'll be able to pay that over time.

MR. RUKAVINA: Your Honor, this is Davor Rukavina. I would renew my objection and move to strike his answer that they've agreed. That is hearsay, an out-of-court statement offered to prove the truth of the matter asserted.

THE COURT: Okay. Mr. Morris, what is your response?

MR. MORRIS: He's describing an agreement. I actually think it's in the Debtor's plan that's on file already. But he's describing the terms of an agreement. He's

not saying what anybody said. There's no out-of-court statement. It's an agreement that's being described.

THE COURT: All right. Thank you. I overrule the objection.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Does the Debtor believe that the CLO agreements will be profitable?

A Yes.

Q And why does the Debtor believe that the CLO agreements will be profitable to the post-confirmation estate?

A Well, we don't -- we don't break out profitability on a line-by-line basis. But the simple math is that the revenues from the CLO contracts which will roll in to the Debtor from the management fees are more than what we anticipate the actual direct costs of monitoring and managing those assets would be.

Q Okay. Are you aware that yesterday the Debtor filed a further revised set of projections?

A I am, yes.

Q All right. Let's call those the February projections.

MR. MORRIS: Can we put those on the screen?

It's Exhibit 7P, Your Honor.

THE COURT: Okay.

MR. MORRIS: All right. I think that for some reason

-- yeah, okay. There we go. Perfect. Right there.

Your Honor, these are the projections that were filed yesterday. I'm going to move for the admission into evidence of these projections.

THE COURT: All right.

MR. TAYLOR: Your Honor, this is Clay Taylor.

THE COURT: Go ahead.

MR. TAYLOR: We object. These were -- these were not previously provided. They were provided on the eve of the confirmation hearing, after the Debtors had already revised them once and provided those on -- after close of business on a Friday before Mr. Seery's deposition. And these were provided even later, certainly not within the three days required by the Rule. And therefore we move to -- that these should not be allowed into evidence.

THE COURT: Mr. Morris, what is your response to that?

MR. MORRIS: Your Honor, first of all, the January projections were provided in advance of Mr. Seery's deposition and he was questioned extensively on it. These projections have been updated since then, I think for the singular purpose of reflecting the UBS settlement.

As Your Honor just saw, the prior projections included an assumption based on the 3018 motion. Since Mr. Seery's deposition, UBS and the Debtor have agreed to publicly

disclose the terms of the settlement, and that's reflected in these revised numbers. I think there was one other change that Mr. Seery can testify to, but those are the only changes that were made.

THE COURT: All right. Mr. Seery, what besides the UBS settlement do you think was put in these overnight ones?

THE WITNESS: I believe the only other change, Your Honor, was correcting a mistake. In Assumption M, the second line is assumes RCP claims will offset against HCMLP's interest in the fund and will not be paid from the Debtor's assets. That hasn't changed.

Basically, the Debtor got an advance from RCP that was to -- for tax distributions, and did not repay it. The RCP investors are entitled to recovery of that. So we had previously backed that out. It's about four million bucks. What happened was it was just double-counted.

THE COURT: Okay.

THE WITNESS: So, as an additional claim, it was counted as $8 million. I think that's the only other change.

THE COURT: All right. I overrule the objection. You may go forward. I admit 7P.

MR. MORRIS: Thank you, Your Honor.

(Debtor's Exhibit 7P is received into evidence.)

MR. MORRIS: Can you just -- if we can go to the next page, please.

BY MR. MORRIS:
Q So, with -- seeing that the claims pool under the plan previously was $313 million, and what's the claims pool under the projections up on the screen under the plan?
A Two -- well, remember, there's 273 for Class 8, and then you'd add in the Class 7 as well, which is the $10.2 million. So the 273 went from 313 to 273 with that settlement.
Q And is there any -- is there any reason for the decrease other than the change from the 3018 settlement -- order figure to the actual settlement amount?
A For the UBS piece, no. And then, as I mentioned, I believe the other piece would have been that four million -- that additional $4 million that was taken out.
Q And did those two changes have a -- did those two changes have an impact on the projected recoveries under the plan?
A Sure, particularly with respect to -- to the Class 8. Those recoveries went up significantly because the denominator went up.
Q Okay. Does the Debtor believe that its plan is feasible?
A Yes, absolutely.
Q And do you know whether the administrative priority and convenience class claims will be paid in full under the Debtor's plan?
A Yes. We monitor the cash very closely, so we do have additional cash to raise, but we're set to reach or exceed

that target, so we do believe we'll be able to pay all the administrative claims when they come in. Obviously, we have to see what they are. We will be able to pay Class 7 on the effective date. Any other distributions, we expect to be able to make as well.

So, and then it's -- then it's a question of going forward with a few other claims that we have to pay over time. We have the cash flow to pay those. Frontier, for example, we'll be able to pay that claim over time in accordance with the restructured terms. If the assets that secure that claim are sold, they would be paid when those assets are sold.

Q Frontier, will the plan enable the Debtor to pay off the Frontier secured claim?

A Yes. That's what I was explaining. The cash flow is sufficient to support the current P&I on that claim. We will be able to satisfy it from other assets if we determine not to sell the asset securing the Frontier claim, or if we sell the asset securing the Frontier claim we could satisfy that claim. The asset far exceeds the value of the claim.

Q Has the plan been proposed for the purpose of avoiding the payment of any taxes?

A No. We expect all tax claims to be paid in accordance with the Code, and to the extent that there are additional taxes generated, we would pay them.

Q Okay. Let's just talk about Mr. Dondero for a moment

before we move on. Are you aware that Mr. Dondero's counsel has requested the backup to, you know, these numbers, including the asset values?

A It -- I'm not sure if it was his counsel or one of the other related-entity counsels.

Q Okay. But you're aware that a request was made for the details regarding the asset values and the other aspects of this?

A Yes.

Q Those were -- were those formal requests or informal requests?

A They were certainly at my deposition.

Q Right. But you haven't seen a document request or anything like that, have you?

A No.

Q Did the Debtor make a decision as to whether or not to provide the rollup, the backup information to Mr. Dondero or the entities acting on his behalf?

A Yes.

Q And what did the Debtor decide?

A We would not do that.

Q And why did the Debtor decide that?

A Well, I think that's pretty standard. The underlying documentation and the specific terms of the model are very specific, and they are -- they are confidential business

information that runs through what we expect to spend and what we expect to receive and when we expect to sell assets and then receive proceeds, and the prices at which we expect to sell them.

To the extent that any entity wants to have that information as a potential bidder, that would be very detrimental to our ability to maximize value. So, typically, I wouldn't expect that to be given out, and I would not approve it to be given out here.

Q Did the Debtor disclose to Mr. Dondero's counsel or counsel for one of his entities the agreement in principle with UBS before the updated plan analysis was filed last night?

A I believe that disclosure was done a while ago, to Mr. Lynn.

Q So, to the best of your -- so, to the best of your knowledge, the Debtor actually shared the specifics of the agreement with UBS with Mr. Dondero and his counsel before last night?

A Yes. I have specific personal knowledge of it because we had to ask UBS for their permission, and they agreed.

Q Okay.

MR. MORRIS: All right. Let's move on to 1129(b), Your Honor, the cram-down portion.

BY MR. MORRIS:

Q Are you aware, Mr. Seery, how various classes have voted under the plan?
A I am generally, yes.
Q Okay. Did any class vote to reject the plan, to the best of your knowledge?
A I don't -- I guess it depends on how you define the class. I think the answer is that I don't believe that, when you count the full votes of the -- the allowed claims and the votes in any class, I don't believe any of the classes voted to reject the plan.
Q What type of claims are in Class 8?
A General unsecured claims.
Q And what percentage of the dollar amount of Class 8 voted to accept?
A It's -- I think it's near -- now with the Daugherty agreements, it's near a hundred percent of the third-party dollars. I don't know the individual employees' claims off the top of my head.
Q All right. And what about the number in Class 8? Have a majority voted to accept or reject in Class 8?
A If you include the employee claims -- which, again, we think have no dollar amounts -- then I think it's a majority would have rejected. The vast dollar amounts did accept.
Q Okay. Let's talk about those employees claims for a moment. Do you have an understanding as to the basis of the

claims?
A Yes.
Q What's your understanding of the basis of the claims?
A Most of the claims are based on deferred compensation, and that's the 2005 Highland Capital Management bonus plan. And that bonus plan provides certain deferred payment amounts to the employees to be paid over multiple-year periods, provided that they are in the seat when the payment is due. That's the vesting date.
Q Okay.
MR. MORRIS: Your Honor, just as a note-keeping matter, the deferred compensation plan and the annual bonus plan are Exhibits 6F and 6G, respectively, and they're on Docket 1822.
THE COURT: All right.
BY MR. MORRIS:
Q And Mr. Seery, are you generally familiar with those plans?
A I am, yes.
Q In order to receive benefits under the plans, are the employees required to be employed at the time of vesting?
A Yeah. Our counsel refers to them, various terms, but generally -- our outside labor counsel. They're referred to as seat-in-the-seat plans, meaning that your seat has to be in a seat at the office at the day that the payment is due. If

you're terminated for cause or if you resign, you're not entitled to any payment.

So either you're there and you receive it or you're not and you don't. The only exception to that, I believe, is death and disability. Or disability.

Q All right. Did the Debtor terminate the annual bonus plan?

A Yes, we did.

Q And in what context did the Debtor terminate the annual bonus plan?

A Well, we had discussion on it last week. As Mr. Dondero had also testified, the plan was to terminate all the employees prior to the transition. That's well known among the employees. The board terminated the 2005 bonus plan and instead replaced it with a KERP plan that was approved by this Court.

Q And what was your understanding of the consequences of the termination of the bonus plan for -- for purposes of the claims that have been asserted by the employees who rejected in Class 8?

A It's clear that, under the 2005 HCMLP bonus plan, no amounts are due because the plan has been terminated.

Q All right. Do you have an understanding as to when payments become due under the deferred compensation -- under the compensation plan?

A I do, yes.
Q And when are they due?
A The next payments are due in May.
Q And what is the Debtor intending to do with respect to the objecting employees?
A The Debtor will have terminated all those employees before that date.
Q All right. So, what's -- what are the consequences of their termination vis-à-vis their claims under the deferred compensation plan?
A They won't have any claims.
Q Okay. So is it the Debtor's view that the employees who voted to reject in Class 8 have no valid claims under the annual comp -- annual bonus plan or the deferred compensation plan?

MR. RUKAVINA: Your Honor, this is Davor Rukavina. With due respect, Your Honor, these employees have voted. The voting is on file. There has been no claim objections to their claims filed. There's been no motion to designate their votes filed. So Mr. Seery's answer to this is irrelevant. They have votes -- pursuant to this Court's disclosure statement order, they have votes and they have counted, and now Mr. Seery is attempting to basically impeach his own balloting summary.

THE COURT: Mr. Morris, what is your response?

MR. MORRIS: The point of cram-down, Your Honor, is it fair and equitable. Does -- does -- is it really fair and equitable to the 99 percent of the economic interests to allow 24 employees who have no valid claims to carry the day here? And this is -- that's what cram-down is about, Your Honor.

THE COURT: All right. I overrule the objection.

BY MR. MORRIS:

Q Let's talk about Class 7 for a moment, Mr. Seery. That's the convenience class; is that right?

A That's correct.

Q How and why was that created?

A Well, initially, that was created because we had two types of creditors in the case, broadly speaking. We had liquidated claims, which were primarily trade-type creditors, and we had unliquidated claims, which were the litigation-type creditors. And so that class was created to deal with the liquidated claims, and the Class 8 would deal with the unliquidated claims, which were expected to, as we talked about earlier with respect to the monetization plan, take some time to resolve.

Q Was the creation of the convenience class a product of negotiations with the Committee?

A The initial discussion on how we set it up I believe was generated by the Debtor's side, but how it evolved and who would be in it and how it was treated in terms of

distributions was a product of negotiation with the Committee.
Q Okay. So how was the dollar threshold figure arrived at? How did you actually determine to create a convenience class at a million dollars?
A It was through negotiation with the Committee. So this was one of those items that moved a fair bit, in my recollection, through the many negotiations we had, heated negotiations on some of these items, with the Committee.
Q And are all convenience class -- all holders of convenience class claims holders of claims that were liquidated at the time the decision was made to create the class?
A I believe so. I don't think there's been -- other than -- well, there -- we just had some settlements today, and I think that relates to the employees, but those would be the only ones that there would be disputes about, and that would roll into the liquidat... the convenience class.
Q Okay. Finally, is there any circumstance under which holders of Class 10 or 11, Class 10 or Class 11 claims will be able to obtain a recovery under the plan?
A Theoretically, there's a circumstance, and that is if every other creditor in the case were to be paid in full, with interest at the federal judgment rate, including Class 9, which are the subordinated claims. If those all got paid in full, then theoretically the junior interest holders could

receive distributions.

However, based upon our projections, that would be wholly dependent on a significant recovery in the Litigation -- by the Litigation Trustee.

Q Okay. Let's move now to questions of the Debtor release and the plan injunction. Is the Debtor providing a release under the plan?

A Yes.

Q Is anyone other than the Debtor providing a release under the plan?

A No.

Q Who is the Debtor proposing to release under the plan?

A The release parties are pretty similar to what you typically would see, in my experience, in most plans. You have the independent board, myself as CEO and CRO, the professional -- the Committee members, the professionals in the case, and the employees that we reached agreement with respect to certain of them who have signed on to a stipulation, and others, get a broader release for negligence.

Q Okay. Is the Debtor aware of any facts that might give rise to a colorable claim against any of the proposed release parties?

A Not with respect to any of the release parties. So the -- obviously, I don't think there's any claims against me. But the same is true with respect to the oversight board, the

independent board.

The Committee has been, you know, working with us hand-in-glove, and I think if they thought we -- there was something there, we would have heard it.

With respect to the professionals, we haven't seen anything as an independent board.

And with respect to the employees' that -- general negligence release, these are current employees and we have been monitoring them for a year and we don't have any evidence or anything to suggest that there would be a claim against them.

Q Are there conditions to the employees' release?

A There are. So, the employee release, as we talked about earlier, was highly negotiated with the Committee. It requires that employees assist in the monetization efforts, which is really on the transition and the monetization. They don't have to assist in bringing litigations against anybody, so that's not part of what the provision requires. But it does require that they assist generally in our efforts to monetize assets.

We don't think that's going to be significant, but if there are individual questions or help we need, we certainly would reach out to them. If it's significant time, that will be a different discussion.

And then with respect to the two senior employees who

signed the stipulation, they have to give up a part of their distribution for their release.

Q All right. I think you just alluded to this, but has the release been the subject of negotiation with the Creditors' Committee?

A Yeah. We've touched on it a bunch of times, and we certainly, unfortunately, let it spill over into the court a couple times. It was a hotly-negotiated piece of the plan.

Q Okay. Has the Committee indicated to the Debtor in any way that anybody subject to the release is the subject of a colorable claim?

A Anyone subject to the release? No.

Q Yeah. All right. Let's talk about the plan injunction for a moment. Are you familiar with the plan injunction?

A Broadly, yes.

Q And what is your broad understanding of the plan injunction?

A Anybody who has a claim or thinks they have a claim will broadly be enjoined from bringing that, other than as it's satisfied under the plan or else ultimately bringing it before this Court. And that's the gatekeeper part, which is a little bit of combining the two pieces.

Q And what's your understanding of the purpose of the injunction?

A It's really to prevent vexatious litigation. We, as

independent directors, stepped into what I think most people would fairly say is one of the more litigious businesses and enterprises that they've seen. And we have a plan that will allow us to monetize assets for the benefit of the creditor body, provided we're able to do that and not have to put out fires every day on different fronts. So what we're hoping to do with the injunction is ensure that we can actually fulfill the purposes of the plan.

Q All right. Let's talk about some of the litigation that you're referring to.

MR. MORRIS: Can we put up on the screen the demonstrative for the Crusader litigation?

BY MR. MORRIS:

Q And Mr. Seery, I would just ask you to kind of describe your understanding in a general way about the history of the Crusader litigation.

MR. MORRIS: And, Your Honor, just to be clear here, this is a demonstrative exhibit. As you can see in the footnotes, it's heavily footnoted to the documents and to -- and, really, to the court cases themselves. The documents on the exhibit list include the dockets from each of the underlying litigations. And I just want to just have Mr. Seery describe at an extremely high level some of the litigation that the Debtor has confronted over the years, you know, as the driver, as he just testified to, for the decision

to seek this gatekeeper injunction.

THE COURT: All right.

BY MR. MORRIS:

Q So, Mr. Seery, can you just describe kind of in general terms the Crusader litigation?

A Yeah. I apologize to the Redeemer team for maybe not doing this justice. But this is litigation that came out of a financial crisis upheaval related to this fund. Disputes arose with respect to the holders of the interests, which were the -- ultimately became the Redeemers, and Highland as the manager.

That went through initial litigation, and then into the Bermuda courts, where it was subject to a scheme. The scheme required or allowed for the liquidation of the fund and then distributions to the -- to the holders, and then deferred many of the payments to Highland.

At some point, Highland, frustrated that it wasn't able to get the payments, decided to just take them, and I think, you know, fairly -- can be fairly described, at least by the arbitration panel, as coming up with reasons that may not have been wholly anchored in reality as to what its reasons were for taking that money.

That led to further disputes with the Redeemers, who then terminated Highland and brought an arbitration action against Highland. They were successful in that arbitration and

received a $137 arbitration award. And right up to the petition date, that arbitration pursued. When they finally got their -- the arbitration award, they were going to Delaware Chancery Court to file it and perfect it, and the Debtor filed.

Q Okay.

MR. MORRIS: Let's go to the next slide, the Terry/Acis slide. If we could just open that up a little bit. It's -- as you can imagine, Your Honor, it's a little difficult to kind of summarize the Acis/Terry saga in one slide, but we've done the best we can.

BY MR. MORRIS:

Q Mr. Seery, can you describe generally for Judge Jernigan, who is well-versed in the matter, the broad overview of this litigation?

A There's clearly nothing I can tell the Court about the bankruptcy that it doesn't already know. But very quickly, for the record, Mr. Terry was an employee at Highland. He also has a partnership interest in Acis, which was, in essence, the Highland CLO business. He -- and he got into a dispute with Mr. Dondero regarding certain transactions that Mr. Dondero wanted to enter into and Mr. Terry didn't believe were appropriate for the investors.

Strangely, the assets that underlie that dispute are still in the Highland portfolio, both Targa (phonetic) and Trussway.

Mr. Terry was terminated, or quit, depending on whose side of the argument you take. Mr. Terry then sought compensation in the arbitration pursuant to the partnership agreement. Ultimately, he was awarded an arbitration award of roughly $8 million.

When he went to enforce that -- that was against Acis. When he went to enforce that against Acis, which had all the contracts, Highland went about, I think, terribly denuding Acis and moving value. Mr. Terry ultimately was able to file an involuntary against Acis, and after a tremendous amount of litigation had a plan confirmed that gave him certain rights in Acis and any ability to challenge certain transactions with respect to Highland that formed the basis of his claims in the Highland bankruptcy.

That wasn't the end of the saga, because Highland commenced a litigation -- well, not Highland, but HCLOF and others, directed by others -- commenced litigation against Mr. Terry in Guernsey, an island in the English Channel. That litigation wound its way for a couple -- probably close to two years, at least a year and a half, and ultimately was -- it was dismissed in Mr. Terry's favor.

While that was pending, litigation was commenced in New York Supreme Court against Mr. Terry and virtually anybody who had ever associated with him in the business, including -- including some of the rating agencies. That was withdrawn as

part of our efforts working with DAF to try to bring a little bit of sanity to the case. But it was withdrawn without prejudice.

But ultimately, you know, we've agreed to a claims settlement, which was approved by this Court, with Acis and Mr. Terry.

Q All right.

MR. MORRIS: How about UBS? Can we get the UBS slide?

THE WITNESS: I should mention that there's other litigations involving Mr. Terry and Highland individuals that are outstanding, I believe, in Texas court. We have not yet had to deal with those.

BY MR. MORRIS:

Q Okay. Can you describe for the Court your general understanding of the UBS litigation?

A Again, UBS comes out of the financial crisis. It was a warehouse facility that UBS had established for Highland. It actually was a pre-crisis facility that was restructured in early '08, while the markets were starting to slide but before they really collapsed. That litigation started after Highland failed to make a margin call. UBS foreclosed out -- or it wasn't really a foreclosure, because it's a warehouse facility, but basically closed out all the interest and sought recovery from Highland for the shortfall.

Highland was one of the defendants, but there are numerous defendants, including some foreign subsidiaries of Highland.

That case wend its way through the New York Supreme Court, up and down between the Supreme and the Appellate Division, which is the intermediate appellate court in New York. Incredibly litigious effort over virtually every single item you could possibly think of.

Ultimately, UBS got a judgment for $500-plus million and -- plus prejudgment interest against two of the Highland subsidiaries. It then sought to commence action up -- enforce its judgment through various theories against Highland. That is part of the settlement that we have -- it's been part of the lift stay motion here, the 3019, as well as the 3018, and as well as the ultimate settlement we've discussed today.

Q Okay. Moving on to Mr. Daugherty, can you describe for the Court your understanding of the Daugherty litigation?

A The Daugherty litigation goes back even further. It did -- I think the original disputes were -- or, again, started to happen between Mr. Daugherty and Mr. Dondero even prior to the crisis, but Mr. Dondero -- Daugherty certainly stayed with Highland post-crisis. And then when Mr. Daugherty was severed or either resigned or terminated from his position, there was various litigations that began between the parties very intensely in state court, one of the more nasty litigations that you can imagine, replete with salacious allegations and

press releases.

That litigation then led to an award originally for Mr. Daugherty from HERA, which was an entity that had assets that Mr. Daugherty alleges were stripped. Mr. Daugherty had to pay a judgment against Highland. Ultimately, litigations were commenced in both the state court and the Delaware Chancery Court. Those litigations, many of those continue, because they're not just against the entities but specific individuals. Mr. Daugherty got a voting -- a claim allowed for voting purposes in our case of $9.1 million, and we've since reached an agreement with Mr. Daugherty on his claim, save for a tax case which we announced earlier that relates to compensation, claimed compensation with respect to a tax distribution, which we have defenses for and he has claims for.

MR. MORRIS: All right. We can take that down, please.

BY MR. MORRIS:

Q And let's just talk for a few minutes about some of the things that have happened in this case. Did Mr. Dondero engage in conduct that caused the Debtor to seek and obtain a temporary restraining order?

A Yes, he did.

Q And did the Debtor -- did Mr. Dondero engage in conduct that caused the Debtor to seek and obtain a preliminary

injunction against him?
A Yes.
Q And has the Debtor filed a motion to hold Mr. Dondero in contempt for violation of the TRO?
A Yes.
Q Are you aware that -- of the CLO-related motion that was filed in mid-December?
A It's similar in that these are controlled entities that brought similar types of claims against the Debtor and interfered in similar ways, albeit not as directly threatening with respect to the personnel of the Debtor.
Q Okay. And you're aware of how that -- that motion was resolved?
A I know we resolved it, and I'm drawing a blank on that. But --
Q All right. Are you aware, did Mr. Daugherty also object to the Acis and HarbourVest settlements, or at least either him or entities acting on his behalf?
A I think you meant Mr. Dondero. I don't believe Mr. Daugherty did.
Q You're right. Thank you. Let me ask the question again. Thank you for the clarification. We're almost done. To the best of your knowledge, did Mr. Dondero or entities that he controls file objections to the Acis and HarbourVest settlements?

A Yes, they did.
Q And we're here today with this long recitation because the remaining objectors are all Mr. Dondero or entities owned or controlled by him; is that right?
A That's correct.
Q All right.
MR. RUKAVINA: Your Honor, I didn't have a chance to object in time. Entities owned or controlled by Mr. Dondero. There's no evidence of that with respect to at least three of my clients, and this witness has not been asked predicate questions to lay a foundation. Mr. Dondero does not own or control the three retail (inaudible). So I move to strike that answer.
MR. MORRIS: Your Honor, I withdraw with respect to the three funds. It's fine.
THE COURT: All right. With that withdrawal, then I think that resolves the objection.
MR. MORRIS: Uh, --
THE COURT: Or I overrule the remaining portion. Okay. Go ahead.
MR. RUKAVINA: That does, Your Honor. Thank you.
BY MR. MORRIS:
Q Are -- are -- is everything that you just described, Mr. Seery, the basis for the Debtor's request for the gatekeeper and injunction features of the plan?

A Well, everything I described are a part of the basis for that. I didn't describe every single basis with respect to why those --

Q So what are -- what are the other reasons that the Debtor is seeking the gatekeeper and injunction provisions in the plan?

A We really do need to be able to operate the business and monetize the assets without direct interference and litigation threats. We didn't go through some of the specifics, and I hesitate to burden the Court again, but the email to me, the email to Mr. Surgent, the testimony threatening -- effectively threatening Mr. Surgent, in my opinion, by Mr. Dondero, in the court in previous weeks, statements by his counsel indicating that Mr. Dondero is going to sue me for hundreds of millions of dollars down the road.

I mean, this is nonstop. I'm an independent fiduciary. I'm trying to maximize value for the estate. I've got some guy who's threatening to sue me? It's absurd.

MR. MORRIS: Your Honor, I have no further questions, but what I would respectfully request is that we take just a short five-minute break. I'd like to just confer with my colleagues before I pass the witness.

THE COURT: All right. Five-minute break.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(A recess ensued from 1:58 p.m. to 2:06 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're back on the record in Highland. Mr. Morris, anything else?

MR. MORRIS: All right, Your Honor. Can you hear me?

THE COURT: I can, uh-huh.

MR. MORRIS: Okay. Mr. Seery, are you there?

THE WITNESS: I am, yes.

MR. MORRIS: I just have a few follow-up questions, Your Honor, if I may.

THE COURT: Okay.

DIRECT EXAMINATION, RESUMED

BY MR. MORRIS:

Q Okay. Mr. Seery, we talked for a bit about the difference between the convenience class and the general unsecured claims. Do you recall that?

A Yes.

Q And that's the difference between Class 7 and 8; do I have that right?

A Yes.

Q And what is the recovery for claimants in Class 7, to the best of your recollection, the convenience class?

A It's 85 cents.

Q And under --

A On the dollar.

Q And under the projections that were filed last night, and we can call them up on the screen if you don't have total recall, do you recall what Class 8 is projected to recover now that we've taken into account the UBS settlement?
A Approximately 71.
Q Okay.
A Percent. 71 cents on the dollar.
THE COURT: Okay. The answer --
BY MR. MORRIS:
Q Okay. Do I this right --
THE COURT: The answer was a little garbled. Can you repeat the answer, Mr. Seery?
THE WITNESS: Approximately 71 cents on the dollar, Your Honor.
THE COURT: Okay. Thank you.
BY MR. MORRIS:
Q Okay. And do I have that right, that that 71 cents includes no value for potential litigation claims?
A That's correct. We didn't even put that in our projections at all.
Q So is it possible, depending on Mr. Kirschner's work, that holders of Class 8 claims could recover an amount in excess of 85 percent?
A It's possible, yes.
Q Okay. Are you aware that Dugaboy has suggested that the

Debtor should resolicit because their -- their -- the projections in the November disclosure statement were misleading?

A I'm aware that they've made allegations along those lines, yes.

Q Okay. Do you think the November projections were misleading in any way?

A No, not at all.

Q And why not?

A Well, the plan was -- the projections are for the plan, and they contain assumptions. And it was clear in the plan that those assumptions could change. So the value of the assets, which aren't static, does change. The costs aren't static. They do change. The amount of the claims, the denominator, was not static and would change.

Q Okay. And were the -- were the changes in the claims, for example, changes that were all subject to public viewing, as the Court ruled on 3018, as the settlement with HarbourVest was announced?

A Well, the plan -- the terms of the plan made clear that the Class 8 claims would -- would be whatever the final amounts of those claims were going to be. We did resolve the claims of HarbourVest and then ultimately the settlement announced today, but in front of -- in front of the world, in front of the Court, with a 9019 motion.

Q Okay. We had finished up with some questioning about the gatekeeper and the injunction provision. Do you recall that?
A Yes, I do.
Q And you had testified as to the reasons why the Debtor was seeking that particular protection. Do you recall that?
A Yes.
Q In the absence of that protection, does the Debtor have any concerns that interference by Mr. Dondero could adversely impact the timing of the Debtor's plan?
A Well, that's my opinion and what I testified to before. I think the -- the injunction -- the exculpation, the injunction, and the gatekeeper are really critical and essential elements of this plan, because we have to have the ability, unfettered by litigation, particularly vexatious litigation in multiple jurisdictions, we have to be able to avoid that and be able to focus on monetizing the assets and try to maximize value.
Q Is there a concern that that value would erode if resources and time and attention are diverted to the litigation you've just described?
A Absolutely. The focus of the team has to be on the assets' monetization, creative ways to get the most value out of those assets, and not on defending itself, trying to paper up some sort of litigation defense against vexatious litigation, and also spending time actually defending

ourselves in various courts.
Q Okay. Last couple of questions. If there was no gatekeeper provision in the plan, would you accept appointment as the Claimant Trustee?
A You broke up. No which provision?
Q If there was no gatekeeper provision in the -- in the confirmation order, would you accept the position as Claimant Trustee?
A No, I wouldn't. Just -- just like when I came on, there were -- there are some pretty essential elements that I mentioned before. One is indemnification. Two is directors and officers insurance. And three was a gatekeeper function. I want to make sure that we're not at risk, that I'm not at risk, for doing my job.
Q And I think you just said it, but if you were unable to obtain D&O insurance, would you accept the position as Claimant Trustee?
A No, I would not.
MR. MORRIS: I have no further questions, Your Honor.
THE COURT: All right. So, you went two hours and 34 minutes in total with your direct. So we'll now pass the witness for cross. And the Objectors get an aggregate of two hours and 34 minutes.
Who's going to go first?
MR. RUKAVINA: Your Honor, Davor Rukavina. I will.

THE COURT: Okay. Go ahead.

MR. RUKAVINA: Mr. Vasek, if you can pull up Exhibit 6N, the ballot summary, Page 7 of 15 on the top.

MR. POMERANTZ: Mr. Morris, you're not on mute.

MR. MORRIS: Thank you, sir.

MR. RUKAVINA: Mr. Vasek, did you hear me? There it is.

CROSS-EXAMINATION

BY MR. RUKAVINA:

Q Mr. Seery, are you familiar with this ballot tabulation that was filed with the Court and that has been admitted into evidence?

A Yes, I believe I've seen this.

Q Okay. And this says that 31 Class 8 creditors rejected and 12 Class 8 creditors accepted the plan, correct?

A That's correct.

Q And since then, I think we've heard that Mr. Daugherty and maybe two other employees have changed their vote to an accept; is that correct?

A That's correct, yes.

Q Okay. Other than three, those three employees that are changing, do you know of any other Class 8 creditors that are changing their votes?

A Mr. Daugherty is not an employee.

Q I apologize. Other than those three Class 8 creditors

that are changing their votes, do you know of any other ones that are changing their votes?
A No.
Q Okay. You didn't tabulate the ballots, did you?
A No, I did not.
Q Do you have any reason to question the accuracy of this ballot summary that's been filed with the Court?
A No, I do not.
Q Okay. You mentioned that many of the people that rejected the plan are former employees who you don't think will ultimately have allowed claims, correct?
A Not ultimately. I said they don't have them now.
Q Okay. Are you aware that the Court ordered that contingent unliquidated claims be allowed to vote in an estimated amount of one dollar?
A I'm aware of that, yes.
Q Okay. All right. Now, no motion to reconsider that order has been filed, correct?
A Not to my knowledge.
Q Okay. No objection to these rejecting employees' claims have been filed yet, correct?
A Correct.
Q Okay. And no motion to strike or designate their vote has been filed as of now, correct?
A Correct.

MR. RUKAVINA: You can take down that exhibit, Mr. Vasek.

BY MR. RUKAVINA:

Q Mr. Seery, the Debtor itself is a limited partnership; I think you confirmed that earlier, correct?

A Correct.

Q And its sole general partner is Strand Advisors, Inc., correct?

A Correct.

Q And to your understanding, the Debtor, as a limited partnership, is managed by its general partner, correct?

A Correct.

Q Okay. And Strand, that's where the independent board of you, Mr. Nelms, and Mr. Dubel -- or I apologize if I'm misspelling, misstating his name -- that's where the board sits, at Strand, correct?

A Yes.

Q Okay. And that board has been in place since about January 9, 2020?

A Yes.

Q Okay. Strand is not a debtor in bankruptcy, correct?

A No.

Q Okay. Do you have any understanding as to whether, under non-bankruptcy law, a general partner is liable for the debts of the limited partnership that it manages?

A I do.
Q Okay. What's your understanding?
A Typically, a general partner is liable for the debts of the partnership.
Q Okay. And under the plan, Strand itself is an exculpated party and a protected party and a released party for matters arising after January 9, 2020, correct?
A Yes.
Q Okay. You mentioned that you're the chief executive officer and chief restructuring officer in this case for the Debtor, correct?
A For the Debtor, yes.
Q Yeah. You are not a Chapter 11 trustee, right?
A No.
Q Okay. You are one of the principal authors of this plan, correct?
A Consultant.
MR. MORRIS: Objection to the form of the question.
THE COURT: Sustained.
BY MR. RUKAVINA:
Q You are --
THE COURT: Sustained.
BY MR. RUKAVINA:
Q You are --
THE COURT: Rephrase.

BY MR. RUKAVINA:
Q -- one of the principal --
MR. RUKAVINA: I apologize.
BY MR. RUKAVINA:
Q You had input in creating this plan, didn't you?
A I did, yes.
Q Okay. And you're familiar with the plan's provisions, aren't you?
A Yes.
Q Okay. And you, of course, approve of the plan, correct?
A Yes.
Q Okay. And you are, of course, familiar generally with what the property of the estate currently is, correct?
A Yes.
Q Okay. And part of the purpose of the plan, I take it, is to vest that property in the Claimant Trust in some respects and the Reorganized Debtor in some respects, correct?
A I don't -- I don't know if that's a fair characterization. Some property -- maybe some property will stay with the Debtor, some will be transferred directly to the Trust.
Q Okay. All property of the estate as it currently exists will stay with the Debtor or go to the Trust, correct?
A Yes.
Q Okay. And under the plan, the Creditor Trust will be responsible for payment of prepetition claims, correct?

A Yes.
Q And under the plan, the Creditor Trust will be responsible for the payment of postpetition pre-confirmation claims, correct?
A Do you mean admin claims? I don't --
Q Sure.
A I don't understand your question. I'm sorry.
Q Yes. We can call them admin claims.
A Yeah. Those -- they'll be -- they will be paid on the effective date or in and around that time. So I'm not sure if that's actually going to be from the Trust, but I think it's actually from the Debtor, as opposed to from the Trust.
Q Okay. But after the creation of the Claimant Trust, --
A Uh-huh.
Q -- whatever administrative claims are not paid by that time will be assumed by and paid from the Claimant Trust, correct?
A I don't recall that specifically.
Q Is it your testimony that the Reorganized Debtor will be obligated post-effective date of the plan to pay any admin claims that are then unpaid?
MR. MORRIS: Objection to the form of the question.
THE COURT: Sustained. Rephrase.
BY MR. RUKAVINA:
Q Who pays unpaid admin claims under the plan once the plan

goes effective?
A I believe the Debtor does. The Reorganized Debtor.
Q Okay. The Reorganized Debtor also gets a discharge, correct?
A Yes.
Q Okay. And there is no bankruptcy estate left after the plan goes effective, correct?
MR. MORRIS: Objection to the form of the question.
THE COURT: Overruled.
MR. RUKAVINA: Your Honor, I have the right to know what the objection to my question is.
THE COURT: I overruled.
MR. MORRIS: Okay.
THE COURT: I overruled the objection.
MR. RUKAVINA: Thank you.
BY MR. RUKAVINA:
Q Mr. Seery, do you remember my question?
A That whether there was a bankruptcy estate after the effective date?
Q Yes.
A There wouldn't be a bankruptcy estate anymore, no.
Q Okay. Under the plan, the creditors, to the extent that they have their claims allowed, the prepetition creditors, they're the beneficiaries of the Claimant Trust, correct?
A They are some of the beneficiaries, yes.

Q Okay. And you would be the Trustee, I think you said, of the Claimant Trust?
A Of the Claimant Trust, yes.
Q Okay. And you will have fiduciary duties to the beneficiaries of the Claimant Trust, correct?
A I believe I have some, yes.
Q Okay. Well, as the Trustee, you will have some fiduciary duties; you do agree with that?
A That's what I said, yes.
Q Okay. What's your understanding of what those fiduciary duties to the beneficiaries of the Claimant Trust will be?
A I think they'll be -- they are cabined to some degree by the provisions of the agreement, but generally there will be a duty of care and a duty of loyalty.
Q Do you feel like you'll have a duty to try to maximize their recoveries?
A That depends.
Q On what?
A My judgment on what's the -- if I'm exercising my duty of care and my duty of loyalty.
Q Okay. But surely you'd like to, whether you have a duty or not, you'd like to maximize their recoveries as Trustee, wouldn't you?
A Yes.
Q Okay. Now, in addition to the beneficiaries, which I

believe are the Class 8 and Class 9 creditors, the plan proposes to give non-vested contingent interests in the Trust to certain holders of limited partnership interests, correct?

A Yes.

Q Okay. And those non-vested contingent interests would only be paid and would only vest if and when all unsecured creditors and subordinated creditors are paid in full, with interest, correct?

A Yes.

Q Okay. And those non-vested contingent interests are a property interest, although they're an inchoate property interest, correct?

A I don't know. I think I testified in my deposition that I -- I reached for inchoate, but I'm not an expert in the definitions of property interests. I don't know if they're too ethereal to be considered a property interest.

Q Okay.

MR. RUKAVINA: Mr. Vasek, will you please pull up Mr. Seery's deposition at Page 215? And if you'll go to Page 200 -- can you zoom -- can you zoom that in a little bit? Mr. Vasek, can you zoom on that?

MR. VASEK: Just a moment. There's some sort of issue here.

MR. RUKAVINA: Okay. And then go to Page 216. Scroll down to 216, please.

MR. VASEK: Okay. I can't see it, so --

MR. RUKAVINA: Okay. Stay, stay where you are. Go down one more row.

BY MR. RUKAVINA:

Q Okay. Mr. Seery, can you see this?

A Yes.

Q Okay. So, I ask you on Line 21, "They may be a property interest, but inchoate only, correct?" And you answer, "That is my belief. I don't claim to be an expert on the different types of property interests," --

MR. RUKAVINA: Mr. Vasek, can you go to the next page?

BY MR. RUKAVINA:

Q (continues) "-- whether they be inchoate, reversionary, ethereal. I don't claim to be an expert on the different types of property interests."

Do you see that answer, sir?

A Yes.

Q And do you stand by your answer given on Lines 23 through Line 4 of the next page?

A Yes.

Q Okay. And these non-vested contingency -- contingent interests in the Claimant Trust, they may have some value in the future, correct?

A Yes.

MR. RUKAVINA: Okay. You can take that down, Mr. Vasek.

BY MR. RUKAVINA:

Q Have you tried to see whether anyone outside this case, or anyone at all, would pay anything for those unvested contingent interests to the Claimant Trust?

A No.

Q Okay. Now, the Debtor is a registered investment advisor under the Investment Advisers Act of 1940; is that correct?

A That's correct.

Q And under that Act, the Debtor owes a fiduciary duty to the funds that it manages and to the investors of those funds, correct?

A Clearly to the funds, and generally to the investors more broadly, yes.

Q Okay. And would you agree that that duty compels the Debtor to look for the interests of the funds and the investors of those funds ahead of its own interests?

A Generally, but it's a much more fine line than what you're describing. It means you can't -- the manager can't put its own interests in front of the investors and the funds. It doesn't mean that the manager subordinates its interest in the -- to the investors and the funds.

MR. RUKAVINA: Well, Mr. Vasek, please pull up the October 20th transcript at Page 233.

MR. MORRIS: What transcript is this?

MR. RUKAVINA: October 20, 2019. Mr. Vasek has the docket entry.

MR. MORRIS: Oh, so it's the -- Your Honor, I just do want to point out that Mr. Rukavina objected, in fact, to the use of trial transcripts, but we'll get to that when we put on our evidence, when we finish up.

MR. RUKAVINA: Well, Your Honor, I believe that you're allowed to use a trial transcript to impeach testimony, which is what I'm going to do now.

So, for that purpose, Mr. Vasek, if you could -- are you on Page 233?

THE COURT: And just so the record is clear, this is from October 2020, not October 2019, which is, I think, what I heard. Continue.

MR. MORRIS: Your --

MR. RUKAVINA: Your Honor, I apologize, you did hear that and I did make a mistake. Yes, this is at Docket 1271.

Mr. Vasek, if you'll scroll down, please. Okay. No, stop there.

BY MR. RUKAVINA:

Q And you see on Line 16, sir, you're asked your understanding, and then you answer, "Okay." "And in exercising those duties, the manager, under the Advisers Act, has a duty to subordinate its interests to the interests of

those investors in the CLOs, correct?" And you answer --

MR. RUKAVINA: Go down, Mr. Vasek.

BY MR. RUKAVINA:

Q -- "I think -- I think, generally, when you think about the fiduciary duty, and I think that we -- I want to make sure I'm very specific about this, is that the manager has a duty, fiduciary duties -- there's a whole bunch of legal analysis of what they are, but they are significant -- that the manager owes to the investors. And to the extent" --

MR. RUKAVINA: Scroll down, please.

BY MR. RUKAVINA:

Q "And to the extent that the manager's interests would somehow be -- somehow interfere with the investors' in the CLO, he is supposed to -- he or she is supposed to subordinate those to the benefit of the investors."

Did I read that accurately, Mr. Seery?

A You did.

Q Was that your testimony on October 20th last?

A Yes.

Q Okay. Are you willing to revise your testimony from a few minutes ago that the manager does not have to subordinate its interests to the interests of the investors?

A No. I think that's very similar.

Q Okay.

A You left out the part about garbled up top where I said it

was nuanced, almost exactly what I just said. On Line 9, I believe, on the prior page.

Q Well, I heard you say a couple of minutes ago, and maybe I misunderstood because of the WebEx nature, that the manager does not have to subordinate its interests to the interests of the investors. Did I misheard you say that a few minutes ago?

A I think you misheard it. I said it's a nuanced analysis, and it's -- it's pretty significant. But the manager does subordinate his general interest and assures that the CLO or any of the investors' interests are paramount, but he doesn't subordinate every single interest.

For example, and I think it's in this testimony, the manager, if the fund isn't doing well, doesn't just have to take his fee and not get paid. He's allowed -- entitled to take his fee. He doesn't subordinate every single interest of his. He doesn't give up his home and his family. So it's -- it's a nuanced analysis. The interests of the manager are subordinated to the interests of the investors and the fund. I don't -- I don't disagree with anything I said there. I think I'm consistent.

Q Okay.

MR. RUKAVINA: You can take that down, Mr. Vasek.

BY MR. RUKAVINA:

Q So, how do you describe, sir, the fiduciary duty that the Debtor owes to the funds that it manages and to the investors

in those funds?

MR. MORRIS: Objection to the -- to the extent it calls for a legal conclusion, Your Honor. I just want to make sure we're -- we're asking a witness for his lay views.

THE COURT: Okay. I overrule the objection. He can answer.

THE WITNESS: Yes. As a manager of a fund, the manager is a fiduciary to the fund, and sometimes to the investors, depending on the structure of the fund. Some funds are purposely set up where the investors are actually debt-holders, and their interests are much more cabined by the terms of the contract, as opposed to straight equity holders. But the manager has a duty to seek to maximize value of the assets in the best interests of the underlying -- of the fund and the underlying investors, to the extent that it can, within the confines and structure of the fund.

BY MR. RUKAVINA:

Q Okay. And these duties as you just described them, they would apply to the Reorganized Debtor, correct?

A They would apply to the Reorganized Debtor to the extent that it's a manager for a fund, not, for example, with respect to necessarily interests -- the inchoate interests that we talked about earlier.

Q Sure. And I apologize, I meant just for the fund. And if the manager, the Reorganized Debtor, breaches those duties,

then it's possible that there's going to be liability, correct?
A It's possible.
Q Okay. Now, under the plan, the limited partnership interests in the Reorganized Debtor will be owned by the Claimant Trust, correct?
A Yes.
Q Okay. And there's a new entity called New GP, LLC that will be created or already has been created, correct?
A Yes.
Q Okay. And that entity will hold the general partnership interest in the Reorganized Debtor, correct?
A I believe that's correct.
Q Okay. And that entity -- that being New GP, LLC -- will also be owned by the Claimant Trust, correct?
A Yes.
Q Okay. Who will manage the Reorganized Debtor?
A The G -- the GP will manage the Reorganized Debtor.
Q Okay. And will there be an officer or officers of the Reorganized Debtor, or will it all be managed through the GP?
A It'll be managed through the GP.
Q Okay. And who will manage the GP?
A Likely, I will.
Q Okay. That's the current plan, that you will?
A I'll be the Claimant Trustee, and I believe that I'll be

responsible for any assets that remain in the Reorganized Debtor, yes.

Q Okay. Right now, the Debtor is managing its own assets as the Debtor-in-Possession, right?

A Yes.

Q And it is managing various funds and CLOs, right?

A Yes.

Q Okay. And right now, the Debtor is attempting to reduce some of its assets to money, like the promissory notes that you mentioned earlier that the Debtor filed suit on, correct?

A Yes.

Q And the Debtor is trying to reduce some of its assets to money, like the promissory notes, to benefit its creditors, correct?

A Yes.

Q Okay. And correct me if I'm wrong, but the Committee has filed various claims and causes of action against Mr. Dondero, correct?

A They -- they've filed some. I haven't -- I haven't looked at their (indecipherable) closely, but --

Q Okay.

A -- some are preserved in the case.

Q You understand --

A In the plan. I'm sorry.

Q You understand that the Committee is doing that for the

benefit of the estate, correct?
A Yes.
Q And you understand that they're also doing that for the benefit of creditors, correct?
A Yes.
Q Okay. And under the plan, just so that I'm clear, those claims that the Committee has asserted will be preserved and will vest in either the Claimant Trust or the Litigation Sub-Trust, correct?
A Yes.
Q Okay. And under the plan, the Reorganized Debtor would continue to manage its assets, correct?
A Yes.
Q And it would continue to manage the Funds and the CLOs, correct?
A Yes.
Q And the Claimant Trust would attempt to liquidate and distribute to its beneficiaries the assets that are transferred to it, correct?
A Yes.
Q Okay. And you mentioned that the Claimant Trust will have an Oversight Board comprised of five members, right?
A Yes.
Q And four of them will be the people that are currently on the Committee, right?

A Yes.
Q And the fifth is David Pauker, and I think you mentioned that he's independent. David Pauker is the fifth member, right?
A Yes.
Q Who -- who is he?
A David Pauker is a very well-known professional in the restructuring world. He's a long-time financial advisor in -- in reorganizations. He's served on numerous boards in restructuring -- restructurings.
Q Okay. So, other than a different corporate structure and the Claimant Trust, the monetization of assets for the benefit of creditors would continue post-confirmation as now, correct?
A I -- I believe so. I'm not exactly sure what you asked there.
Q No one is putting in any new money under the plan, are they?
A No. No.
Q Okay. There's no exit financing contingent on the plan being confirmed, right?
A You mean no exit -- the plan is not contingent on exit financing. I think you just mixed up your -- your financing and your plan.
Q I apologize. There's no exit financing in place today, correct?

A No.
Q Okay. So, post-confirmation, you are basically going to continue managing the CLOs and funds and trying to monetize assets for creditors the same as you are today, correct?
A Similar, yes.
Q Okay. And just like the Committee has some oversight role in the case, the members of the Oversight Board will have some oversight role post-confirmation, correct?
A Yes.
Q Okay. You don't need anything in the plan itself to enable you to continue managing the Debtor and its assets, correct?
A I don't need anything in the plan?
Q Correct.
A I don't -- I don't understand the question. Can you rephrase it?
Q Well, you are managing the Debtor and its assets today, correct?
A Yes.
Q Okay. Nothing in the plan is going to change that, correct?
A Well, it's going to change it a lot.
Q Okay. Well, with respect to you managing the Funds and the CLOs, you don't need anything in the plan that you don't have today to keep managing them, do you?

A No. The Debtor manages them, and I will -- I'm the CEO and I'll be in a similar position with a different team.
Q Okay. And I believe you told me that you expect the Debtor to administer the CLOs for two or three years, maybe?
A However long it takes, but we expect -- our projections are that we'd be able to monetize most of the assets within two years.
Q Does that include the CLOs?
A It does, yes.
Q Okay. Now, you're going to be the person for the Reorganized Debtor in charge of managing the CLOs, correct?
A I'll be the person responsible for managing the Reorganized Debtor. The Reorganized Debtor will be the manager of the CLOs.
Q Okay. But the buck will stop with you at the Reorganized Debtor, right?
A Yes.
Q Okay. You're going to have a team of employees and outside professionals helping you, but ultimately, on behalf of the Reorganized Debtor, you're going to be the one in charge of managing the CLOs, correct?
A Yes.
Q Okay. That means that you'll also be making decisions as to when to sell assets of the CLOs, correct?
A Yes.

Q Okay. And to be clear, the CLOs, they own their own assets, whatever they are, and the Debtor just manages those assets, right?
A Correct.
Q The Debtor doesn't directly own those assets, right?
A No.
Q And currently there's more than one billion dollars in CLO assets that the Debtor manages?
A Approximately.
Q Yeah. And the Debtor receives fees for its services, correct?
A Yes.
Q Can you generally describe how the amount of those fees is calculated and paid, if you have an understanding?
A How the fees are calculated and paid?
Q Yes, sir.
A It's a percentage of the assets.
Q Assets administered or assets sold in any given time period?
A Administered.
Q Okay. So the sale of CLO assets does not affect the fees that the Reorganized Debtor would receive under these agreements?
MR. MORRIS: Objection to the form of the question.
THE COURT: Over --

THE WITNESS: That's not correct.

THE COURT: Overruled.

BY MR. RUKAVINA:

Q Okay. What is not correct about that?

A When you sell the assets, the amount administered shrinks, so you have less fees.

MR. RUKAVINA: Your Honor, the answer cut out at the very end. You have less--?

THE WITNESS: Fees.

BY MR. RUKAVINA:

Q Fees? I understand. Okay. So are you saying that there is a disincentive to the Reorganized Debtor to sell assets in the CLOs?

A No.

Q Okay. Is there an incentive to the Reorganized Debtor to sell assets in the CLOs?

A To do their job correctly, yes.

Q Okay. And the Debtor wishes to assume those contracts because the Debtor will get those fees going forward and there'll be a profit, even after the expenses of servicing those contracts are taken out, correct?

A They are profitable. That's one of the reasons that we're assuming, yes.

Q Okay. Now, over my objection, you testified that the CLOs have agreed to the assumption of these contracts, right?

A Yes.
Q Okay. Is there anything in the record other than your testimony here today demonstrating that?
A I believe there is, yes.
Q What do you believe there is in the record other than your testimony?
A I believe we filed a notice of assumption.
Q Okay. My question is a little bit different. You testified that the CLOs, over my objection, have agreed to the assumption. You did testify so, right?
A Yes.
Q Okay. What is there in the record, sir, from the CLOs confirming that?
A You mean today's record?
Q Yes, sir.
A I'm the only one who's testified so far.
Q Okay. Are you aware of anything in the exhibits that would confirm your testimony?
A Not that I know of.
Q Has there been an agreement with the CLOs that's been reduced to writing?
A Yes.
Q So there is a written agreement with the CLOs providing for assumption?
A Yes.

Q A signed, written agreement?
A No, it's -- it's email.
Q Okay. When was this email agreement reached?
A Within the last couple weeks. There's a number of back and forths where that was agreed to, and I believe we filed a notice of assumption.
MR. RUKAVINA: Mr. Vasek, if you will please pull up Mr. Seery's January 29th deposition.
BY MR. RUKAVINA:
Q Mr. Seery, you remember me deposing you last Friday, correct?
A Yes.
Q And you remember me asking you if there was a written agreement in place with the CLOs?
A I don't recall specifically.
MR. RUKAVINA: Okay. Mr. Vasek, if you would please scroll to that. Okay. Stop there.
BY MR. RUKAVINA:
Q Sir, you'll recall I also deposed you January 20th, right?
A Yes.
Q Okay. And do you remember that we had some discussion regarding whether the CLOs would consent or not?
A Yes.
Q Okay. And do you remember telling me something like that like you think that they will and that's still in the works on

January 20th?
A I don't recall specifically, but if you say that's what it says.
Q Okay. Well, here I'm asking you on January 29th, Line 17, "I asked you before and you didn't have anything in writing by then, so let me ask now. As of today, do you have anything in writing from the CLOs consenting to the assumption of those management agreements?" I'm sorry. Contracts. Answer, "I don't believe that I do. It could be on my email I opened. I don't recall."
MR. RUKAVINA: Scroll down, Mr. Vasek.
BY MR. RUKAVINA:
Q Okay. Then I ask, "Do you have an understanding of whether those CLOs have consented in writing to the assumption of the management agreements?" And you answer, "I believe they have. The actual final docs haven't been completed, but I believe they have agreed in writing, yes."
Then I ask --
MR. RUKAVINA: Scroll down a little bit more.
BY MR. RUKAVINA:
Q I ask, "Do you expect the final docs to be completed before Tuesday's confirmation hearing?" Answer, "I don't know whether they will be done by Tuesday."
Did I read all of that correctly, sir?
A Other than your misstatement. The word was "unopened."

Q Thank you. So, let me ask you again today. As of today, is there a written agreement that has been signed by the parties providing for the assumption of the CLO agreements?
A When phrased the way you did, is it signed by the parties, no.
Q Okay.
MR. RUKAVINA: You can take that down, Mr. Vasek.
BY MR. RUKAVINA:
Q I think -- I'm not sure if you quantified this earlier, but it might help. I believe that the Reorganized Debtor projects that it will generate revenue of $8.269 million post-reorganization from managing the CLO contracts, correct?
A It's in that neighborhood. I did not testify to that earlier.
Q That's what I meant. And when I asked you at deposition, you were able to give me an estimate of how much it would cost to generate that revenue, correct?
A I was not?
Q You were? I'm sorry. Let me --
A Did you say I wasn't or I was?
Q Let me -- I apologize. Let me ask again. I talk too fast and I have an accent. You have been able to give an estimate of how much the Reorganized Debtor will expend to generate that revenue, correct?
A Yes.

Q Okay. Do you remember what your estimate is?
A I -- I think it was around $2 million a year. It was a portion of our employees plus the contracts.
Q Okay. So, over the life of the projection at $8.2 million, do you remember that you projected costs of about $3.5 to $4 million to generate that revenue?
A If -- if you are representing that to me, I'd accept it. Yes, that sounds about right.
Q Well, suffice it to say you're projecting at least $4 million in net profit over the next two years for the Reorganized Debtor from managing the CLO agreements, correct?
A Net profit is not a fair, fair way to analyze it, no.
Q Okay. Are you projecting any profit for the Reorganized Debtor from managing the CLO agreements post-confirmation?
A Yes.
Q Okay. Do you have an estimate of what that profit is?
A General overview are the contracts are profitable to about the tune of $4 million over that period.
Q Okay. Thank you. If the Reorganized Debtor makes a profit post-confirmation, is it fair to say that that would then be dividended up or distributed up to the partners, ultimately to the Claimant Trust?
A I don't think that's fair to say, no.
Q Okay. So, if the Reorganized Debtor makes a profit post-confirmation, where does that profit go?

A The Reorganized Debtor -- what kind of profit? I don't understand your question.
Q Okay. I apologize if I'm being too simplistic about it. If a business, after it takes account of its expenses to generate revenue, has any money left over, would that be profit to you?
A Yes.
Q Okay. Do you think that the Reorganized Debtor, post-confirmation, will make a profit?
A I don't know.
Q Okay. Do you think that the Reorganized Debtor, post-confirmation, will lose money?
A I think there will be costs, and the costs will exceed the -- the amount that it generates on an income basis, yes.
Q Okay. Thank you.
MR. RUKAVINA: Mr. Vasek, if you'll please pull up the plan, the injunctions, and releases. 9F.
(Pause.)
BY MR. RUKAVINA:
Q I apologize, Mr. Seery.
MR. RUKAVINA: So, Mr. Vasek, if you'll go to the bottom of the Page 51. Stop there.
BY MR. RUKAVINA:
Q So, I'm going to read just the first couple sentences here, Mr. Seery, if you'll read it along with me. Subject --

this is the bottom paragraph: Subject in all respects to Article 12(b), no enjoined party may commence or pursue a claim or cause of action of any kind against any protected party that arose or arises from or is related to the Chapter 11 case, the negotiation of the plan, the administration of the plan, or property to be distributed under the plan, the wind-down of the business of the Debtor or Reorganized Debtor.

I'd like to stop there. Do you see that clause there, Mr. Seery, talking about the wind-down of the business of the Debtor or Reorganized Debtor? Do you see that, sir?

A Yes.

Q Okay. Do I understand correctly that this provision we've just read means that, upon the assumption of these CLO management agreements, if the counterparties to those agreements want to take any action against the Reorganized Debtor, they first have to go through this channeling injunction?

A I believe that's what it says, yes.

Q Okay. Because the wind-down of the business of the Reorganized Debtor will include the management of these CLO portfolio management agreements, correct?

A Yes.

Q Okay. As well as the management of various funds that the Debtor owns, correct?

A Yes.

Q Okay. And would you agree with me that the new general partner, New GP, LLC, is also a protected party under the plan?
A I assume it is. I don't recall specifically.
Q I believe you discussed to some degree postpetition losses. I'd like to visit a little bit about those. Since January 9th, 2020, Mr. Dondero was not an officer of the Debtor, correct?
A Correct.
Q And since January 9th, 2020, he was no longer a director of Strand, correct?
A That's correct.
Q Since January 9th, 2020, until he was asked to resign, he was an employee, correct?
A Yes.
Q And about -- I'm trying to remember. About when did he resign? October something of 2020? Do you remember?
A I don't recall.
Q Okay. Do you recall if it was in October 2020?
A It was in the fall.
Q Okay. And he resigned because the independent board asked him to resign, correct?
A Yes.
Q Okay. And you mentioned that the estate has had a postpetition drop in the value of its assets and the assets

that it manages. Right?
A I believe I went through the estate's assets. The only asset that wasn't a direct estate asset was the hundred percent control of Select Equity Fund. I didn't talk about the Fund assets.
Q Okay. Do you recall that the disclosure statement that the Court approved states that, postpetition, there was a drop from approximately $566 million to $328 million in the value of Debtor assets and assets under Debtor management?
A Yes. That's the $200 million I walked through earlier.
Q Okay. And I believe you mentioned some of it was due to the pandemic, right?
A It certainly impacted the markets. The pandemic didn't cause a specific loss. It impacted the markets and the ability to work within those markets.
Q But you also believe that Mr. Dondero was responsible for something like a hundred million dollars of these losses, right?
A Probably more.
Q Okay. Mr. Dondero is not being released or exculpated for that, is he?
A No.
Q And while Mr. Dondero was an employee during the period of these losses, he answered to you as CEO and CRO, correct?
A Not during that period. I wasn't (audio gap) until later.

Q I'm sorry. As of January 9th, 2020, were you the CEO of the Debtor?
A No.
Q When did you become the CEO of the Debtor?
A I believe the order was July 9th, retroactive to a date in March.
Q July 9th, 2020?
A Correct.
Q Okay. And when did you become the CRO of the Debtor?
A At the same time.
Q Okay. So, between January and July 2020, you were one of the independent directors, correct?
A Yes.
Q Okay. So, during that period of time, would Mr. Dondero have answered to that independent board?
A Yes.
Q Okay. Now, if someone alleges that that independent board has any liability on account of Mr. Dondero's losses, that's released under this plan, isn't it?
A Yes.
Q Okay. And if someone alleges that Strand has any liability on account of Mr. Dondero's losses, that's released under this plan, correct?
A Yes.
Q Okay. And if someone believes that the Debtor -- that the

way that the Debtor has managed the CLOs or its funds postpetition gives rise to a cause of action in negligence, that's also released and exculpated in the plan, correct?

A I believe it would be. I'm not positive, but I believe it would be.

Q Well, let's be clear. The plan does not release or exculpate you or Strand or the board for willful misconduct, gross negligence, fraud, or criminal conduct, correct?

A No, it does not.

Q Okay. And I'm not, just so we're clear, I'm not alleging that, okay? So I want the judge to understand I'm not alleging that. But the plan does release and exculpate for negligence, right?

A Yes.

Q Okay. Where do you have an understanding a cause of action for breach of fiduciary duty lies on the spectrum of negligence all the way to criminal conduct?

A It's -- it's not -- generally not criminal, although I suppose that breach of fiduciary duty could be criminal. Typically, it's negligence, and that you would breach a duty for either duty of care, duty of loyalty. But it could slide to willful. And probably most of the instances where they come up are where someone has done something willfully or grossly negligent.

Q Okay. But -- and I would agree with you. But there are

certain breaches of fiduciary duty that are possible based on simple negligence, correct?

A They are, and in these instances, they don't -- they don't rise to actionable claims because they're indemnified by the funds.

Q Okay. You have to explain that to me. So, the negligence claim is not actionable because someone is indemnifying it?

A Typically, there's no way to recover because it's indemnified by the fund that the investor might be in. If it goes beyond that, then it wouldn't be.

Q Okay. So there are potential negligence breach of fiduciary duty claims that might be subject to these exculpations and releases that would not be indemnified?

A Gross negligence and willful misconduct, certainly.

Q Okay. Now, post-confirmation, post-confirmation, if the Debtor, or the Reorganized Debtor, rather, engages in negligence or any actionable conduct, that's when the channeling injunction comes into play, right?

A I don't quite understand your question.

Q Okay.

A Can you repeat that?

Q Sure. To your understanding, does the channeling injunction we're looking at right now -- and you can read it if you need to -- does it apply to purely post-confirmation alleged causes of action?

A It does apply to those, yes.
Q Okay. And it says that the Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable, and, only to the extent legally permissible and as provided for in Article 11, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.
Do you see that, sir?
A I do.
Q Okay. And this -- the Bankruptcy Court's exclusive jurisdiction here, that would continue after confirmation? Is that the intent behind the plan?
A It has -- it says what it says. Will have the sole and exclusive jurisdiction to determine whether a claim is colorable, and then, to the extent permissible, it'll have jurisdiction to adjudicate.
Q Okay. Nothing in this plan limits the period of the Bankruptcy Court's inquiry to the pre-confirmation time frame, correct?
A I don't believe it does, no.
Q Okay. Have you taken into account the potential that this bankruptcy case will eventually be closed with a final decree?
A Have I taken that into account?
Q Well, do you know what a final decree in Chapter 11 is?
A I do.

Q Okay. So, help me understand. If there's a final decree and the bankruptcy case is closed, then who do I go to, because the Bankruptcy Court has exclusive jurisdiction, to get this clearing injunction cleared?

MR. MORRIS: Objection to the form of the question, Your Honor.

THE COURT: Sustained. Rephrase.

MR. RUKAVINA: Okay.

BY MR. RUKAVINA:

Q Is it the plan's intent, Mr. Seery, that this channeling injunction that we just looked at would continue to apply even after a point in time in which the bankruptcy case is closed?

A I don't believe so.

MR. RUKAVINA: Again, Your Honor, someone -- I heard someone's phone right when he answered, and I didn't hear his answer, if he could please re-answer.

THE WITNESS: I don't -- I don't think if the case is closed that's the intention.

BY MR. RUKAVINA:

Q Okay. What about if there's a final decree entered?

MR. MORRIS: Objection, Your Honor. You know, the document kind of speaks for itself.

THE COURT: Overruled. He can answer if he knows.

THE WITNESS: Yeah. I don't -- I don't -- I'm not making a distinction between the case being closed and the

final decree. I believe in both instances they'll be pretty close to the same time and we'll make a judgment then as to how to close the case in accordance --

Q Okay.

A -- with the rules.

MR. RUKAVINA: Mr. Vasek, if you'll please scroll up to the beginning of this injunction. A little bit higher. Right there. Right there.

BY MR. RUKAVINA:

Q The very first clause, Mr. Seery, if you'll read with me, says, Upon entry of the confirmation order -- pardon me -- all enjoined parties are and shall be permanently enjoined on and after the effective date from taking any actions to interfere with the implementation or consummation of the plan.

Do you see that, sir?

A I do, yes.

Q What does interfering with the implementation or consummation of the plan mean?

A It means in some way taking actions to upset, distract, stop, or otherwise prohibit or hurt the estate from implementing or consummating the plan.

Q Okay. And is that intended -- is that clause we just read and you described intended to be very broad?

A I -- I think it's -- if the words have meaning, yes, that

it should -- it's pretty broad.
Q Okay. Is the Debtor not able to state with more specificity what it would believe interference with the implementation or consummation of the plan would mean?
MR. MORRIS: Objection to the form of the question.
THE COURT: Sustained.
THE WITNESS: I think it's -- I think it's --
THE COURT: Sustained.
MR. RUKAVINA: Okay.
THE WITNESS: I'm sorry.
BY MR. RUKAVINA:
Q Well, you just gave us four or five examples of what interfering with the implementation or consummation of the plan might be. Why isn't that, those four or five examples, why aren't they listed here?
MR. MORRIS: Object to the form of the question.
MR. RUKAVINA: Well, Your Honor, I'll withdraw it and I'll argue this at closing argument.
THE COURT: Okay.
BY MR. RUKAVINA:
Q When did the Committee agree to you serving as the Claimant Trustee?
A In the late -- in the late fall. I've been contemplated to be the Claimant Trustee. I'm willing to take -- if we can come to an agreement. They have their options open if we

can't come to an agreement on compensation.
Q Okay. And since the Committee agreed to you being the Claimant Trustee, you have reached a resolution with UBS, correct?
A I don't think so. I think that that was before UBS, the UBS resolution was reached.
Q I'm sorry. When did you reach the UBS resolution in principle with UBS?
A I don't recall the exact date, but I do recall specific conversations where some of the Committee members were supportive. I didn't know that UBS wasn't, but I assumed that some meant not all. And that was UBS, because I don't think we had a deal yet.
Q Well, let me ask the question in a little bit of a different way. Whenever the Debtor reached the agreement in principle with UBS that your counsel described this morning, whenever that point in time was, the Committee had already agreed before that point in time to you serving as Claimant Trustee, correct?
A I believe so, yes.
Q And is the answer the same with respect to the HarbourVest settlement?
A I believe so. With HarbourVest, I believe so as well, yes.
Q What about the Acis settlement?

A I don't believe so. I think Acis came first. I don't think we settled on an agreement on Claimant Trustee until after the Acis -- certainly after the Acis agreement, maybe not after the Acis 9019. I just don't recall.

Q Okay. And the million-dollar cutoff for convenience class creditors, that number was a negotiated amount with the Committee, correct?

A Yes.

Q Okay. Thank you, Mr. Seery.

MR. RUKAVINA: Your Honor, I'll pass the witness.

THE COURT: All right. Just for purposes of time, it's 3:00 o'clock, so you went 48 minutes.

Who's next?

MR. DRAPER: Mr. Taylor is.

THE COURT: All right. Mr. Taylor, go ahead.

MR. TAYLOR: Yes, Your Honor. At this time, what we would like the Court to do, we are asking for a brief continuance and to go into tomorrow, and there is a reason for that and I would like to explain it.

Mr. Dondero has communicated an offer which we believe to be a higher and better offer than what the plan analysis, even in its most recent iteration that was just changed last night, will yield significantly higher recoveries. Those are guaranteed recoveries. There is a cash component to that offer. There are some debt components, but they would be

secured by substantially all of the assets of Highland.

We believe it's a higher and better offer, that the creditors and the Creditors' Committee, Mr. Seery, who obviously has been testifying all day on the stand, may have heard some -- some inkling of it via a text or an email he might have been able to glance at, or maybe not, because he's been too busy, and that's understandable.

But we do believe it is a material offer. It is a real offer. And for that reason, we would like to request the Court's indulgence. This has gone rather fast. We believe that in the event that it does not gain any traction, then we could complete this confirmation hearing tomorrow, or it's more than likely that we could. And therefore we would request a continuance until tomorrow morning beginning at 9:30 so all the parties can confer, consider that offer, and see if it gains any traction.

THE COURT: All right.

MR. POMERANTZ: Your -- Your --

THE COURT: Go ahead. Mr. Morris? Or who is going to respond --

MR. POMERANTZ: Your --

THE COURT: -- to that?

MR. POMERANTZ: Your Honor, this is Jeff --

THE COURT: Mr. Pomerantz?

MR. POMERANTZ: This is Jeff Pomerantz. I will

respond.

I think right at the beginning of the hearing, or slightly after, I did receive an email from Michael Lynn extending this offer. The email was also addressed to Mr. Clemente. As we have told Your Honor before, if the Committee is interested in continuing negotiations with Mr. Dondero, far be it from us to stand in the way.

So what I would really ask is for Mr. Clemente to respond to think if -- to see if he thinks that this offer is worthy. If it's worthy and the Committee wants to consider it, we would by all means support a continuance. If it is not, I think this is just a last-minute delay without a reason. And if there is no likelihood of that being acceptable or the Committee wanting to engage, we would want to continue on.

THE COURT: All right. Mr. Clemente, what say you?

MR. CLEMENTE: Yes. Yes, Your Honor. Matt Clemente on behalf of the Committee.

Obviously, I haven't had a chance to confer with my Committee members, but there's no reason to not continue the confirmation hearing today. I will be able to confer with them over email, et cetera, this evening. There's simply no reason to not continue going forward at this particular point in time, Your Honor.

So, although I haven't conferred with the Committee members, that would be what I would recommend to them. And so

my view, the Committee's view, I believe, would be let's continue forward and we'll discuss Mr. Dondero's proposal that I know came across after opening statements this morning, you know, in due course. But I do not believe that a continuance here is necessary or appropriate.

THE COURT: All right. Mr. Taylor, that request is denied, so you may cross-examine.

MR. TAYLOR: Yes. (Pause.) I'm sorry, Your Honor. I have a couple people that are in my ear. But yes, I'm ready to proceed.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. TAYLOR:

Q Mr. Seery, I believe you can probably largely testify from your memory of the various iterations of the plan analysis versus the liquidation analysis. But to the extent that you're unable to, we can certainly pull those up.

Mr. Seery, you put forth or Highland put forth on November 24th of 2020 a plan analysis versus a liquidation analysis, correct?

A I think that's the approximate date, yes.

Q Okay. And do you recall what the plan analysis predicted the recovery to general unsecured creditors in Class 8 would be at that time?

A I believe it was in the 80s.

Q And approximately 87.44 percent?
A That sounds close, yes.
Q Okay. And then just right before -- the evening before your deposition that took place on January 29th, I believe a revised plan analysis versus a liquidation analysis was provided. Do you remember that?
A Yes.
Q Okay. And what was the predicted recovery to general unsecured creditors under that analysis?
A I believe that was --
MR. MORRIS: Object to the form of the question. I just want to make sure that we're talking about the -- and maybe I misunderstood the question -- plan versus liquidation.
THE COURT: Okay. Could you restate --
MR. TAYLOR: I said plan analysis.
THE COURT: Plan.
THE WITNESS: I believe that that initially was in the -- in the high 60s.
BY MR. TAYLOR:
Q It was --
A Might have been --
Q -- 62.14 percent; is that correct?
A Okay. Yeah. That sounds -- I'll take your representation. That's fine.
Q Okay. And going back to the November 28th liquidation

analysis, what did Highland believe that creditors in Class 8 would get under a liquidation analysis?
A I don't recall the -- if you just tell me, I'll -- I'll -- if you're reading it, I'll agree with -- because I -- from my memory.
Q 62.6 percent? Is that correct?
A That sounds about right.
Q You would agree with me, would you not, that 62.6 cents on the dollar is higher than 62.14 cents, correct?
A Yes.
Q And so at least comparing the January 28th versus -- of 2021 versus the November 24th of 2020, the liquidation analysis actually ended up being higher than the plan analysis, correct?
A Yes.
Q But there was -- there was some changes also in the plan analysis. I'm sorry. There were some subsequent changes that were done over the weekend that were provided on February 1st. Is that correct?
A Yes.
Q Okay. And what were -- give us an overview of what those changes were.
A What are -- what are you comparing? What would you like me to compare?
Q Okay. The January to February plan analysis, what were

the changes? Why did it go up from 62.6 to 71.3?
A The main changes, as we discussed earlier, and maybe the only major change, was the UBS claim amount, which went down significantly from the earlier iteration. And then there was the small change related to the RCP recovery, which was a double-count.
Q Okay. And you talked about earlier about what assumptions went into these analyses, correct?
A Yes.
Q And you said these assumptions were always done after careful consideration. Is that a correct summation of what you said?
A I think that's fair.
Q Okay.
MR. TAYLOR: Mr. Assink, could you pull up the November assumptions?
BY MR. TAYLOR:
Q I believe that's coming up, Mr. Seery. The Court.
(Pause.)
MR. TAYLOR: And go down one page, please, Mr. Assink. Roll up. The Assumption L.
BY MR. TAYLOR:
Q So, these are the November assumptions, correct, Mr. Seery?
A I believe so, yes.

Q Okay. And what was the assumption that you made after careful consideration regarding the claims for UBS and HarbourVest?
A The plan assumes zero, that was L, for those claims.
Q Okay. And ultimately what did -- and I believe you just announced this today and made this public today -- what is UBS's claim? What are you proposing that it be allowed at?
A $50 million in Class 8, and then they have a junior claim as well.
Q Okay. And what about HarbourVest? What kind of allowed claim did they end up with?
A $45 million in Class 8 and a $35 million junior claim.
Q So your well-reasoned assumption, carefully considered, was off by $95 million; is that correct?
MR. MORRIS: Objection to the form of the question.
THE COURT: Overruled.
THE WITNESS: The difference between zero and those numbers is $95 million, yes.
BY MR. TAYLOR:
Q You solicited creditors of the Highland estate based upon the November plan analysis and liquidation analysis that was provided and that we're looking at right now, correct?
A It was one of the bases, yes. It's the plan is what -- what we solicited votes for, not the projections.
Q But this was included within the disclosure statement; is

that correct?
A It's one of the bases. It was included, yes.
Q And this is the bases by which you believe that the best interests of the creditors have been met better than a Chapter 7 liquidation, correct?
A I believe this evidences that the best interest test would be satisfied, yes.
Q And so the record is very clear, for this Court and anybody looking at the record, no solicitation was done of the creditor body after the disclosure statement was sent out? No updates were sent, correct?
A Updated projections were filed, but no solicitation was -- was -- there was only one solicitation. We did not resolicit. That's correct.
Q Okay. Mr. Seery, how much are you -- after this plan, or if this plan is confirmed, how much are you going to be paid per month to be the Trustee?
A For the Trustee role, $150,000 per month is the base.
Q It's a base amount? On top of that, you're going to receive some sort of bonus amount, correct?
A There's two bonuses. There's a bonus for the bankruptcy case, which I'd need Court approval for, and then I'm going to seek a bonus for the Trustee work, which would be a combination of myself and the team for a performance bonus. That's to be negotiated.

To be fair, the Committee or the Oversight Group may not agree to any change, in which case we would not have an agreement.

Q And what would happen if you don't come to an agreement, Mr. Seery?

A They would have to get a different Plan Trustee.

Q Okay. So it's certainly going to have to be greater than zero, correct?

A Typically.

Q Is it going to be in the nature of three or four percent of the sales proceeds, or have you considered that?

A Oh, I'm sorry. Yeah, you mean the bonus? No. I've been thinking -- my apologies. I misunderstood. I thought you meant any number. I haven't -- I haven't had negotiation with them. I'm thinking about looking at the full recovery of the team -- for the team, looking at expected performance numbers, and then trying to negotiate a structure of bonus compensation that would be payable to the whole team, and then allocated by the CEO (garbled) which would be made.

Q When predicting the expenses of the Trust going forward in your projections, did you build in an amount for a bonus fee?

A No. It wouldn't be part of the expenses. It would come out at the end.

Q Okay. So those additional expenses are not shown in the plan analysis, correct?

A No, they're not. It's just not going to be an expense. It'll be a -- as an operating expense. It'll be an expenditure at the end out of distributions.
Q Okay. And did you subtract those from the distributions?
A No.
Q Okay. A Chapter 7 trustee is not going to charge $150,000 or more to monetize these assets, is he?
A No.
Q Have you priced how much D&O insurance is going to be on a go-forward basis post-confirmation?
A I'm sorry. I couldn't -- couldn't hear you.
Q Sorry. Let me get closer to my mic. Have you priced what D&O insurance is going to run the Trust on a go-forward basis post-confirmation?
A Yes.
Q Okay. And what are you projecting that to run?
A About $3-1/2 million.
Q And is that per annum for over the two-year life of this plan?
A Well, it's the two-year projection period, not life. But I expect that that's for the two-year projection period.
Q Okay. So approximately one point -- I'm sorry, you said $3.5 million, correct?
A Yes.
Q Okay. So, $1.75 million per year?

A Yes.
Q On top of the minimum $1.8 million per year that you're going to be paid, correct?
A Well, that's -- that's the base compensation. But, again, to be fair to the Oversight Committee, they haven't approved it yet. So the Committee, the Committee reserves their rights to negotiate a total package.
Q And there's going to be a Litigation Trustee, correct?
A Yes.
Q And that Litigation Trustee is going to be paid some amount of compensation, correct?
A Yes.
Q That has not been negotiated yet, correct?
A No, I believe -- I believe the base piece has. But his -- I don't know what the contingency fee or if that's been negotiated yet. I don't know.
Q And what is the base fee for the Litigation Trustee?
A My recollection is it was about $250,000 a year, some number in that area.
Q Thank you. So, at this point, over the two-year period, we're looking at approximately $3.6 million to you, $3.5 million to the D&O insurance, and approximately $500,000 base fee to the Litigation Trustee, plus a contingency. Is that correct?
A That's probably real close, yes.

Q Okay. And how about U.S. Trustee fees? You've estimated of how much those are going to be during the two-year period, correct?
A They're built into the plan up 'til -- I think it's only up until the actual effective date, but I don't recall the specifics.
Q Okay. And U.S. Trustee fees, the case is going to stay open and those are going to continue to have to be paid, even after confirmation, correct?
A Yes.
Q Okay. And do you have an estimate of how much those are going to run per annum or over that two-year period?
A I don't recall, no.
Q Okay. Well, they're provided within your projections, correct?
A Yes.
Q Okay. A Chapter 7 trustee would not have to incur any of these costs, would they?
A I don't think they'll have to incur Chapter -- U.S. Trustee fees. I don't know whether they would bring on a litigation trustee or not. I would assume, since there's -- appear to be valuable claims, they probably would, but perhaps they would do it themselves. So I don't know the specifics of what they would do.
Q In preparing your liquidation analysis, did you ask

Pachulski if they would be willing to work for a Chapter 7 trustee if one was appointed?
A I didn't specifically ask, no.
Q Did you ask DIS, your, for lack of a better word, financial advisors in this case, if they would be willing to work with a Chapter 7 trustee?
A DSI. No, I did not specifically ask them.
Q Okay. All right. Any of the accountants that you're working with, did you ask them if they would be willing to work with a Chapter 7 trustee?
A I didn't specifically ask them, no.
Q Okay. The proposed plan has no requirements that you notice any potential sale of either Highland assets or Highland subsidiary assets; is that correct?
A Do you mean after the effective date?
Q Yes.
A No, it does not.
Q In the SSP sale, which is a subsidiary of Trussway, which is a subsidiary of Highland, or actually it's a sub of a sub of Highland, you conducted the sale of SSP, correct?
A The team did, yes. I was part.
Q All right. That was not noticed to the creditor body; is that correct?
A That's correct.
Q And it is the Debtor's and your position that no notice

was required because this was a sub of a sub and therefore this was in the ordinary course?

A Not exactly, no.

Q Okay. Then what is your position?

A It was in the ordinary course. It was -- I believe it's a sub of a sub of a sub, and a significant portion of the interests are owned by third parties.

Q It is possible, is it not, that had you noticed this to the larger creditor body, that you might have engendered a competitive bidding situation that might have reached a higher return for investors, correct?

A The same possibility is it could have gone lower.

Q But it is possible, correct?

A Certainly possible.

Q In fact, there is normally requirements under the Bankruptcy Code and the Rules that asset sales are noticed out to the creditor body, correct?

A Asset sales that -- property of the estate, yes. Other than in the ordinary course, of course.

Q I believe you have described Mr. Dondero as being very litigious within this case; is that correct?

A I believe so, yes.

Q Okay. Did Mr. Dondero initiate any litigation in this case prior to September 2020?

A Prior to September? I don't believe so. I don't know

when he filed the claim from NexPoint. It certainly indicated that -- I believe it was from NexPoint. My memory is slightly off here. He filed a claim in -- administrative claim, which effectively is like you're bringing a complaint, against HCMLP for the management of Multi-Strat and the sale of the life settlement policies out of Multi-Strat, which was conducted in the spring.

Q And wasn't Mr. Dondero seeking document production related to that sale?

A No.

Q Okay. I believe that the preliminary injunction that you talked about and were questioned earlier, the plan asks to enjoin (garbled) party from allowing the plan to go effective. Is that correct?

A I'm sorry. I didn't understand you question. There was a -- there was a bunch of interference.

Q Okay. Sure. I'm sorry about that. I don't know if that's -- I don't think that's me, but --

A It may not be. It sounded like someone else.

Q The injunction prohibits anybody from interfering with the plan going effective, correct?

A The plan injunction?

Q Yes.

A Yes.

Q Okay. Just so I'm clear, is the plan injunction

attempting to strip appellate rights of Mr. Dondero?
A No.
Q Okay. So, if, for instance, if he were to file any appeal of an order confirming this plan, he wouldn't be in violation of that plan injunction?
A I don't think so, because the order wouldn't be final.
Q Okay. But it -- it says upon entry of a confirmation order, you're enjoined from doing so. So that's not the intent?
A It certainly would not be my intent. I don't think that anybody had that in mind.
Q Okay. And if Mr. Dondero were to seek a stay pending appeal either during that 14-day period or afterwards, is that plan injunction attempting to stop that -- that sort of action?
A I apologize. You're breaking up. But I think I understood your question. No, it was -- it was your screen as well. No. If either this Court stays its own order or a higher court says that the order is stayed, then there would be no way there could be any allegation that it's interfering with an order if it's not effective.
Q Mr. Dondero opposed the Acis sale, correct?
A The Acis settlement?
Q Correct.
A Yes.

Q After he opposed the Acis settlement, the next filing Mr. Dondero made was requesting that the Debtor notice the sale of any assets or any major subsidiary assets. Is that correct?
A I don't recall the sequence of his filings. I think that Judge Lynn at least sent a letter to that effect. I don't recall if there is a filing to that effect.
Q Did Mr. Dondero, through his counsel, attempt to resolve that motion without filing anything further?
A I don't recall the specifics of the motion. I know they asked for some sort of relief that -- that we thought was inappropriate.
Q When the Court postponed any hearing on Mr. Dondero's request for relief until the eve of the confirmation hearing, and Mr. Pomerantz announced that no sales were expected before confirmation, did Mr. Dondero withdraw his motion?
A Again, I don't recall the specifics of the motion. I only recall the letter from Judge Lynn.
Q Did Mr. Dondero do anything more than object to the HarbourVest deal?
A Not that I know of.
Q Did Mr. Dondero do anything more than respond to the Defendants' injunction suit?
MR. MORRIS: Objection to the form of the question. I mean, -- objection to the form.
THE COURT: Overruled.

MR. TAYLOR: I apologize. I should have said the Debtor's injunction suit.

THE WITNESS: Yeah, the -- I'm not sure of the specific order, but certainly the communications with me, which I think are prior to the order. The communications with Mr. Surgent, which I believe are after the order. Certain communications with Mr. Waterhouse, which were oral. Those were all similarly difficult and obstreperous actions.

BY MR. TAYLOR:

Q Has Mr. Dondero commenced any adversary proceeding or litigation in this case other than filing a competing plan?

MR. MORRIS: Objection to the form of the question.

THE COURT: Over --

THE WITNESS: Yeah, I don't --

THE COURT: -- ruled.

THE WITNESS: I don't believe he's commenced an adversary. I'm sorry, Judge. I don't believe he's commenced an adversary proceeding, no.

BY MR. TAYLOR:

Q Mr. Dondero didn't file any opposition to the life settlement sale, did he?

A We didn't do the life settlement (garbled) Court.

Q Right. Again, that wasn't noticed through the -- this Court, was it?

A It was an -- the reason was it was an asset of Multi-Strat

Fund. It wasn't an asset of the Debtor's.
Q Okay. Mr. Dondero did have concerns regarding the life settlement sale, correct?
A Yes.
Q In fact, he believed that they were being sold for substantially less than what could have otherwise been received, correct?
A He may have.
Q And if you conduct any subsequent sales for less than market value that might ultimately prevent the waterfall from ever reaching Mr. Dondero, he would have no recourse under this proposed plan to object to this sale or otherwise have any comment on it. Is that correct?
A I clearly object to the thinking that that was less than market value. It was -- it was more than market value. So I don't -- I disagree with the premise of your question.
Q So, I don't believe that was the question that was asked. The question that was asked is, as you move forward with your -- what I will characterize as a wind-down plan, not putting that word in your mouth -- but as you execute forward on your plan, as these sales of these assets go through, no notice is going to be provided, correct?
A Not necessarily. It depends on the asset and what we think of the, you know, the -- the position of the parties at the time.

If we have a -- if we have a transaction that's pending that wouldn't be hurt by a notice and that we'd be able to get the Court's imprimatur to maybe more better insulate, if you will, against Mr. Dondero's attacks, then we may well come to the Court to seek that.

The problem with noticing sales is that -- that it often depresses value. That's just not the way folks outside of the bankruptcy world (audio gap) sales.

Q So there's no requirement that either public or private notice be provided, correct?

A No. Meaning it is correct.

Q Okay. And if Mr. Dondero had objections either to the pricing of the sale or the manner and means by which the sale was being conducted, he would be prohibited by the plan injunction from bringing any objection to such sale, correct?

A I believe so, yes.

Q Mr. Dondero also had concerns regarding the OmniMax sale, correct?

A Mr. Dondero did not go along with the OmniMax sale with the assets that he managed. I don't know if he had concerns with -- with our sale or OmniMax's interests.

Q Did Mr. Dondero ever express to you any concern that the value wasn't being maximized regarding the sale of those assets?

A He thought he could get more. I don't know that he

thought that he could get more for his assets that he was managing or whether he thought he could get more for all of the assets.

Q Other than voicing those concerns, did Mr. Dondero file any pleading with this Court attempting to block that sale?

A Pleading with the Court? No.

MR. TAYLOR: Your Honor, I would like to confer with my colleagues just very briefly and see if they have anything further. And even if they don't, Mr. Lynn of my firm would like a very brief moment to address the Court prior to me passing the witness.

So, if I may have a literally hopefully one-minute break where I can turn my camera off and my microphone off to confer with my colleagues, and then move forward?

THE COURT: Okay. Well, you can have a one-minute break, but we're going to continue on with cross-examination at this point. Okay? I'm not sure what you meant by Mr. Lynn wants to raise an issue at this point. Could you elaborate?

MR. TAYLOR: I will get some elaboration during our 30-second to one-minute break, Your Honor. I was just passed a note.

THE COURT: All right. So, but I'll just you know, --

A VOICE: Your Honor?

THE COURT: -- I'm inclined to continue with the

cross-examination. You know, this isn't a time for, you know, arguments or anything like that. All right?

So, we'll take a one-minute break. You can turn off your audio and video for one minute, and come back.

(Off the record, 3:33 p.m. to 3:34 p.m.)

THE WITNESS: Your Honor?

THE COURT: Yes?

THE WITNESS: It's Jim Seery. Can I turn it into just a two-minute break, since I've sat in my seat, and it would be better for him to just continue straight through. I could use one or two minutes.

THE COURT: Okay.

THE WITNESS: I apologize.

THE COURT: All right. Well, it's been more than minute. Let's just say a five-minute break for everyone, and we'll come back at 3:39 Central time. Okay.

THE WITNESS: Okay. Thank you, Your Honor. I appreciate that.

(A recess ensued from 3:35 p.m. until 3:40 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated. All right. We are back on the record. Mr. Taylor, are you there?

MR. TAYLOR: I am, Your Honor. My video is not wanting to start, but my -- I believe my audio is on.

THE COURT: Okay. After you went offline for your

one-minute break, Mr. Seery asked for a five-minute bathroom break, or a couple-minute. Anyway, we've been gone on a bathroom break. We're back now.

MR. TAYLOR: Thank you. I was actually -- I was still listening with one ear, --

THE COURT: Okay.

MR. TAYLOR: -- Your Honor, so I understand.

THE COURT: All right.

MR. TAYLOR: So, thank you.

THE COURT: Are you finished with cross, or no?

MR. TAYLOR: Just a little bit of a follow-up.

CROSS-EXAMINATION, RESUMED

BY MR. TAYLOR:

Q Mr. Seery, you had previously testified that Mr. Dondero's counsel had threatened you and/or the independent board, I was not exactly sure who you were referring to, with suits, and I believe you said a hundred million dollars' worth of suits and getting dragged into litigation.

Is that still your testimony today, that you were -- you were threatened with suit by this firm of a suit of over a hundred million dollars?

A I believe what I was told by my counsel was that, not Mr. Dondero's, but one of the other counsel, who I can name, said specifically that Dondero will sue Seery for hundreds of millions of dollars. We're going to take it up to the Fifth

Circuit, get it reversed, and he'll go after him.
Q Okay. So it was not Mr. Dondero's counsel, and you were not -- is that correct?
A No. It was one of the other counsel on the phone today.
Q Okay. And you base that not upon your own personal knowledge but based on some -- something else that you were told, correct?
A Yes. By my counsel.
Q Thank you.
MR. TAYLOR: Yes, Your Honor. We can pass the witness.
THE COURT: Okay. So, you've gone, or you and Mr. Rukavina collectively have gone one hour and 17 minutes. Mr. Draper, you're next.
MR. DRAPER: Yes, Your Honor. Thank you. I basically have no more than ten questions, so I gather the Court will welcome that.
THE COURT: Okay.

CROSS-EXAMINATION

BY MR. DRAPER:
Q Mr. Seery, has the new general partner been formed yet?
A I don't know if they've been -- we've actually done the formation, but it -- it would be in process.
Q So it either has been formed or has not been formed?
A I don't -- I don't know the answer.

Q Okay. Now, going forward, Judge Nelms and Mr. Dubel will have nothing to do with the Reorganized Debtor, correct?
A Not necessarily, but they don't have a specific role at this time.
Q They won't be officers or directors of the new general partner or the Reorganized Debtor, correct?
A I don't -- I don't believe so, but it's not set in stone.
Q All right. Has any finance -- has any party who is the beneficiary of an exculpation, a release, or the channeling injunction contributed anything to this plan of reorganization in terms of money?
A No.
Q Have you ever interviewed a trustee as to how they would liquidate the assets or monetize the assets in this case?
A No.
Q And last question is, is there any bankruptcy prohibition that you're aware of that a Chapter 7 trustee could not do what you're doing?
A Which -- which -- what do you mean, under the plan?
Q No. Could not monetize the assets of the estate in the manner that you're attempting to monetize them.
A I don't think there's a specific rule, but I just haven't -- I haven't seen that before, no. So I don't think there's a specific rule that I know of.
Q Okay.

MR. DRAPER: I have nothing further for this witness.

THE COURT: All right. I should have asked, we had a couple of other objectors. Ms. Drawhorn, did you have any questions?

MS. DRAWHORN: I have no questions, Your Honor.

THE COURT: All right. Were there any other objectors out there that I missed that might have questions? All right. Any redirect?

MR. MORRIS: Your Honor, if I may, can I -- can I just take a short minute to confer with my colleagues?

THE COURT: Sure. You can --

MR. MORRIS: Thank you.

THE COURT: -- put you --

MR. MORRIS: Two -- two minutes, Your Honor.

THE COURT: Okay.

(Pause, 3:45 p.m. until 3:48 p.m.)

THE COURT: All right. We've been a couple of minutes. Mr. Morris?

MR. MORRIS: Yes, Your Honor.

THE COURT: What are --

MR. MORRIS: Just, just a few points, Your Honor.

THE COURT: Okay.

MR. MORRIS: Hold on a sec. You ready, Mr. Seery?

THE WITNESS: I am, yes.

REDIRECT EXAMINATION

BY MR. MORRIS:
Q You were asked a number of questions about your compensation. Do you recall all that?
A Yes, I do.
Q And you testified to the $150,000 a month. Do you recall that?
A Yes.
Q Under the -- under the documentation right now, your compensation is still subject to negotiation with the Committee; is that right?
A Yes, it is.
Q Okay. You were asked a couple of questions about the conduct of Mr. Dondero. Earlier, you testified that the monetization plan was filed under seal at around the time of the mediation. Do I have that right?
A Yes. Right at the start of the mediation.
Q Okay. And is that the first time that the Debtor made the constituents aware, including Mr. Dondero, that it intended to use that as a catalyst towards getting to a plan?
A That's the first time that we filed it, but that plan had been discussed prior to that.
Q And do you recall that there came a point in time where you -- when the Debtor gave notice that it intended to terminate the shared services agreements with the Dondero-related entities?

A Yes.
Q And when did that happen?
A That was about 60 -- now it's like 62 days ago.
Q Uh-huh. And you know, from your perspective, from the filing of the monetization plan in August through the notice of shared services, is that what you believe has contributed to the resistance by Mr. Dondero to the Debtor's pursuit of this plan?
A Well, I think there's a number of factors that contributed, but the evidence that I've seen is that when we started talking about a transition, if there wasn't going to be a deal, if Mr. Dondero couldn't reach a deal with the creditors, we were going to push forward with the monetization plan. And the monetization plan required the transition of the employees. And indeed, it called specifically, and we had testimony regarding it all through the case, about the employees being terminated or transferred.

In order to transfer them over to an entity that's related, Mr. Dondero pulls all of those strings. And he refused to engage on that. We started in the fall. We specifically told employees of the Debtor not to engage. They couldn't spend his money, which made sense --

MR. TAYLOR: Objection, Your Honor.

THE WITNESS: So, very -- that --

THE COURT: Just -- there's an objection.

MR. MORRIS: There's an objection.

THE WITNESS: I'm sorry.

THE COURT: There was an objection.

MR. TAYLOR: Yes, Your Honor. Object --

THE COURT: Go ahead.

MR. TAYLOR: Yes, Your Honor. This is Clay, Clay Taylor. Objection. He's directly said Mr. Dondero told other employees *x*, and that is purely hearsay, not based upon his personal opinion, or his personal knowledge, and therefore that part of the answer should be struck.

MR. MORRIS: Your Honor, it's a statement against interest.

THE COURT: Overrule the objection. Go ahead.

THE WITNESS: Yeah. The difficulty of transitioning this business, I've equated it to doing a corporate carve-out transaction on an M&A side. It's hard, and you need counterparties on the other side willing to engage. And what we went through over the weekend, on Friday, was seemingly that the Funds, you know, directed by Mr. Dondero, just haven't engaged.

We actually gave them an extra two weeks to engage, because it's -- they've really been unable to do anything. I mean, hopefully, we've got the employees working in a way that can -- that can foster and get around some of this obstreperousness, and I've used that word before, but that's

what it is. It's really an attempt to just prevent the plan from going forward.

And at some point, the plan will go forward. And if we are unable to transition people, we will simply have to terminate them. And that is not a good outcome for those employees, but it's not a good outcome for the Funds, either. And the Funds, Mr. Dondero, the Advisors, the boards, nobody wants to do anything except come in this court.

BY MR. MORRIS:

Q Do you recall being asked about Mr. Dondero and certain things that he didn't do and certain actions that he hadn't taken?

A Yes.

Q By Mr. Taylor? To the best of your recollection, did Mr. Dondero personally object to the HarbourVest settlement?

A I -- I don't recall if he did or if it was one of the entities.

Q It was Dugaboy. Does that refresh your recollection?

A Dugaboy certainly objected, yes.

Q And do you understand that Dugaboy has appealed the granting of the 9019 order in the HarbourVest settlement?

A Yes.

Q And Mr. Taylor asked you to confirm that Mr. Dondero hadn't taken any action with respect to the life settlement deal. Do you remember that?

A I do.
Q But are you aware that Dugaboy actually filed an administrative claim relating to the alleged mismanagement of the life settlement sale?
A Yes, I did, I did allude to that. I wasn't sure it was Dugaboy, but -- but that was very --
Q Uh-huh.
A -- very early on, an objection filed in the form of an administrative claim or complaint against, if you will, against Highland for the management of Multi-Strat.
Q Uh-huh. And Mr. Dondero didn't personally file any motion seeking to inhibit the Debtor from managing the CLO assets; is that right?
A No, not the CLO assets, no.
Q Yeah. But the Funds and the Advisors did. That was the hearing on December 16th. Do you recall that?
A Yeah. That was the -- the Funds. K&L Gates, the Funds, and the various Advisors.
Q All right. Do you recall Mr. Rukavina asking you whether there was any evidence in the record to support your testimony that there was an agreement in place to assume the CLO management agreements?
A I recall the question, yes.
Q Okay.
MR. MORRIS: Your Honor, I'm going to ask Ms. Canty

to put up on the screen the Debtor's omnibus reply to the plan objections.

THE COURT: Okay.

MR. MORRIS: It was filed -- it was filed on January 22nd. And if we can go, I think, to -- I think it's Paragraph -- I think it's Paragraph 135 on Page 71. Yeah. Okay.

BY MR. MORRIS:

Q Take a look at that, Mr. Seery. Does that -- does that statement in Paragraph 135 accurately reflect the understanding that's been reached between the Debtor and the CLO Issuers with respect to the Debtor's assumption of the CLO management agreements?

A Yes. I think that's consistent with what I testified to earlier, the substance of the agreement.

MR. MORRIS: And if we can just scroll to the top, just to see the date. Or the bottom. I guess the top.

THE WITNESS: Do you mean the date of this pleading?

BY MR. MORRIS:

Q Yeah. So, it was filed on January 22nd, right, ten days ago? Okay.

A That's correct.

MR. MORRIS: I'd like to put up on the screen an email, Your Honor, that I'd like to mark as Debtor's Exhibit 10A. And this is --

BY MR. MORRIS:

Q Do you recall, Mr. Seery, you testified that the agreement was reflected in an email?
A Yes.
Q Is this the email that you're referring to?
MR. MORRIS: If we could scroll down. Right there.
THE WITNESS: Yes.
MR. MORRIS: Okay. One -- the email below. Okay. Right there.
BY MR. MORRIS:
Q Is that the -- is that the email you had in mind?
A It was the series of emails. We -- we had a -- I think I testified in the prior testimony, or my -- one of my depositions, that we had had a number of conversations with the Issuers and their counsel, and this was the summary of the agreement that was contained in these emails.
Q Okay. And this is, this is the same date as the omnibus reply that we just looked at, right, January 22nd?
A That's correct.
Q Okay. You were asked a question, I think, late in your cross-examination about a Chapter 7 trustee's ability to sell the assets in the same way as you are proposing to do. Do you recall that testimony?
A Yes.
Q And I think, if I understood correctly, the question was narrowly tailored to whether there was any legal impediment to

a trustee doing -- performing the same functions as you. Do I have that right?

A That's the question I was asked, whether the Bankruptcy Code had a specific prohibition.

Q Okay. And I think, I think you testified that you weren't aware of anything. Is that right?

A That's correct.

Q All right. But let's talk about practice. Do you think a Chapter 7 trustee will realize the same value as you and the team that you're assembling will, in terms of maximizing value and getting the maximum recovery for the assets?

A No. As I testified earlier, you know, I've been working with these assets now for a year. It's a complicated structure. The assets are all slightly different. And sometimes much more than slightly. And the team that we're going to have helping managing is familiar with the assets as well. We believe we'll be able to execute very well in the markets that we (garbled).

Q Do you think a Chapter 7 trustee will have a steep learning curve in trying to even begin to understand the nature of the assets and how to market and sell them?

A I think anybody coming into this, the way this company is set up, as an asset manager, and the diversity of the assets, would have a steep learning curve, yes.

Q Do you have any view as to whether the perception in the

marketplace of a Chapter 7 trustee taking over to sell the assets will have an impact on value as compared to a post-confirmation estate of the type that's being proposed under the plan?

A Yes, I do, and it certainly would be negative, in my experience. Typically, assets are not conducted -- asset sales are not conducted through a bankruptcy court, and certainly not with a Chapter 7 trustee that has to sell them, and generally is viewed as having to sell them quickly. So we -- we approach each asset differently, but certainly in a way that would be much more conducive to maximizing value than a Chapter 7 trustee could, just by the nature of their role.

Q Is it -- is it your understanding that, under the proposed plan and under the proposed corporate governance structure, that the Claims Oversight Committee will -- will manage you? That you'll report to that Committee and that they'll have the opportunity to make their assessment as to the quality of your work?

A Yeah, absolutely. And that's consistent with what we've done before in this case. Even where it wasn't an asset of the estate or was being sold in the ordinary course, we spent time with the Committee and the Committee professionals before selling assets.

Q And you've worked with the Committee for over -- for a year now, right?

A It's over a year.
Q And the Committee is comfortable with you taking this role; is that right?
A I think they're supportive of it. Comfortable might be not the right word choice.
Q Okay. I appreciate the clarification. And do you have any reason to believe that the -- that the Oversight Committee is going to allow you the unfettered discretion to do whatever you want with the assets of the Trust?
A Not a chance. Not with this group. Nor would I want to. There's no right or wrong answer for most of these things, and the collaborative views from professionals and people who have an economic stake in the outcome will be helpful.
Q Okay. You were asked some questions about the November projections and the -- and the assumption that was made that valued the HarbourVest and the UBS claims at zero. Do you recall that?
A Yes.
Q As of that time, was the Debtor still in active litigation with both of those claim holders?
A Very much so.
Q And after the disclosure statement was issued, do you recall that the Court entered its order on UBS's Rule 3018 motion?
A Yes.

Q And do you recall what the -- what the claims estimate was for voting purposes under that order?
A It was about $95 million. That was -- it was together with the summary judgment orders of that date. They were separate orders, but that was the lone hearing.
Q And was that public information, that order was publicly filed on the docket; isn't that right?
A Yes, it was.
Q Is there anything in the world that you can think of that would have prevented any claim holder from doing the math to try to figure out the impact on the estimated recoveries from the -- by using that 3018 claims estimate?
A No. It would have -- it would have been quite easy to do.
Q And, in fact, that's what you wound up doing with respect to the January projections, right?
A That's correct.
Q And do you recall when the HarbourVest settlement, when the 9019 motion was filed?
A I don't recall the actual filing. It was subsequent to the UBS, though.
MR. MORRIS: Ms. Canty, if you have it, can we just put it on the screen, to see if we can refresh Mr. Seery's recollection? If we could just look at the very top.
BY MR. MORRIS:
Q Does that refresh your recollection that the 9019 motion

was filed on December 23rd?
A Yes, it does. The agreement was reached before that, but it took a little bit of time to document the particulars and then to -- to get it filed.
Q And this wasn't filed under seal, to the best of your recollection, was it?
A No, no. This was -- this was open, and we had a very open hearing about it, because it was a related-party objection.
Q And to the best of your recollection, did this 9019 motion publicly disclose all of the material terms of the proposed settlement?
A Yes, it did.
Q Can you think of anything in the world that would have prevented any interested party from doing the math to figure out how this particular settlement would impact the claim recoveries set forth in the Debtor's disclosure statement?
A No. And just again, to be clear, the plan and the projections had assumptions, but the plan was very clear that the denominator was going to be determined by the total amount of allowed claims.
Q And, again, at the time that that was filed, you hadn't reached a settlement with HarbourVest, had you?
A No.
Q And the order on the 3018 motion hadn't yet been filed; is that right?

A That's correct.
Q Okay. Has -- are you aware of any creditor expressing any interest in trying to change their vote as a result of the updates of the forecasts?
A Only Mr. Daugherty. And actually, they have a stipulation with the two -- the two former employees.
Q All right. But to be fair, that wasn't -- had nothing to do with the revisions to the projections? That was just in connection with their settlement; is that right?
A That's correct. As was, I suspect, Mr. Daugherty's, but he'd been aware of the settlements, just like everyone else.
Q Okay. You were asked a couple of questions, I think, by Mr. Rukavina about whether there is anything that you need to do your job on a go-forward basis. And I think you said no. Do I -- do I have that right? Nothing further that you need?
A I -- I'm not really sure what your question means, to be honest.
Q Okay. Fair enough. To be clear, is there any chance that you would accept the position as the Claimant Trustee if the gatekeeper and injunction provisions of the proposed plan were extracted from those documents?
A No. As I said earlier, they're integral in my view to the entire plan, but they're absolutely essential to my bottom.
Q Okay. And through -- through the date of the effective date, are you relying on the exculpation clause of the -- have

you been relying on the exculpation clause in the January 9th order that you testified to at the beginning of this hearing?

A Yeah. Both the January 9th order as well as the July order with respect to my CEO/CRO positions.

Q Okay.

MR. MORRIS: I've got nothing further, Your Honor.

THE COURT: All right. Any recross on that redirect?

A VOICE: I believe Mr. Rukavina is speaking but is muted, Your Honor.

THE COURT: Mr. Rukavina, do you have any recross?

MR. RUKAVINA: Your Honor, I do, yes. Thank you. I apologize.

THE COURT: Okay.

MR. RUKAVINA: Can you hear me now?

THE COURT: Yes.

THE WITNESS: Yes.

MR. RUKAVINA: Thank you.

Mr. Vasek, if you'll please pull up the Debtor's Omnibus Reply, Docket 1807. And if you'll go to Exhibit C. Do a word search for Exhibit C. It's attached to it. Okay. Now scroll down. Stop there.

RECROSS-EXAMINATION

BY MR. RUKAVINA:

Q Mr. Seery, do you see what's attached as Exhibit C to the Omnibus Reply, which is proposed language in the confirmation

order?
A I see the exhibit. I didn't know if this was -- I don't know exactly what it's for. If it's proposed language, I'll accept your representation.
MR. RUKAVINA: Well, scroll back up to Exhibit C, Mr. Vasek. I want to make sure that I understand what you're saying. Scroll back up. Do the word search for where Exhibit C appears first. Start again. Okay. So scroll up.
BY MR. RUKAVINA:
Q So, you'll recall Mr. Morris was asking you about the paragraph in here where you outlined the terms of the agreement with the CLOs. Do you recall that testimony?
A Yes.
Q Okay. And then you see it says, The Debtor and the CLOs agreed to seek approval of this compromise by adding language to the confirmation order. A copy of that language is attached hereto as Exhibit C and will be included in the confirmation order.
Do you see that, sir?
A I do.
Q Okay.
MR. RUKAVINA: Mr. Vasek, go back to Exhibit C.
BY MR. RUKAVINA:
Q So it's correct that this Exhibit C is the referenced agreement that the Debtor and the CLOs will seek approval of,

correct?
A The -- the -- it may be word-splitting, but I believe it says that they've reached agreement and this is the language that will evidence that agreement or embody that agreement.
Q Okay.
MR. RUKAVINA: Scroll down, Ms. Vasek, to the next page, please.
BY MR. RUKAVINA:
Q Real quick, do the CLOs owe the Debtor any money for the management fees?
A I don't -- well, the answer is there are accrued fees that haven't been paid, but when they have cash they run through the waterfall and pay them.
Q And I believe you mentioned to me those accrued fees before. They're several million dollars, correct?
A It -- I don't know right off the top of my head. They can aggregate and then they get paid down in the quarter depending on the waterfall. And it's -- it's not a fair statement by either of us to say the CLOs, as if they're all the same. Each one is different.
Q I understand. But as of today, you agree that the CLOs collectively owe some amount of money to the Debtor in accrued and unpaid management fees?
A I believe that's the case.
Q Okay. And do you believe it's north of a million dollars?

A I don't recall.
Q Okay.
MR. RUKAVINA: Well, scroll down a couple of more lines, Mr. Vasek. Stay there.
BY MR. RUKAVINA:
Q Sir, if you'll read with me, isn't the Debtor releasing each Issuer, which is the CLOs, for and from any and all claims, debts, et cetera, by this provision?
A Claims. Not -- not fees, but claims. I don't believe there's any release of fees that the CLOs might owe and would run through the waterfall here.
Q Okay. For and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs, and expenses, including without limitation attorneys' fees and related costs, damages, injuries, suits, actions, and causes of action, of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed.
Are you saying that that does not release whatever fees have accrued and the CLOs owe?
A I don't believe it would. If it did, your client should be ecstatic. But I don't believe it does that.
Q And you don't believe that it releases the CLOs of any and all other obligations that they may have to the Debtor and the

estate?
A I -- again, I don't believe there are any, but I think it's a broad release of claims away from the actual fees that are generated by the Debtor. I don't believe there's an intention to release fees that have accrued.
Q Have you seen this language before I showed it to you right now?
A I believe I have, yes.
Q Okay. Take a minute. Can you point the Court to anywhere where present or future fees under the CLO agreements are excepted from the release?
A I could go through, I'll take your representation, but I don't believe that that's what it -- it's supposed to release fees. Again, if the fees are owed, they get paid, if there are assets there to pay them.
Q Okay. This release and this settlement was never noticed out as part of a 9019, was it?
A I don't believe so, no.
Q Okay. So, other than bringing it up here today, this is the first that the Court, at least, has heard of this, correct?
A Yeah, again, I don't --
MR. MORRIS: Objection to the form of the question.
THE WITNESS: Yeah. I just stated before that I don't think this is a -- that there claims.

THE COURT: Wait. Slow down. I think --

MR. SEERY: Oh, I'm sorry, Your Honor.

THE COURT: -- there was an objection. Go ahead, Mr. Morris.

MR. MORRIS: The notion that this is the first time the Court has heard of this is just factually incorrect. First of all, it's in the document from January 22nd. Second of all, Mr. Seery testified to it last week at the preliminary injunction hearing. I mean, --

THE COURT: I -- I --

MR. MORRIS: -- I don't know what the point of the inquiry is, but there's -- this is not new news.

THE COURT: Okay. I sustain the objection.

BY MR. RUKAVINA:

Q And Mr. Seery, can you point me to any document where counsel for the CLOs has signed this particular confirmation order or any other document agreeing to this language in the confirmation order?

A I don't think there's any document that's signed. I think we already went over that. I think the email is evidence their agreement to the general terms. I don't see any agreement with respect to this particular language.

Q Well, you have no personal information? You're going on what your lawyers told you that the CLOs agreed to, correct?

A That's correct.

Q Okay. You didn't personally --
A Excuse me. That's correct with respect to this language, not with respect to the agreement. I was on the phone when they agreed.
Q Okay. And they agreed orally, you're saying, to basically the assumption of the CLO management agreements?
A Correct.
Q Okay.

MR. RUKAVINA: Thank you, Your Honor. I'll pass the witness.

THE COURT: All right. Other recross?

MR. TAYLOR: Yes, Your Honor, I do.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. TAYLOR:

Q Mr. Seery, Clay Taylor again. You worked -- I'm sorry, let me restart. I believe you testified earlier, in response to questions by Mr. Morris, that you didn't believe a Chapter 7 trustee would be very effective in monetizing these assets, correct?
A I think I said I didn't believe that the Chapter 7 trustee would be as effective at monetizing the assets as the Reorganized Debtor would be, and me in the role as Claimant Trustee.
Q And one of the reasons that you gave is you believe that

the Chapter 7 trustee had to liquidate assets so quickly that it could not be effective; is that correct?

A Typically, that's the case, yes.

Q You worked for the Lehman trustee, correct?

A That's incorrect.

Q Okay. Did you work on the Lehman case?

A Did I work in the case? No.

Q Okay. Did you -- how were you involved within -- within the Lehman case?

A It's a long history, but I was a relatively senior person, not senior level, not senior management level person at Lehman. I ran the loan businesses and I helped a number of other places and I -- in the organization. I helped construct the sale of Lehman to Barclays out of the broker-dealer and then helped consummate that sale.

Q Okay. I believe, in that case, it was a SIPC -- the trustee was a SIPC trustee, correct?

A With respect to the broker-dealer.

Q Okay. And you believe that a SIPC trustee is very -- has very similar rules with respect to asset sales; is that correct?

A There are some similarities, absolutely.

Q Okay. And so in that case, the trustee was in place for seven years, yet you believe -- you want this Court to believe that a Chapter 7 trustee has to liquidate assets in a very

short time frame, is that correct?

MR. MORRIS: Objection to the form of the question.

THE WITNESS: Yeah, in the Lehman case, --

THE COURT: Overruled.

THE WITNESS: I'm sorry, Judge.

THE COURT: Go ahead.

THE WITNESS: In the Lehman case, the SIPC trustee spent years litigating, not liquidating. The broker-dealer was sold in our structured deal to Barclays, and then the SIPC trustee liquidated the remainder of the estate, which was the broker-dealer, but most of it had been sold to Barclays. It was really a litigation case.

BY MR. TAYLOR:

Q But it did -- that trustee did sell off subsequent assets after the initial sale, correct?

A That trustee, I don't think, managed -- I don't know about that. The trustee didn't really manage any assets. Other than litigations.

Q You've also testified that you didn't believe or that you would not take on this role without the gatekeeper and injunction -- gatekeeper role and injunction being in place; is that correct?

A Yes.

Q And you're also familiar with the Barton Doctrine, correct?

A I'm not.
Q Okay. Do you believe that a Chapter 7 trustee could be sued by third parties without obtaining either relief from this Court -- let me just stop there. Do you believe that a Chapter 7 trustee could be sued without seeking leave of this Court?
A I think it would be difficult. I know that Chapter 7 trustees have qualified immunity, so I think, whether it would be leave of this Court or it's just that there's a very high bar to suing them, I'm not exactly sure. It's not something I've spent time on.
Q Okay. So a hypothetical Chapter 7 trustee would have no need of the gatekeeper role or injunction if this case were converted to one under Chapter 7, correct?
A That's probably true.
Q Thank you.
MR. TAYLOR: No further questions.
THE COURT: All right. Any other recross?
MR. DRAPER: Your Honor, I have nothing --
THE COURT: All right.
MR. DRAPER: -- further.
THE COURT: All right. I think we're done, but anyone I've missed?
All right. Mr. Seery, it's been a long day. You are excused from the virtual witness stand.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Mr. Morris, let's see if there's anything else we can accomplish today. It's 4:18 Central time. Who would be your next witness?

MR. MORRIS: My next witness would be John Dubel, Your Honor.

THE COURT: All right. Can you give us a time estimate for direct?

MR. MORRIS: I wouldn't expect Mr. Dubel to be more than 20 minutes or so, but I would offer the Court, if you think it would be helpful, counsel for the CLO Issuers is on the call, and I believe that they would be prepared to just confirm for Your Honor that there is an agreement in principle, just as Mr. Seery has testified to, and maybe you want to hear from her. I know she's not really a witness, but she might be able to make some representations to give the Court some comfort that everything Mr. Seery has said is true.

THE COURT: I think that would be useful. Is it Ms. Anderson or who is it?

MS. ANDERSON: That is -- it is, Your Honor. And you know, I appreciate the testimony given. I certainly do not want to testify, but thought it might be useful for the Court to hear from us.

Amy Anderson on behalf of the Issuers from Jones Walker. Schulte Roth also represents the Issuers. And I can represent

to the Court that the agreement as it's represented on Docket 1807, as more particularly described in Exhibit C, which Your Honor has seen, is the agreement reached between the Issuers and the Debtor.

There was some testimony about fees owed, accrued fees owed to the Debtor. I certainly cannot speak to the substance of each particular management agreement with each CLO. They are all distinct and unique and very lengthy documents. I will -- I can represent to the Court that any accrued fees that are owed were not intended to be included in the release. It is -- it is not meant to release fees owed to Highland under the particular management agreements.

Of course, if the Court has any questions or if I can provide anything further, I'm happy to. And I will be on the hearing today and tomorrow, but I thought it might be useful, given the topic of the testimony this afternoon.

THE COURT: All right. That was useful. Thank you, Ms. Anderson.

All right. Well, Mr. Morris, shall we go ahead and hear from Mr. Dubel today, perhaps finish up a second witness?

MR. MORRIS: Yeah. I think we have the time. I think Mr. Dubel is here. Are you here, Mr. Dubel?

MR. DUBEL: I am. Can you hear me, Your Honor?

THE COURT: I can hear you, but I cannot see you. Oh, now I can see you. Please raise your right hand.

JOHN S. DUBEL, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Thank you. Mr. Morris, go ahead.

MR. MORRIS: Thank you very much, Your Honor.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Dubel, can you hear me?

A I can, Mr. Morris.

Q Okay. Do you have a position today with the Debtor, sir?

A I am a director of Strand Advisors, Inc., which is the general partner of the Debtor.

Q Okay. And can you --

MR. MORRIS: Your Honor, just as a reminder, I'm going to ask Mr. Dubel to describe his professional experience in some detail, to put into context his testimony, but his *C.V.* can be found at Exhibit 6Y as in yellow on Docket No. 1822.

THE COURT: All right.

BY MR. MORRIS:

Q Mr. Dubel, can you describe your professional background?

A Yes. I have approximately, almost, and I hate to say it because it's making me feel old, but I have almost 40 years of experience working in the restructuring industry.

I have served in many roles in that, both as an advisor, an investor in distressed debt, and also a member of

management teams, and as a director, both an independent director and a non-independent director.

My executive roles have included the -- both an executive director, chief executive officer, president, chief restructuring officer, chief financial officer. And I have been involved in some of the largest Chapter 11 cases over the last several decades, including cases like *WorldCom* and *SunEdison*.

Q Let's focus your attention for a moment just on the position of independent director. Have you served in that capacity before this case?

A I have.

Q Can you describe for the Court some of the cases in which you've served as an independent director?

A Sure. I've served as an independent director in several cases that were I'll call post-reorg cases. *Werner Company*, which was the largest climbing equipment manufacturer in the world, manufacturer of ladders, Werner Ladders. You'll see them on every pickup truck running around the countryside.

FXI Corporation, which is a -- one of the largest foam manufacturers. Everybody's probably slept or sat on one of their products.

Barneys New York, back in 2012, when they did an out-of-court restructuring. I had previously been involved with Barneys 15 years before that, and so I was called upon because

of my knowledge to be an independent director in that situation. Have had no relationship with Barneys since it emerged from Chapter 11 back in 1998.

I have been the independent director in *WMC Mortgage*, which was a mortgage company owned by General Electric.

And I am currently serving as an independent director in a company -- in two companies. One, *Alpha Media*, which is a large radio station chain that recently filed Chapter 11, I believe it was late Sunday night, and I am also an independent director in the *Purdue Pharma* bankruptcy, and have served prior to the bankruptcy and am the chair of the special independent committee of directors -- special committee of independent directors in that particular situation.

Q That sounds like a lot. In terms of other fiduciary capacities, I think your *C.V.* refers to Leslie Fay. Were you involved in that case, and if so, how?

A I was. That was -- for those people who may remember it, that goes back into the 1993 era. *Leslie Fay* was a large apparel manufacturer, and at the time was one of the largest companies that had gone through an extensive fraud. I say at the time because it was about a $180 million fraud, which pales by some of the ones that have followed it.

I was brought in as the executive vice president in charge of restructuring, chief financial officer, and was also added to the board of directors. Even though I wasn't independent,

I was added to the board of directors to have the fresh face on the board in that particular situation because of the fraud that had taken place.

Q And --

A *Sun* --

Q Go ahead.

A *SunEdison*, I was brought in as the CEO. Actually, initially, as the chief restructuring officer, with a mandate to replace the CEO, which took place shortly after I was brought on board and -- because of various issues surrounding investigations by the SEC, DOJ, and allegations by the creditors of fraud. And so I was brought in to run the company through its Chapter 11 process.

As I'd mentioned earlier, *WorldCom*, I was brought in at the beginning of the case as the fresh chief financial officer. And I think everybody is familiar with what happened in the *WorldCom* situation.

Q All right. Based on that experience, do you have a view as to whether the appointment of independent directors is unusual?

A It is not. More recently, it has -- it had been in the past. Usually, you know, they would try and take the existing directors and form a special committee of the existing directors. But I think the state of the art has become more where independent directors are brought in, mainly because the

cases have become a lot more complex in nature, and larger, and the transactions themselves are much more sophisticated. And so having somebody independent has been important for analyzing the various transactions. And also, quite often, it's just bringing a fresh, independent voice to the company on the board.

Q Do you have an understanding as to the purpose and the role of independent directors generally in restructuring and bankruptcy cases?

A Sure. As I kind of alluded to a little bit earlier, the -- probably the most critical thing is for restoring confidence in the company and in the management in terms of corporate governance, especially when there have been troubled situations, where -- whether it's been fraud or allegations made against the company and its prior management or when management has left under difficult situations.

Also, you know, independent thought process being brought to the board is very important for helping guide companies. It's quite often the existing management team or the existing board may get stuck in a rut, as you can say, you know, in terms of their thinking on how to manage it, and having somebody with restructuring experience who provides that independent voice is very important to the operations.

In addition, having someone who can look at conflicts that might arise between shareholders or shareholders and the board

members is important. As I mentioned earlier, the *WMC Mortgage* situation was one where I was brought on to -- as an independent member of the board to effectively negotiate an agreement or a settlement between WMC and its parent, General Electric. That entity was being -- WMC was being sued for billions of dollars, and there were issues as to whether or not General Electric should fund those obligations. And so that was a role that is quite often occurring in today's day and age.

In addition, evaluating transactions for companies is important, whereby either the shareholders who sit on the board or board members may be involved in those transactions, needing an independent voice to review it. And, you know, I have served in situations. Again, *Barneys New York* and *Alpha Media* is another example where, as an independent director, I am one of the parties responsible for evaluating those transactions and making recommendations to the entire board.

And then, again, you know, situations where it's just highly-contentious and having, as I said, having that independent view brought to the table is something that is very helpful in these cases.

Q I appreciate the fulsomeness of the answer. During the time that you served in these various fiduciary capacities, is it fair to say you spent a lot of time considering and addressing issues relating to D&O and other executive

liability issues?
A It's usually one of the things that you get involved with thinking about prior to taking on the role because you want to make sure that there are the appropriate protections for the director.
Q Can you describe for the Court some of the protections that you've sought or that you've seen employed in some of the cases you've worked on, including this one, by the way?
A Sure. I mean, one of the first things you look to is does the company -- will the company indemnify the director for serving in that capacity? And if the company will not indemnify, then there's always a question as to why not, and it's probably something you don't want to get involved with.
Generally, that is something that I don't think I've ever seen a case where there has not been indemnification. Obviously, it would, you know, cause great pause or concern if they weren't willing to indemnify. But that is important.
Providing D&O insurance is very important. And in most situations, you know, over the last 10-15 years, if there's not adequate D&O insurance -- quite often, the D&O insurance has been tapped out because of claims that will -- have been brought or are anticipated to be brought -- new D&O insurance is something that's front and center for the minds of independent directors such as myself.
As you -- that gets you into the case and gets you moving.

As you start to look towards the confirmation and exit from the case, things that would be appropriate, that, you know, would always be something you would want to look at would be exculpation language, releases. And in this particular case, the injunction, or what Mr. Seery earlier referred to as the gatekeeper clause, is something that is very important for directors, both, you know, as they're thinking through it and as they emerge.

Q All right. Let's shift now to this case, with that background. How did you learn about this case?

A I had a party who was involved in the case reach out to me in early part of December of 2019 to see if I would be interested in getting involved. I think that was about the time -- it was after -- as I recall, it was after the case had been moved to Dallas and when there was a -- consideration of either a Chapter 11 or a Chapter 7 trustee. I can't remember exactly which it was. But there was talk about a motion to bring on a trustee and get rid of all the management and the like and such.

Q Can you describe in as much detail as you can recall the facts and circumstances that led to your appointment as an independent director?

A Sure. I, as I said, I had -- early December, I had an -- one of the parties involved -- had, probably within the next week, probably two or three others -- that reached out to see

if I would be interested in participating. I met with the Creditors' Committee or -- I'm not sure if it was all the members, but representatives of the Creditors' Committee, along with counsel, and I believe financial advisors were involved. They walked me through the issues. They wanted to hear about my *C.V.* Quite a few of them knew me, knew me well, but others wanted to hear about my background and how I would look at things as an independent director.

That went through into the latter part of December. I knew that they were talking to other parties. I think it was probably right around the first of the year or so that I was informed, maybe a little bit earlier than that, that I was informed that Mr. Seery was one of the other parties that they were talking to, and Mr. Seery and I were put in touch with each other. I had worked with Mr. Seery back probably nine years earlier when I was the CEO of FGIC. He was involved in a matter that we were restructuring, and so knew him a little bit and was comfortable working with him as a, you know, another independent director.

Then we took the time that we had to to -- or, I took the time to -- from the beginning, you know, the early part of December, look at the docket, understand what was taking place. I -- in addition, I met with the company and its advisors, in-house counsel, the folks at DSI who were at the time the CRO and the company's counsel to better understand

some of the issues.

Mr. Seery and I, as I said, were both selected, and we went through the process of, I guess, breaking the tie, I think, if I could say it that way, amongst the creditors and the Debtor as to who would be the third member of the board. And we were given the opportunity to go out, interview, and select the third member, which resulted in Russell Nelms' appointment to the board. And also during that time, we were given the opportunity to have some input -- not a hundred percent input, but some input -- on the January 9th order that -- the January 9, 2020 order that was put in place appointing us and giving us some of the protections that we felt were appropriate and necessary in this case.

Q All right. We'll get to that in a moment, but during this diligence period, did you form an understanding as to why an independent board was being formed, why it was being sought?

A Yes. There was, my words, there was a lot of distrust between the creditors and the management -- not the CRO, but the prior management of the company -- and there had been a motion brought both to obviously bring the case back to Dallas from I think it was originally in Delaware and then there was a motion to seek, you know, to remove management and put in a trustee.

There had been a dozen years of litigation with one party, about eight or nine years with another major party, and

several other of the major creditors were litigants. The other, as I understood, the other creditors, main creditors in the case were all lawyers who had not yet gotten paid for the litigation work that they had done. And so it was obvious that this was a very -- a highly-litigious situation.

Q In addition to speaking with the various constituents, did you do any diligence on your own to try to understand the case before you accepted the appointment?

A Yes. I went to the docket to look at all the -- not every single thing that had been filed, but to try and look at all the key, relevant items that had been filed, get a better understanding of what was out there. Looked at some of the initial filings of the company in terms of the, you know, the creditors, to understand who the creditor base was per the schedules that had been filed. Looked at the -- some of the various pleadings that had been put in place.

Q Did you form a view as to the causes of the bankruptcy filing?

A Litigation. That was my clear view. This company had been in litigation with multiple parties, various different parties, since around 2008. Generally, you would see litigation like the types that were, you know, that were here, you know, you'd litigate for a while, then you'd try and settle it.

It did not appear to me that there was any intention on

the -- the Debtor to settle these litigations, but would rather just continue the process and proceed forward on the litigation until the very last minute. And so it was obvious that this was going to -- that the Debtor was a, as I said, a highly-litigious shop, and that was one of the causes, obviously, the cause of the filing, along with the fact that judgments were about to be entered against the Debtor.

Q All right. And in January 2020, do you recall that's when the agreement was reached between the Debtor, the Committee, and Mr. Dondero?

A Yeah, it was the first week or so, which resulted in a hearing on I believe it was January 9th in front of Judge Jernigan.

Q And as a part of that -- I think you testified at that hearing. Do I have that right?

A I don't recall if I did. I might have. I might have testified at a subsequent hearing. But --

Q But was --

A -- I was in the courtroom for that hearing, yes.

Q Was it part of that process by which you accepted the appointment as independent director?

A I accepted it based upon the order that had been negotiated amongst the parties, the creditors, the Debtor, Mr. Dondero, and others. And that was the key thing that was -- and approved by the Court on that date. And that was key for

my acceptance of the role as an independent director.
Q And did you and the other prospective independent directors participate in the negotiation of the substance of the agreement?
A We did. We didn't have a hundred percent say over it, but we were able to get our voices heard. As Mr. Seery testified earlier, he was instrumental in coming up with an idea about how to put in place the injunction, you know, the -- I think he referred to it as the gatekeeper injunction, which was obviously in this case very critical to all three of us: Mr. Seery, Mr. Nelms, and myself.
Q Can you describe for the Court kind of the issues of concern to you and the other prospective board members? What was it that you were focused on in terms of the negotiations?
A Well, obviously, indemnification was important, but that was something that was going to be granted. Having the right to obtain separate D&O insurance just for the three directors was important. We were concerned that Strand Advisors, Inc. really had no assets, and so we wanted to make sure that the Debtor was going to get -- was going to basically guarantee the indemnification.

The -- because of the litigious nature and what we had heard from all of the various parties involved, including people inside the Debtor who we had talked with, that it would be something that was important for us to make sure that the

injunction, the gatekeeper injunction was put in place.

Q And can you elaborate a little bit on I think you said you had done some diligence and you had formed a view as to the causes of the bankruptcy filing, but did this case present any specific concerns or issues that you and the board members had to address perhaps above and beyond what you experienced in some of the other cases you described?

A Well, as I said earlier, the fact that the litigation -- the various litigations with the creditors have been going on for what I viewed as an inordinate amount of years, and that it was clear from my diligence that I had done that this had been directed by Mr. Dondero, to keep this moving forward in the litigation, and to, in essence, just, you know, never give up on the litigation.

It was important that the types of protections that we were afforded in the January 9th order were put in place, because we -- none of us -- none of the three of us, and myself in particular, did not want to be in a position where we would be sued and harassed through lawsuits for the next, you know, ten years or so. That's not something anybody would want to sign up for.

Q All right. Let's look at the January 9th order and the specific provisions I think that you're alluding to.

MR. MORRIS: Can we call up Exhibit 5Q, please?

THE WITNESS: Pardon me while I put my glasses on to

read this.

MR. MORRIS: All right. And if we can go to Paragraph 4.

BY MR. MORRIS:

Q Is that the paragraph, sir, that was intended to address the concern that you just articulated about Strand not having any assets of its own?

A Yes, it is.

Q And can you just describe for the Court how that particular provision addressed that concern?

A Sure. Since we were directors of Strand, which is the general partner of the Debtor, we felt it was important that the general -- that Highland, the Debtor, would provide the guaranty on indemnification, because Highland had the assets to back up the indemnification.

It was also pretty clear, from my experience in having placed D&O insurance, you know, over the last 25-30 years, that if there was no, you know, opportunity for indemnification, putting in place insurance would be very difficult or exorbitantly expensive. So having this indemnification by Highland was a very important piece of the order that we were seeking.

Q And the next piece is the insurance piece in Paragraph 5. Do you see that?

A I do.

Q Did you have any involvement in the Debtor's efforts to obtain D&O insurance for the independent board?
A I did.
Q Can you just describe for the Court what role you played and what issues came up as the Debtor sought to obtain that insurance?
A Sure. The Debtors had been looking to get an insurance policy in place. They were not able to do that. I happen to have worked with an insurance broker on D&O situations in some very difficult situations over the years and brought them into the mix. They were able to go out to the market and find a policy that would cover us, the -- kind of the key components of that policy, though, were, number one, the guaranty that HCMLP would give -- I'm sorry, the guaranty that HCMLP would give to Strand's obligations, and also the -- I'll call it the gatekeeper provision was very important because these parties did not want to have -- they wanted to have what was referred to, commonly referred to as the Dondero Exclusion.

So while we were -- we purchased a policy that covered us, it did have an exclusion, unless there were no assets left, and then the what I'll call -- we refer to as kind of a Side A policy would kick in.
Q Okay. What do you mean by the Dondero Exclusion?
A The insurers did not want to cover the -- any litigation that Mr. Dondero would bring against directors. It was pretty

commonly known in the marketplace that Mr. Dondero was very litigious, and insurers were not willing to write the insurance without the protections that this order afforded because they did not want to be hit with frivolous -- hit with claims on the policy for frivolous litigation that might be brought.

MR. TAYLOR: Your Honor, this is Mr. Taylor. I've got to object to the last answer. He testified as to what the insurers' belief was and what they would or would not do based upon their own knowledge. It's not within his personal knowledge. And therefore we'd move to strike.

THE COURT: I overrule that objection.

MR. MORRIS: Your Honor?

THE COURT: I overrule the objection.

MR. MORRIS: Thank you. Thank you, Your Honor.

BY MR. MORRIS:

Q Mr. Dubel, can you explain to the Court, in your work in trying to secure the D&O insurance, what rule the gatekeeper provision played in the Debtor's ability to get that?

A Based upon my discussions with the insurance broker, who I have worked with for 25-plus years, had that gatekeeper provision not been put in place, we would not have been able to get insurance.

Q All right. Let's look at the gatekeeper provision.

MR. MORRIS: Can we go down to Paragraph 10, please?

Perfect. Right there.

BY MR. MORRIS:

Q Is this gatekeeper provision, is this also the source of the exculpation that you referred to?

A Yes.

Q And what's your understanding of how the exculpation and gatekeeper functions together?

A Well, my apologies, I'm not an attorney, so just from a business point of view, the way I look at this is that, you know, obviously, we're -- you know, the directors are not protected from willful misconduct or gross negligence, but any negligence -- you know, claims brought under negligence and the likes of such, and things that might be considered frivolous, would have to first go to Your Honor in the Bankruptcy Court for a review to determine if they were claims that should be entitled to be brought.

Q If you take a look at the provision, right, do you understand that nobody can bring a claim without -- in little i, it says, first determining -- without the Court first determining, after notice, that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against an indirect -- independent director. Do you see that?

A I do.

Q Is it your understanding that parties can only bring

claims for gross negligence or willful misconduct if the Court makes a determination that there is a colorable claim?

A That's my understanding.

Q And the second --

A I think they have the right -- I think they have the right to go to the Court to ask if they can bring the claim, but the Court has to make the determination that it's a colorable claim for willful misconduct or gross negligence.

Q And if the Court -- is it your understanding that if the Court doesn't find that there is a colorable claim of willful misconduct or gross negligence, then the claim can't be brought against the independent directors?

A That is my understanding, yes.

Q And was -- taken together, Paragraphs 4, 5, and 10, were they of importance to you and the other independent directors before accepting the position?

A They were absolutely critical to me and definitely critical to the other directors, because we all negotiated that together, and it would -- I don't -- I don't think any of the three of us would have taken on this role if those paragraphs had not been included in the order.

Q Okay. Just speaking for yourself personally, is there any chance you would have accepted the appointment without all three of those provisions?

A I would not have.

Q And why is that? In this particular case, why did you personally believe that you needed all three of those provisions?

A Well, you know, people like myself, you know, someone who's coming in as an independent director, come in in a fiduciary capacity. And, you know, we take on risks. Now, granted, in a Chapter 11 case, as the saying goes, you know, it's a lot safer because everything has to be approved by the Court, but there are still opportunities for parties to, in essence, have mischief going on and bring nuisance lawsuits that would take a lot of time and effort away from either the role of our job of restructuring the entity or post-restructuring, would just be nuisance things that would cost us money. And we, you know, I did not want to be involved in that situation, knowing the litigious nature of Mr. Dondero from the research that I had done, you know, the diligence that I had done. I did not want to subject myself to that. And it has proven an appropriate and very solid order because of the conduct of Mr. Dondero, as Mr. Seery has testified to earlier.

Q Do you have a view as to what the likely effect would be on future corporate restructurings if you and your fellow directors weren't able to obtain the type of protection afforded in the January 9th order?

A I think it would be very difficult to find qualified

people who would be willing to serve in these types of positions if they knew they had a target on their backs. You know, it was something that was clear to us, to Mr. Seery, Mr. Nelms, myself at the time, that if we had a target -- we felt like we would have a target on our back if we didn't have these protections.

It just wasn't worth the risk, the stress, the uncertainty, the potential cost to us. And so I don't think anybody else would be, you know, willing to take on the roles as an independent director with the facts and circumstances and the players involved in this particular case.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: All right. Pass the witness. Let's see. You went -- I'm going to give a time. You went 32 minutes. So, for cross of this witness, I'm going to limit it to an aggregate of 32 minutes. Who wants to go first?

MR. DRAPER: Your Honor, this is Douglas Draper. I'll be happy to go first.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. DRAPER:

Q Mr. Dubel, prior to your engagement, did you happen to read the case of *Pacific Lumber*?

A I did not.

Q And were you advised about *Pacific Lumber* by somebody

other than a -- your lawyer?
A I'm not familiar with the case at all, Mr. Draper.
Q Are you aware, and you've been around a long time, that different circuits have different rules for liabilities of officers, directors, and people like that?
A I am aware that there are different, I don't know what the right term is, but precedents, I guess, in different circuits for any number of things, whether it's a sale motion or protections of officers and directors or anything. So each circuit has its own unique situations.
Q And one last question. On a go-forward, after -- if this plan is confirmed and on the effective date, you will not have any role whatsoever as an officer or director of the new general partner, correct?
A I have not been asked to. As Mr. Seery testified, he may ask for assistance or just -- in most situations that I'm involved with, I may have a continuing role just as a -- I'll call it an advisor or somebody to provide a history. But at this point in time, I have not been asked to have any involvement.
Q And based on your experience, you know that there's a different liability for a director and an officer versus somebody who is an advisor?
MR. MORRIS: Objection to the form of the question. No foundation.

THE COURT: Overruled.

MR. DRAPER: Mr. Dubel has shown --

THE COURT: Mr. Dubel, you can answer if you know.

MR. DRAPER: Mr. Dubel, you can answer.

THE WITNESS: I'm sorry, Your Honor, I didn't hear you say overruled. Thank you.

Mr. Draper, I apologize, could you repeat the question?

BY MR. DRAPER:

Q The question is you know from your experience that there's a different liability for somebody who is an officer or director versus somebody who's an advisor?

A Yes, that's my experience, which is why in several situations post-reorganization, while I have not been involved *per se*, and I use the term involved meaning, you know, on a day-to-day basis, if someone asks me to assist, I'll usually ask them to bring me in as a non -- an unpaid employee or a, you know, a nominally-amount-paid employee, so that I would be protected by whatever protections the company might provide.

MR. DRAPER: I have nothing further for this witness, Your Honor.

THE COURT: All right. Other cross?

MR. TAYLOR: Yes, Your Honor.

MR. RUKAVINA: Yes, Your Honor.

MR. TAYLOR: Oh, go ahead, Davor.

MR. RUKAVINA: No, Clay, go ahead.

CROSS-EXAMINATION

BY MR. TAYLOR:

Q Mr. Dubel, this is Clay Taylor here on behalf on Mr. Dondero. I believe you had previously testified in response to questions from Mr. Morris that Mr. Dondero had engaged in a pattern of litigious behavior; is that correct?

A I believe that's the testimony I gave, yes.

Q Okay. And please give me the specific examples of which cases you believe he has engaged in overly-litigious behavior.

A Well, all of the cases that resulted in creditors, large creditors in our bankruptcy. That would be the UBS situation, the Crusader situation which became the Redeemer Committee, litigation with Mr. Daugherty, with Acis and Mr. Terry. And as I mentioned earlier, I'd, you know, been informed by members of the management team that it was Mr. Dondero's style to just litigate until the very end to try and grind people down.

Q Okay. Was Mr. Dondero or a Highland entity the plaintiff in the UBS case?

A No, but what was referred -- what I was referring to was the nature in which he defended it and went overboard and refused to ever, you know, try and settle things in a manner that would have gotten things done. And just looking at, having been involved in the restructuring industry for the last 40 years, as I said, almost 40 years, and been involved

in many, many litigious situations, it's obvious when someone is litigious, whether they're the plaintiff or the defendant.

Q So are you personally familiar with the settlement negotiations in the UBS case that happened pre-bankruptcy, then?

A I have been informed that there were settlement negotiations, and subsequently determined, through discussions with the parties, that they weren't really close to -- to a settlement.

Q But are you aware of --

A Mr. Dondero might have thought they were, but they were not.

Q Okay. Would you be surprised to learn if UBS had offered to settle pre-bankruptcy for $7 million?

A As I understand, settlements -- settlement offers pre-bankruptcy had a tremendous number of -- I don't know what the right term is -- things tied to it and that clearly were never going to get done.

Q Okay. When you say things were tied to it, what things were tied to it?

A I don't know all of the settlement discussions that took place, but what I was informed was that there were a lot of conditions that were included in that. And it's -- if it had been an offer of $7 million and Mr. Dondero didn't settle for that, there must have been a reason why. So, you know, since

the entities -- all of the entities within the Highland Capital empire, if you'd call it that, were being sued for almost a billion dollars.

Q Okay. And you say there was lots of conditions that were tied to that. What were the conditions?

A As I said earlier, I wasn't informed of them on all the prepetition settlements. That's just what I was told, there was conditions.

Q Okay. And who were you told these things by?

A Both external counsel and internal counsel. Mr. Ellington, Scott Ellington, and Isaac -- the litigation counsel.

Q Okay. So --

A That's -- sorry.

Q Okay. In each of these cases, you were informed by your views by statements that were made to you by other people?

A Yes.

Q Okay.

A Made -- and particularly made by members of management of the Debtor, which is pretty informed.

Q Okay. Which members of management were those?

A As I just testified, it was Mr. Ellington, who was the general -- the Debtor's general counsel, and Mr. Leventon, Isaac Leventon, who was the -- I believe his title was associate general counsel in charge of litigation.

Q Okay. Thank you.

MR. TAYLOR: No further questions.

THE COURT: All right. Mr. Rukavina?

CROSS-EXAMINATION

BY MR. RUKAVINA:

Q Mr. Dubel, we've never met, although I think we were on the phone once together. I know you're a director, so you're at the top, but having been in this case for more than a year, you probably have some understanding of the assets that the Debtor has, don't you?

A I do, but I'm not as facile with it as Mr. Seery, obviously.

Q Sure. Is it true, to your understanding, that the Debtor owns various equity interests in third-party companies?

A Either directly or indirectly. That's my understanding, yes.

Q Okay. Have you heard of an entity called Highland Select Equity Fund, LP?

A I have.

Q And is that a publicly-traded company?

A I'm not familiar with its nature there, no.

Q Do you know how much of the equity of that entity the Debtor owns?

A I don't know off the top of my head, no.

Q And again, these may be unfair questions because you're at

the top, so I'm not trying to make you look foolish. I'm just trying to see. Let me ask one more. Have you heard of Wright, W-R-I-G-H-T, Limited?

MR. MORRIS: Objection, Your Honor. Beyond the scope.

MR. RUKAVINA: Your Honor, I can recall him on my direct, then.

THE COURT: Yeah. I'll --

MR. RUKAVINA: But I'd just rather get it over with.

THE COURT: I'll allow it.

MR. MORRIS: All right. If we're going to get rid of --

THE COURT: Overruled.

MR. MORRIS: No, that's fine.

BY MR. RUKAVINA:

Q Have you heard of Wright, W-R-I-G-H-T, Limited?

A I think I have, but I just don't recall it, Mr. Rukavina. I'm sorry, Rukavina. Sorry.

Q It's okay. It's a --

A I'm looking at your chart here, at your name here, and it looks like Drukavina, so I really apologize.

Q Believe it or not, it's actually a very famous name in Croatia, although it means nothing here.

So, all of the entities that the Debtor owns equity in, I guess you probably, just because, again, you're not in the

weeds, you can't tell us how much of that equity the Debtor owns, can you?

A I can't individually, no. You know, Mr. Seery is our CEO and he's responsible for the day-to-day, you know, issues. So usually we look at it more on a consolidated basis and not in the, you know, down in the weeds, as you refer to it, unless something specific came up.

Q Well, would you remember whether, when Mr. Seery or the prior CRO would provide you, as the board member, financial reports, whether that included P&Ls and balance sheets and financial reports for the entities that the Debtor owned interests in?

A We might -- we would have seen certain consolidating reports that might -- that would be, you know, consolidating financial statements that would be P&Ls. Where we didn't consolidate them, I'm not sure we saw the actual individual-entity P&Ls on a regular basis. We might have seen them if there was a transaction taking place. But again, you know, I don't have -- I don't remember every single one of them, no.

Q And you would agree with me, sir, that the Pachulski law firm is an excellent restructuring, reorganization, insolvency law firm, wouldn't you?

A Yes, I would agree with you there.

Q Okay. And you would expect them to ensure that anything that has to be filed with Her Honor is timely filed, wouldn't

you?
A I would expect that they would follow the rules.
Q Okay. And you have the utmost of confidence, I take it, in your CRO, don't you?
A I have a tremendous amount of confidence in our CEO, who also happens to hold the title of CRO, yes, if that's what you're referring to as, Mr. Seery.
(Interruption.)
MR. RUKAVINA: John.
BY MR. RUKAVINA:
Q Okay, I think -- yeah, I think I heard that you have tremendous confidence in the CEO, who happens to be the CRO, right?
A Yes, that's the case.
MR. RUKAVINA: Thank you, Your Honor. I'll pass the witness.
THE COURT: All right. Any other cross of Mr. Dubel? All right. Mr. Morris, redirect?
MR. MORRIS: Yeah, just very briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. MORRIS:
Q You were asked about that *Pacific Lumber* case, Mr. Dubel; do you remember that?
A I do remember being asked about it.
Q And you weren't familiar with that case, right?

A I'm not familiar with the name of the case, no.
Q But you did know that the exculpation and gatekeeping provisions were going to be included in the order; is that fair?
A I did.
Q And did you testify that you wouldn't have accepted the position without it?
A I did testify that way.
Q And if you knew that you couldn't get those provisions in the Fifth Circuit, would you ever accept a position as an independent director in the Fifth Circuit on a go-forward basis?
A Not in a situation such as this, no.
Q Okay. Okay.
MR. MORRIS: No further questions, Your Honor.
THE COURT: All right. Any recross on that narrow redirect?
All right. Well, Mr. Dubel, you are excused from the virtual witness stand.
THE WITNESS: Thank you, Your Honor.
THE COURT: All right. I want to go ahead and --
MR. DUBEL: Do you mind if I turn my video off?
THE COURT: I'm sorry, what?
MR. DUBEL: I said, do you mind if I turn my video off?

THE COURT: No, you may. That's fine.

MR. DUBEL: Thank you, Your Honor.

THE COURT: All right. I want to break now, unless there's any quick housekeeping matter. Anything?

MR. MORRIS: No, Your Honor, but I would just ask all parties to let me know by email if they have any objections to any of the exhibits on the witness list that was filed at Docket No. 1877, because I want to begin tomorrow by putting into evidence the balance of our exhibits.

MR. RUKAVINA: And Your Honor, I was responsible for this due to an internal mistake. The only ones I have an objection to are -- is that 7? John, is that 7, right, 7OO --

MR. MORRIS: Yes.

MR. RUKAVINA: Your Honor, I only have an objection to 7O and 7P, although I think -- think the Court has already admitted 7P, so my objection is moot.

THE COURT: I have.

MR. RUKAVINA: Okay.

THE COURT: So, what --

MR. RUKAVINA: Then it would just be --

THE COURT: Go ahead.

MR. RUKAVINA: I'm sorry. It would just be 7O. Septuple O or whatever the word is.

THE COURT: All right. So I will go ahead and admit 7F through 7Q, with the exception of 7O. Again, these appear

at Docket Entry 1877. And Mr. Morris, you can try to get in 7O the old-fashioned way if you want to.

MR. MORRIS: Yeah, I'll deal with 7O and the very limited number of other objections at the beginning of tomorrow's hearing.

THE COURT: All right.

(Debtor's Exhibits 7F through 7Q, with the exception of 7O, are received into evidence.)

THE COURT: So we will reconvene at 9:30 Central time tomorrow. I think we're going to hear from the Aon, the D&O broker, Mr. Tauber; is that correct?

MR. MORRIS: That's right. And that should be shorter than even Mr. Dubel.

THE COURT: All right. Well, we will see you at 9:30 in the morning. We are in recess.

MR. MORRIS: Thank you so much.

THE CLERK: All rise.

(Proceedings concluded at 5:09 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 **02/04/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBIT 24

EXHIBIT N

EXECUTION COPY

SERVICING AGREEMENT

This Servicing Agreement, dated as of December 21, 2006 is entered into by and among BRENTWOOD CLO, LTD., an exempted company incorporated under the laws of the Cayman Islands, with its registered office located at the offices of Maples Finance Limited, P.O. Box 1093GT, Queensgate House, South Church Street, George Town, Grand Cayman, Cayman Islands (together with successors and assigns permitted hereunder, the "Issuer"), and HIGHLAND CAPITAL MANAGEMENT, L.P., a Delaware limited partnership, with its principal offices located at Two Galleria Tower, 13455 Noel Road, Suite 1300, Dallas, Texas 75240, as servicer ("Highland" or, in such capacity, the "Servicer").

WITNESSETH:

WHEREAS, the Issuer and BRENTWOOD CLO, CORP. (the "Co-Issuer" and together with the Issuer, the "Co-Issuers") intend to issue U.S.$388,700,000 of their Class A-1A Floating Rate Senior Secured Extendable Notes due 2022 (the "Class A-1A Notes"), U.S.$75,000,000 of their Class A-1B Delayed Drawdown Floating Rate Senior Secured Extendable Notes due 2022 (the "Class A-1B Notes" and, together with the Class A-1A Notes, the "Class A-1 Notes"), U.S.$51,500,000 of their Class A-2 Floating Rate Senior Secured Extendable Notes due 2022 (the "Class A-2 Notes" and, together with the Class A-1 Notes, the "Class A Notes"), U.S.$68,000,000 of their Class B Floating Rate Senior Secured Deferrable Interest Extendable Notes due 2022 (the "Class B Notes"), U.S.$23,800,000 of their Class C Floating Rate Senior Secured Deferrable Interest Extendable Notes due 2022 (the "Class C Notes" and, together with the Class A Notes and the Class B Notes, the "Senior Notes") and the Issuer will issue U.S.$21,000,000 of the Class D Floating Rate Senior Secured Deferrable Interest Extendable Notes due 2022 (the "Class D Notes" and, together with the Senior Notes, the "Notes") pursuant to the Indenture dated as of December 21, 2006 (the "Indenture"), among the Co-Issuers and Investors Bank & Trust Company, as trustee (the "Trustee") and 34,400 Class I Preference Shares, $0.01 par value (the "Class I Preference Shares") and 37,000 Class II Preference Shares, $0.01 par value (the "Class II Preference Shares" and, together with the Class I Preference Shares, the "Preference Shares" and, together with the Notes, the "Securities") pursuant to the Preference Share Documents;

WHEREAS, pursuant to the Indenture, the Issuer intends to pledge certain Collateral Obligations, Eligible Investments and Cash (all as defined in the Indenture) and certain other assets (all as set forth in the Indenture) (collectively, the "Collateral") to the Trustee as security for the Notes;

WHEREAS, the Issuer wishes to enter into this Servicing Agreement, pursuant to which the Servicer agrees to perform, on behalf of the Issuer, certain duties with respect to the Collateral in the manner and on the terms set forth herein; and

WHEREAS, the Servicer has the capacity to provide the services required hereby and is prepared to perform such services upon the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual agreements herein set forth, the parties hereto agree as follows:

1. Definitions.

Terms used herein and not defined below shall have the meanings set forth in the Indenture.

"Advisers Act" shall mean the Investment Advisers Act of 1940, as amended.

"Agreement" shall mean this Servicing Agreement, as amended from time to time.

"Governing Instruments" shall mean the memorandum, articles or certificate of incorporation or association and by-laws, if applicable, in the case of a corporation; the certificate of formation, if applicable, or the partnership agreement, in the case of a partnership; or the certificate of formation, if applicable, or the limited liability company agreement, in the case of a limited liability company.

"HFP" shall mean collectively, Highland Financial Partners, L.P. and any subsidiary thereof.

"Independent Advisor" shall have the meaning specified in Section IV.B. of Annex 1 hereto.

"Offering Memorandum" shall mean the Offering Memorandum of the Issuer dated December 21, 2006 prepared in connection with the offering of the Securities.

"Servicer Breaches" shall have the meaning specified in Section 10(a).

"Special Procedures Obligation" shall have the meaning specified in Section IV.A. of Annex 1 hereto.

2. General Duties of the Servicer.

(a) The Servicer shall provide services to the Issuer as follows:

(i) Subject to and in accordance with the terms of this Agreement and the other Transaction Documents, the Servicer shall supervise and direct the administration, acquisition and disposition of the Collateral, and shall perform on behalf of the Issuer those duties and obligations of the Servicer required by the Indenture and the other Transaction Documents, and including the furnishing of Orders, Requests and officer's certificates, and such certifications as are required of the Servicer under the Indenture with respect to permitted purchases and sales of the Collateral Obligations, Eligible Investments and other assets, and other matters, and, to the extent necessary or appropriate to perform such duties, the Servicer shall have the power to execute and deliver all necessary and appropriate documents and instruments on behalf of the Issuer with respect thereto. The Servicer shall, subject to the terms and conditions of this Agreement and the other Transaction Documents, perform its obligations hereunder and thereunder with reasonable care, using a degree of skill and attention no less than that which the Servicer exercises with respect to comparable assets that it services or manages for others having similar objectives and restrictions, and in a manner consistent with

practices and procedures followed by institutional servicers or managers of national standing relating to assets of the nature and character of the Collateral for clients having similar objectives and restrictions, except as expressly provided otherwise in this Agreement and/or the other Transaction Documents. To the extent not inconsistent with the foregoing, the Servicer shall follow its customary standards, policies and procedures in performing its duties under the Indenture and hereunder. The Servicer shall comply with all terms and conditions of the other Transaction Documents affecting the duties and functions to be performed hereunder. The Servicer shall not be bound to follow any amendment to any Transaction Document until it has received written notice thereof and until it has received a copy of the amendment from the Issuer or the Trustee; provided, however, that the Servicer shall not be bound by any amendment to any Transaction Document that affects the rights, powers, obligations or duties of the Servicer unless the Servicer shall have consented thereto in writing. The Issuer agrees that it shall not permit any amendment to the Indenture that (x) affects the rights, powers, obligations or duties of the Servicer or (y) affects the amount or priority of any fees payable to the Servicer to become effective unless the Servicer has been given prior written notice of such amendment and consented thereto in writing;

(ii) the Servicer shall select any Collateral which shall be acquired by the Issuer pursuant to the Indenture in accordance with the Collateral criteria set forth herein and in the Indenture;

(iii) the Servicer shall monitor the Collateral on an ongoing basis and provide to the Issuer all reports, certificates, schedules and other data with respect to the Collateral which the Issuer is required to prepare and deliver under the Indenture and any Hedge Agreement, in the form and containing all information required thereby and in reasonable time for the Issuer to review such required reports, certificates, schedules and data and to deliver them to the parties entitled thereto under the Indenture; the Servicer shall undertake to determine to the extent reasonably practicable whether a Collateral Interest has become an Defaulted Collateral Obligation; and the Servicer shall monitor any Hedge Agreements and direct the Trustee on behalf of the Issuer in respect of all actions to be taken thereunder by the Issuer;

(iv) the Servicer, subject to and in accordance with the provisions of the Indenture may, at any time permitted under the Indenture, and shall, when required by the Indenture, direct the Trustee (x) to dispose of a Collateral Obligation, Equity Security or Eligible Investment or other securities received in respect thereof in the open market or otherwise, (y) to acquire, as security for the Notes in substitution for or in addition to any one or more Collateral Obligations or Eligible Investments included in the Collateral, one or more substitute Collateral Obligations or Eligible Investments, or (z) direct the Trustee to take the following actions with respect to a Collateral Obligations or Eligible Investment:

(1) retain such Collateral Obligations or Eligible Investment; or

(2) dispose of such Collateral Obligations or Eligible Investment in the open market or otherwise; or

(3) if applicable, tender such Collateral Obligations or Eligible Investment pursuant to an Offer; or

(4) if applicable, consent to any proposed amendment, modification or waiver pursuant to an Offer; or

(5) retain or dispose of any securities or other property (if other than cash) received pursuant to an Offer; or

(6) waive any default with respect to any Defaulted Collateral Obligations; or

(7) vote to accelerate the maturity of any Defaulted Collateral Obligations; or

(8) exercise any other rights or remedies with respect to such Collateral Obligations or Eligible Investment as provided in the related Underlying Instruments, including in connection with any workout situations, or take any other action consistent with the terms of the Indenture which is in the best interests of the Holders of the Securities;

(v) subject to and in accordance with the terms of this Agreement and the Transaction Documents, the Servicer on behalf of the Issuer shall determine whether to enter into any additional hedging arrangements, increase or reduce the notional amounts of existing Hedge Agreements or terminate existing Hedge Agreements, and the Servicer shall use its reasonable efforts to cause the Issuer, promptly following the early termination of a Hedge Agreement (other than on a Redemption Date) and to the extent possible through application of funds received as a result of the early termination (including the proceeds of the liquidation of any collateral pledged by the hedge counterparty), to enter into a replacement Hedge Agreement

(vi) the Servicer shall (a) on or prior to any day which is a Redemption Date, direct the Trustee to enter into contracts to dispose of the Collateral Obligation and any other Collateral pursuant to the Indenture and otherwise comply with all redemption procedures and certification requirements in the Indenture in order to allow the Trustee to effect such redemption and (b) conduct Auctions in accordance with the terms of the Indenture; and

(vii) if the Servicer, on behalf of the Issuer, desires to make distributions of Eligible Equity Securities on any Payment Date pursuant to Section 2(e) of the Preference Shares Paying Agency Agreement, the Servicer shall so notify the Trustee and the Preference Shares Paying Agent and provide the Trustee and the Preference Shares Paying Agent (for forwarding to each Holder of the Preference Shares with respect to the applicable Record Date) details of such Eligible Equity Securities in accordance with the procedure set forth in Section 3(b) of the Preference Shares Paying Agency Agreement.

(b) In performing its duties hereunder, the Servicer shall seek to preserve the value of the Collateral for the benefit of the Holders of the Securities taking into account the collateral criteria and limitations set forth herein and in the Indenture and the Servicer shall use reasonable efforts to select and service the Collateral in such a way that will permit a timely performance of all payment obligations by the Issuer under the Indenture; provided, that the Servicer shall not be responsible if such objectives are not achieved so long as the Servicer performs its duties under this Agreement in the manner provided for herein, and provided, further, that there shall be no recourse to the Servicer with respect to

the Notes or the Preference Shares. The Servicer and the Issuer shall take such other action, and furnish such certificates, opinions and other documents, as may be reasonably requested by the other party hereto in order to effectuate the purposes of this Agreement and to facilitate compliance with applicable laws and regulations and the terms of this Agreement.

(c) The Servicer hereby agrees to the following:

(i) The Servicer agrees not to institute against, or join any other Person in instituting against, the Issuer or the Co-Issuer any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings or other proceedings under federal or state bankruptcy or similar laws of any jurisdiction until at least one year and one day (or if longer, any applicable preference period plus one day) after the payment in full of all Notes issued under the Indenture; provided, however, that nothing in this clause (i) shall preclude, or be deemed to estop, the Servicer (A) from taking any action prior to the expiration of such period in (x) any case or proceeding voluntarily filed or commenced by the Issuer or the Co-Issuer, as the case may be, or (y) any involuntary insolvency proceeding filed or commenced against the Issuer or the Co-Issuer, as the case may be, by a Person other than the Servicer, or (B) from commencing against the Issuer or the Co-Issuer or any properties of the Issuer or the Co-Issuer any legal action which is not a bankruptcy, reorganization, arrangement, insolvency, moratorium, liquidation or similar proceeding. The provisions of this Section 2(c)(i) shall survive the termination of this Agreement.

(ii) The Servicer shall cause each sale or purchase of any Collateral Obligations or Eligible Investment to be conducted on an arm's-length basis.

(d) The Servicer shall not act for the Issuer in any capacity except as provided in this Section 2. In providing services hereunder, the Servicer may employ third parties, including its Affiliates, to render advice (including advice with respect to the servicing of the Collateral) and assistance; provided, however, that the Servicer shall not be relieved of any of its duties or liabilities hereunder regardless of the performance of any services by third parties. Notwithstanding any other provision of this Agreement, the Servicer shall not be required to take any action required of it pursuant to this Agreement or the Indenture if such action would constitute a violation of any law.

(e) Notwithstanding any other provision of this Agreement or the Indenture, (i) any granted signatory powers or authority granted to the Servicer on behalf of the Issuer with respect to the Special Procedures Obligations shall be conditioned upon the prior written approval of the Independent Advisor and (ii) neither the Servicer nor any Affiliate of the Servicer shall have any authority to enter into agreements, or take any action, on behalf of the Issuer with respect to the Special Procedures Obligations without the prior written approval of the Independent Advisor.

3. Brokerage.

The Servicer shall seek to obtain the best prices and execution for all orders placed with respect to the Collateral, considering all reasonable circumstances. Subject to the objective of obtaining best prices and execution, the Servicer may take into consideration research and other brokerage services furnished to the Servicer or its Affiliates by brokers and dealers which are not Affiliates of the Servicer. Such services may be used by the Servicer or its Affiliates in connection with its other servicing or advisory activities or operations. The Servicer may aggregate sales and purchase orders of securities placed with respect to the Collateral with similar orders being made simultaneously for other accounts serviced or managed by Servicer or with accounts of the Affiliates of the Servicer, if in the Servicer's reasonable judgment such aggregation shall result in an overall economic benefit to the Issuer, taking into consideration the advantageous selling or purchase price, brokerage commission and other expenses. In the event that a sale or purchase of a Collateral Obligation or Eligible Investment (in accordance with the terms of the Indenture) occurs as part of any aggregate sales or purchase orders, the objective of the Servicer (and any of its Affiliates involved in such transactions) shall be to allocate the executions among the accounts in an equitable manner and consistent with its obligations hereunder and under applicable law.

In addition to the foregoing and subject to the provisions of Section 2 and the limitations of Section 5, the objective of obtaining best prices and execution and to the extent permitted by applicable law, the Servicer may, on behalf of the Issuer, direct the Trustee to acquire any and all of the Eligible Investments or other Collateral from, or sell Collateral Obligations or other Collateral to, the Placement Agent, the Trustee or any of their respective Affiliates, or any other firm.

4. Additional Activities of the Servicer.

Nothing herein shall prevent the Servicer or any of its Affiliates from engaging in other businesses, or from rendering services of any kind to the Trustee, the Holders of the Securities, or any other Person or entity to the extent permitted by applicable law. Without prejudice to the generality of the foregoing, the Servicer and partners, directors, officers, employees and agents of the Servicer or its Affiliates may, among other things, and subject to any limits specified in the Indenture:

(a) serve as directors (whether supervisory or managing), officers, partners, employees, agents, nominees or signatories for any issuer of any obligations included in the Collateral or their respective Affiliates, to the extent permitted by their Governing Instruments, as from time to time amended, or by any resolutions duly adopted by the Issuer, its Affiliates or any issuer of any obligations included in the Collateral or their respective Affiliates, pursuant to their respective Governing Instruments; provided, that in the reasonable judgment of the Servicer, such activity shall not have a material adverse effect on the enforceability of Collateral or the ability of the Issuer to comply with each Overcollateralization Ratio and the Interest Coverage Test; provided, further, that nothing in this paragraph shall be deemed to limit the duties of the Servicer set forth in Section 2 hereof;

(b) receive fees for services of any nature rendered to the issuer of any obligations included in the Collateral or their respective Affiliates; provided, that in the reasonable judgment of the Servicer, such activity shall not have a material adverse effect on the enforceability of Collateral or the ability of the Issuer to comply with each Overcollateralization Ratio and the Interest Coverage Test; and provided, further that if any portion of such services are related to the purchase by the Issuer of any obligations included in the Collateral, the portion of such fees relating to such obligations shall be applied to the purchase price of such obligations; and

(c) be a secured or unsecured creditor of, or hold an equity interest in, the Issuer, its Affiliates or any issuer of any obligation included in the Collateral; provided, that in the reasonable judgment of the Servicer, such activity shall not have a material adverse effect on the enforceability of Collateral or the ability of the Issuer to comply with each Overcollateralization Ratio and the Interest Coverage Test; provided, further, that nothing in this paragraph shall be deemed to limit the duties of the Servicer set forth in Section 2 hereof.

It is understood that the Servicer and any of its Affiliates may engage in any other business and furnish servicing, investment management and advisory services to others, including Persons which may have policies similar to those followed by the Servicer with respect to the Collateral and which may own securities of the same class, or which are the same type, as the Collateral Obligations or other securities of the issuers of Collateral Obligations. The Servicer shall be free, in its sole discretion, to make recommendations to others, or effect transactions on behalf of itself or for others, which may be the same as or different from those effected with respect to the Collateral.

Unless the Servicer determines in its reasonable judgment that such purchase or sale is appropriate, the Servicer may refrain from directing the purchase or sale hereunder of securities issued by (i) Persons of which the Servicer, its Affiliates or any of its or their officers, directors or employees are directors or officers, (ii) Persons for which the Servicer or its Affiliate act as financial adviser or underwriter or (iii) Persons about which the Servicer or any of its Affiliates have information which the Servicer deems confidential or non-public or otherwise might prohibit it from trading such securities in accordance with applicable law. The Servicer shall not be obligated to have or pursue any particular strategy or opportunity with respect to the Collateral.

5. Conflicts of Interest.

(a) The Servicer shall not direct the Trustee to acquire an obligation to be included in the Collateral from the Servicer or any of its Affiliates as principal or to sell an obligation to the Servicer or any of its Affiliates as principal unless (i) the Issuer shall have received from the Servicer such information relating to such acquisition or sale as it may reasonably require and shall have approved such acquisition, which approval shall not be unreasonably withheld, (ii) in the reasonable, good faith judgment of the Servicer, such transaction is on terms no less favorable than would be obtained in a transaction conducted on an arm's length basis between third parties unaffiliated with each other and (iii) such transaction is permitted by the Advisers Act.

(b) The Servicer shall not direct the Trustee to acquire an obligation to be included in the Collateral directly from any account or portfolio for which the Servicer serves as servicer or investment adviser, or direct the Trustee to sell an obligation directly to any account or portfolio for which the Servicer serves as servicer or investment adviser unless such acquisition or sale is (i) in the reasonable, good faith judgment of the Servicer, on terms no less favorable than would be obtained in a transaction conducted on an arm's length basis between third parties unaffiliated with each other and (ii) permitted by the Advisers Act.

(c) The Servicer shall not undertake any transaction described in this Section 5 unless such transaction is exempt from the prohibited transaction rules of ERISA and the Code. In addition, after the initial distribution of the Class D Notes and the Preference Shares, neither the Servicer nor any of its affiliates (as defined in the Plan Asset Regulation) shall acquire any Class D Notes or Preference Shares (including pursuant to the Extension Procedure or the Amendment Buy-Out Option) unless such acquisition would not, as determined by the Trustee in reliance on representations made in the applicable transfer certificates with respect thereto, result in persons that have represented that they are Benefit Plan Investors owning 25% or more of the aggregate outstanding amount of any of the Class D

Notes, the Class I Preference Shares or the Class II Preference Shares immediately after such acquisition (determined in accordance with Section 3(42) of ERISA, the Plan Asset Regulation, the Indenture and the Preference Share Documents). The Class D Notes and the Preference Shares held as principal by the Servicer or any of its affiliates shall be disregarded and shall not be treated as outstanding for purposes of determining compliance with such 25% limitation to the extent that such person has represented that it is not a Benefit Plan Investor.

6. Records; Confidentiality.

The Servicer shall maintain appropriate books of account and records relating to services performed hereunder, and such books of account and records shall be accessible for inspection by a representative of the Issuer, the Trustee, the Collateral Administrator, the Holders of the Securities and the Independent accountants appointed by the Issuer pursuant to the Indenture at a mutually agreed time during normal business hours and upon not less than three Business Days' prior notice. At no time shall the Servicer make a public announcement concerning the issuance of the Notes or the Preference Shares, the Servicer's role hereunder or any other aspect of the transactions contemplated by this Agreement and the other Transaction Documents. The Servicer shall keep confidential any and all information obtained in connection with the services rendered hereunder and shall not disclose any such information to non-affiliated third parties except (i) with the prior written consent of the Issuer, (ii) such information as either Rating Agency shall reasonably request in connection with the rating of any class of Securities, (iii) as required by law, regulation, court order or the rules or regulations of any self regulating organization, body or official having jurisdiction over the Servicer, (iv) to its professional advisers, (v) such information as shall have been publicly disclosed other than in violation of this Agreement, or (vi) such information that was or is obtained by the Servicer on a non-confidential basis, provided, that the Servicer does not know or have reason to know of any breach by such source of any confidentiality obligations with respect thereto. For purposes of this Section 6, the Trustee, the Collateral Administrator and the Holders of the Securities shall in no event be considered "non-affiliated third parties."

Notwithstanding anything in this Agreement or the Indenture to the contrary, the Servicer, the Co-Issuers, the Trustee and the Holders of the Securities (and the beneficial owners thereof) (and each of their respective employees, representatives or other agents) may disclose to any and all Persons, without limitation of any kind, the U.S. tax treatment and U.S. tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to them relating to such U.S. tax treatment and U.S. tax structure, as such terms are defined under U.S. federal, state or local tax law.

7. Obligations of Servicer.

Unless otherwise specifically required by any provision of the Indenture or this Agreement or by applicable law, the Servicer shall use its best reasonable efforts to ensure that no action is taken by it, and shall not intentionally or with reckless disregard take any action, which would (a) materially adversely affect the Issuer or the Co-Issuer for purposes of Cayman Islands law, United States federal or state law or any other law known to the Servicer to be applicable to the Issuer or the Co-Issuer, (b) not be permitted under the Issuer's or the Co-Issuer's respective governing instruments, (c) violate any law, rule or regulation of any governmental body or agency having jurisdiction over the Issuer or the Co-Issuer including, without limitation, any Cayman Islands or United States federal, state or other applicable securities law the violation of which has or could reasonably be expected to have a material adverse effect on the Issuer, the Co-Issuer or any of the Collateral, (d) require registration of the Issuer, the Co-Issuer or the pool of Collateral as an "investment company" under the Investment Company Act, (e) cause the Issuer or the Co-Issuer to violate the terms of the Indenture, including, without limitation, any representations made by the Issuer or Co-Issuer therein, or any other agreement

contemplated by the Indenture or (f) not be permitted by Annex 1 hereto and would subject the Issuer to U.S. federal or state income or franchise taxation or cause the Issuer to be engaged in a trade or business in the United States for U.S. federal income tax purposes. The Servicer covenants that it shall comply in all material respects with all laws and regulations applicable to it in connection with the performance of its duties under this Agreement and the Indenture. Notwithstanding anything in this Agreement to the contrary, the Servicer shall not be required to take any action under this Agreement or the Indenture if such action would violate any applicable law, rule, regulation or court order.

8. Compensation.

(a) The Issuer shall pay to the Servicer, for services rendered and performance of its obligations under this Agreement, the Servicing Fee, which shall be payable in such amounts and at such times as set forth in the Indenture. The provisions of the Indenture which relate to the amount and payment of the Servicing Fee shall not be amended without the written consent of the Servicer. If on any Payment Date there are insufficient funds to pay the Servicing Fee (and/or any other amounts due and payable to the Servicer) in full, the amount not so paid shall be deferred and shall be payable with accrued interest on such later Payment Date on which funds are available therefor as provided in the Indenture.

The Servicer hereby agrees to waive the Class II Preference Share Portion of the Servicing Fees deposited by the Trustee into the Class II Preference Share Special Payment Account pursuant to the Indenture, which would otherwise be payable to the Servicer as Servicing Fees, on each Payment Date until February 3, 2008. After February 3, 2008, the Servicer may, in its sole discretion, at any time waive the Class II Preference Share Portion of its Servicing Fees then due and payable, in which event an amount equal to such waived portion will be paid by the Issuer as Class II Preference Share Special Payments pursuant to the Indenture. For purposes of any calculation under this Agreement and the Indenture, the Servicer shall be deemed to have received the Servicing Fee in an amount equal to the sum of the Servicing Fee actually paid to the Servicer and the amount distributed to the Holders of the Class II Preference Shares as Class II Preference Share Special Payments.

In addition, notwithstanding anything set out above, the Servicer may, in its sole discretion: (i) waive all or any portion of the Servicing Fee, any funds representing the waived Servicing Fees to be retained in the Collection Account for distribution as either Interest Proceeds or Principal Proceeds (as determined by the Servicer) pursuant to the Priority of Payments; or (ii) defer all or any portion of the Servicing Fee, any funds representing the deferred Servicing Fees to be retained in the Collection Account, when they will become payable in the same manner and priority as their original characterization would have required unless deferred again.

(b) The Servicer shall be responsible for the ordinary expenses incurred in the performance of its obligations under this Agreement, the Indenture and the other Transaction Documents; provided, however, that any extraordinary expenses incurred by the Servicer in the performance of such obligations (including, but not limited to, any fees, expenses or other amounts payable to the Rating Agencies, the Collateral Administrator, the Trustee and the accountants appointed by the Issuer, the reasonable expenses incurred by the Servicer to employ outside lawyers or consultants reasonably necessary in connection with the evaluation, transfer or restructuring of any Collateral Obligations or other unusual matters arising in the performance of its duties under this Agreement and the Indenture, any reasonable expenses incurred by the Servicer in obtaining advice from outside counsel with respect to its obligations under this Agreement, brokerage commissions, transfer fees, registration costs, taxes and other similar costs and transaction related expenses and fees arising out of transactions effected for the Issuer's account and the portion allocated to the Issuer of any other fees and expenses that the Servicer customarily allocates among all of the funds or portfolios that it services or manages) shall be

reimbursed by the Issuer to the extent funds are available therefor in accordance with and subject to the limitations contained in the Indenture.

(c) If this Agreement is terminated pursuant to Section 12, Section 14 or otherwise, the fees payable to the Servicer shall be prorated for any partial periods between Payment Dates during which this Agreement was in effect and shall be due and payable on the first Payment Date following the date of such termination and on any subsequent Payment Dates to the extent remaining unpaid and in accordance with, and to the extent provided in, the Indenture.

9. Benefit of the Agreement.

The Servicer agrees that its obligations hereunder shall be enforceable at the instance of the Issuer, the Trustee, on behalf of the Noteholders, or the requisite percentage of Noteholders or the Holders of the Preference Shares, as applicable, as provided in the Indenture or the Preference Share Paying Agency Agreement, as applicable.

10. Limits of Servicer Responsibility; Indemnification.

(a) The Servicer assumes no responsibility under this Agreement other than to render the services called for hereunder and under the terms of the other Transaction Documents made applicable to it pursuant to the terms of this Agreement in good faith and, subject to the standard of liability described in the next sentence, shall not be responsible for any action of the Issuer or the Trustee in following or declining to follow any advice, recommendation or direction of the Servicer. The Servicer, its directors, officers, stockholders, partners, agents and employees, and its Affiliates and their directors, officers, stockholders, partners, agents and employees, shall not be liable to the Issuer, the Co-Issuer, the Trustee, the Preference Shares Paying Agent, the Holders of the Securities or any other person, for any losses, claims, damages, judgments, assessments, costs or other liabilities (collectively, "Liabilities") incurred by the Issuer, the Co-Issuer, the Trustee, the Preference Shares Paying Agent, the Holders of the Securities or any other person, that arise out of or in connection with the performance by the Servicer of its duties under this Agreement and under the terms of the other Transaction Documents made applicable to it pursuant to the terms of this Agreement, except by reason of (i) acts or omissions constituting bad faith, willful misconduct, gross negligence or breach of fiduciary duty in the performance, or reckless disregard, of the obligations of the Servicer hereunder and under the terms of the other Transaction Documents made applicable to it pursuant to the terms of this Agreement or (ii) with respect to any information included in the Offering Circular in the section entitled "The Servicer" and "Risk Factors—Relating to Certain Conflicts of Interest—The Issuer Will Be Subject to Various Conflicts of Interest Involving the Servicer" that contain any untrue statement of material fact or omits to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading (the preceding clauses (i) and (ii) collectively being the "Servicer Breaches"). For the avoidance of doubt, the Servicer shall have no duty to independently investigate any laws not otherwise known to it in connection with its obligations under this Agreement, the Indenture and the other Transaction Documents. The Servicer shall be deemed to have satisfied the requirements of the Indenture and this Agreement relating to not causing the Issuer to be treated as engaged in a trade or business in the United States for U.S. federal income tax purposes (including as those requirements relate to the acquisition (including manner of acquisition), ownership, enforcement, and disposition of Collateral) to the extent the Servicer complies with the requirements set forth in Annex 1 hereto.

(b) The Issuer shall indemnify and hold harmless (the Issuer in such case, the "Indemnifying Party") the Servicer, its directors, officers, stockholders, partners, agents and employees (such parties collectively in such case, the "Indemnified Parties") from and against any and all Liabilities, and shall reimburse each such Indemnified Party for all reasonable fees and expenses

(including reasonable fees and expenses of counsel) (collectively, the "Expenses") as such Expenses are incurred in investigating, preparing, pursuing or defending any claim, action, proceeding or investigation with respect to any pending or threatened litigation (collectively, the "Actions"), caused by, or arising out of or in connection with, the issuance of the Securities, the transactions contemplated by the Offering Memorandum, the Indenture or this Agreement, and/or any action taken by, or any failure to act by, such Indemnified Party; provided, however, that no Indemnified Party shall be indemnified for any Liabilities or Expenses it incurs as a result of any acts or omissions by any Indemnified Party constituting Servicer Breaches. Notwithstanding anything contained herein to the contrary, the obligations of the Issuer under this Section 10 shall be payable solely out of the Collateral in accordance with the priorities set forth in the Indenture and shall survive termination of this Agreement.

(c) With respect to any claim made or threatened against an Indemnified Party, or compulsory process or request or other notice of any loss, claim, damage or liability served upon an Indemnified Party, for which such Indemnified Party is or may be entitled to indemnification under this Section 10, such Indemnified Party shall (or with respect to Indemnified Parties that are directors, officers, stockholders, agents or employees of the Servicer, the Servicer shall cause such Indemnified Party to):

(i) give written notice to the Indemnifying Party of such claim within ten (10) days after such Indemnified Party's receipt of actual notice that such claim is made or threatened, which notice to the Indemnifying Party shall specify in reasonable detail the nature of the claim and the amount (or an estimate of the amount) of the claim; provided, however, that the failure of any Indemnified Party to provide such notice to the Indemnifying Party shall not relieve the Indemnifying Party of its obligations under this Section 10 unless the Indemnifying Party is materially prejudiced or otherwise forfeits rights or defenses by reason of such failure;

(ii) at the Indemnifying Party's expense, provide the Indemnifying Party such information and cooperation with respect to such claim as the Indemnifying Party may reasonably require, including, but not limited to, making appropriate personnel available to the Indemnifying Party at such reasonable times as the Indemnifying Party may request;

(iii) at the Indemnifying Party's expense, cooperate and take all such steps as the Indemnifying Party may reasonably request to preserve and protect any defense to such claim;

(iv) in the event suit is brought with respect to such claim, upon reasonable prior notice, afford to the Indemnifying Party the right, which the Indemnifying Party may exercise in its sole discretion and at its expense, to participate in the investigation, defense and settlement of such claim;

(v) neither incur any material expense to defend against nor release or settle any such claim or make any admission with respect thereto (other than routine or incontestable admissions or factual admissions the failure to make which would expose such Indemnified Party to unindemnified liability) nor permit a default or consent to the entry of any judgment in respect thereof, in each case without the prior written consent of the Indemnifying Party; and

(vi) upon reasonable prior notice, afford to the Indemnifying Party the right, in its sole discretion and at its sole expense, to assume the defense of such

claim, including, but not limited to, the right to designate counsel reasonably acceptable to the Indemnified Party and to control all negotiations, litigation, arbitration, settlements, compromises and appeals of such claim; provided, that if the Indemnifying Party assumes the defense of such claim, it shall not be liable for any fees and expenses of counsel for any Indemnified Party incurred thereafter in connection with such claim except that if such Indemnified Party reasonably determines that counsel designated by the Indemnifying Party has a conflict of interest in connection with its representation of such Indemnified Party, such Indemnifying Party shall pay the reasonable fees and disbursements of one counsel (in addition to any local counsel) separate from its own counsel for all Indemnified Parties in connection with any one action or separate but similar or related actions in the same jurisdiction arising out of the same general allegations or circumstances; provided, further, that prior to entering into any final settlement or compromise, such Indemnifying Party shall seek the consent of the Indemnified Party and use its commercially reasonable efforts in the light of the then prevailing circumstances (including, without limitation, any express or implied time constraint on any pending settlement offer) to obtain the consent of such Indemnified Party as to the terms of settlement or compromise. If an Indemnified Party does not consent to the settlement or compromise within a reasonable time under the circumstances, the Indemnifying Party shall not thereafter be obligated to indemnify the Indemnified Party for any amount in excess of such proposed settlement or compromise.

(d) In the event that any Indemnified Party waives its right to indemnification hereunder, the Indemnifying Party shall not be entitled to appoint counsel to represent such Indemnified Party nor shall the Indemnifying Party reimburse such Indemnified Party for any costs of counsel to such Indemnified Party.

(e) Notwithstanding any other provision of this Agreement, nothing herein shall in any way constitute a waiver or limitation of any rights which the Issuer or the Holders of the Securities may have under any U.S. federal securities laws.

11. No Partnership or Joint Venture.

The Issuer and the Servicer are not partners or joint venturers with each other and nothing herein shall be construed to make them such partners or joint venturers or impose any liability as such on either of them. The Servicer's relation to the Issuer shall be deemed to be that of an independent contractor.

12. Term; Termination.

(a) This Agreement shall commence as of the date first set forth above and shall continue in force and effect until the first of the following occurs: (i) the payment in full of the Notes, the termination of the Indenture in accordance with its terms and the redemption in full of the Preference Shares; (ii) the liquidation of the Collateral and the final distribution of the proceeds of such liquidation to the Holders of the Securities; or (iii) the termination of this Agreement in accordance with subsection (b), (c), (d) or (e) of this Section 12 or Section 14 of this Agreement.

(b) Subject to Section 12(e) below, the Servicer may resign, upon 90 days' written notice to the Issuer (or such shorter notice as is acceptable to the Issuer). If the Servicer resigns, the Issuer agrees to appoint a successor Servicer to assume such duties and obligations in accordance with Section 12(e).

(c) This Agreement shall be automatically terminated in the event that the Issuer determines in good faith that the Issuer or the pool of Collateral has become required to be registered under the provisions of the Investment Company Act, and the Issuer notifies the Servicer thereof.

(d) If this Agreement is terminated pursuant to this Section 12, neither party shall have any further liability or obligation to the other, except as provided in Sections 2(c)(i), 8, 10 and 15 of this Agreement.

(e) No removal or resignation of the Servicer shall be effective unless:

(i) (A) the Issuer appoints a successor Servicer at the written direction of a Majority of the Preference Shares (excluding any Preference Shares held by the retiring Servicer, any of its Affiliates or any account over which the retiring Servicer or its Affiliates have discretionary voting authority (or, with respect to Class I Preference Shares held by Investors Corp. at such time, Holding Preference Shares held by the retiring Servicer, any of its Affiliates or any account over which the retiring Servicer or its Affiliates have discretionary voting authority) other than, with respect to the Class II Preference Shares, HFP; provided that, with respect to the voting authority of Class II Preference Shares owned by HFP, such vote shall not be excluded only if such vote is determined by a vote of the majority of the "independent directors" (determined in accordance with the governing documents of HFP and certified in writing to the Preference Shares Paying Agent by any of the "independent directors" of HFP) of HFP) (each such non-excluded Preference Share, a "Voting Preference Share"), (B) such successor Servicer has agreed in writing to assume all of the retiring Servicer's duties and obligations pursuant to this Agreement and the Indenture and (C) such successor Servicer is not objected to within 30 days after notice of such succession by either (x) a Super Majority of the Controlling Class of Notes (excluding any Notes held by the retiring Servicer, its Affiliates or any account over which the retiring Servicer or its Affiliates have discretionary voting authority other than HFP; provided that, with respect to the voting authority of Notes owned by HFP, such vote shall not be excluded only if such vote is determined by a vote of the majority of the "independent directors" (determined in accordance with the governing documents of HFP and certified in writing to the Trustee by any of the "independent directors" of HFP) of HFP) (each such non-excluded Note, a "Voting Note") or (y) a Majority in Aggregate Outstanding Amount of the Voting Notes (voting as a single class);

(ii) if a Majority of the Voting Preference Shares has nominated two or more successor Servicers that have been objected to pursuant to the preceding clause (i)(C) or has failed to appoint a successor Servicer that has not been objected to pursuant to the preceding clause (i)(C) within 60 days of the date of notice of such removal or resignation of the Servicer, (A) the Issuer appoints a successor Servicer at the written direction of a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes), (B) such successor Servicer has agreed in writing to assume all of the retiring Servicer's duties and obligations pursuant to this Agreement and the Indenture and (C) such successor Servicer is not objected to within 30 days after notice of such succession by either (x) Majority of the Voting Preference Shares or (y) a Majority in Aggregate Outstanding Amount of the Voting Notes (voting as a single class); or

(iii) if a Majority of the Voting Preference Shares and a Super Majority of the Controlling Class (excluding any Notes that are not Voting Notes) has

nominated two or more successor Servicers that have been objected to pursuant to the preceding clauses (i)(C) and (ii)(C) or has otherwise failed to appoint a successor Servicer that has not been objected to pursuant to the preceding clause (i)(C) or (ii) (C) within 120 days of the date of notice of such removal or resignation of the Servicer, (A) any Holder of the Controlling Class of Notes (excluding any Notes that are not Voting Notes), any Holder of Voting Preference Shares or the Trustee petitions a court of competent authority to appoint a successor Servicer, (B) such court appoints a successor Servicer and (C) such successor Servicer has agreed in writing to assume all of the retiring Servicer's duties and obligations pursuant to this Agreement and the Indenture.

In addition, any successor Servicer must be an established institution which (i) has demonstrated an ability to professionally and competently perform duties similar to those imposed upon the Servicer hereunder, (ii) is legally qualified and has the capacity to act as Servicer hereunder, as successor to the Servicer under this Agreement in the assumption of all of the responsibilities, duties and obligations of the Servicer hereunder and under the applicable terms of the Indenture, (iii) shall not cause the Issuer or the pool of Collateral to become required to register under the provisions of the Investment Company Act, (iv) shall perform its duties as Servicer under this Agreement and the Indenture without causing the Issuer, the Co Issuer or any Holder of Preference Shares to become subject to tax in any jurisdiction where such successor Servicer is established as doing business and (v) each Rating Agency has confirmed that the appointment of such successor Servicer shall not cause its then current rating of any Class of Notes to be reduced or withdrawn. No compensation payable to a successor Servicer from payments on the Collateral shall be greater than that paid to the retiring Servicer without the prior written consent of a Super Majority of the Controlling Class of Notes, a Majority of the Noteholders and a Majority of the Preference Shares. The Issuer, the Trustee and the successor Servicer shall take such action (or cause the retiring Servicer to take such action) consistent with this Agreement and the terms of the Indenture applicable to the Servicer, as shall be necessary to effectuate any such succession.

(f) In the event of removal of the Servicer pursuant to this Agreement, the Issuer shall have all of the rights and remedies available with respect thereto at law or equity, and, without limiting the foregoing, the Issuer or, to the extent so provided in the Indenture, the Trustee may by notice in writing to the Servicer as provided under this Agreement terminate all the rights and obligations of the Servicer under this Agreement (except those that survive termination pursuant to Section 12(d) above). Upon expiration of the applicable notice period with respect to termination specified in this Section 12 or Section 14 of this Agreement, as applicable, all authority and power of the Servicer under this Agreement, whether with respect to the Collateral or otherwise, shall automatically and without further action by any person or entity pass to and be vested in the successor Servicer upon the appointment thereof.

13. Delegation; Assignments.

This Agreement, and any obligations or duties of the Servicer hereunder, shall not be delegated by the Servicer, in whole or in part, except to any entity that (i) is controlled by any of James Dondero, Mark Okada and Todd Travers and (ii) is one in which any of James Dondero, Mark Okada and Todd Travers is involved in the day to day management and operations (and in any such case pursuant to an instrument of delegation in form and substance satisfactory to the Issuer), without the prior written consent of the Issuer, a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) and a Majority of the Voting Preference Shares and, notwithstanding any such consent, no delegation of obligations or duties by the Servicer (including, without limitation, to an entity described above) shall relieve the Servicer from any liability hereunder.

Subject to Section 12, any assignment of this Agreement to any Person, in whole or in part, by the Servicer shall be deemed null and void unless (i) such assignment is consented to in writing

by the Issuer, a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) and a Majority of the Voting Preference Shares and (ii) the Rating Agency Confirmation is satisfied with respect to any such assignment. Any assignment consented to by the Issuer, a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) and a Majority of the Voting Preference Shares shall bind the assignee hereunder in the same manner as the Servicer is bound. In addition, the assignee shall execute and deliver to the Issuer and the Trustee a counterpart of this Agreement naming such assignee as Servicer. Upon the execution and delivery of such a counterpart by the assignee and consent thereto by the Issuer, a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) and a Majority of the Voting Preference Shares, the Servicer shall be released from further obligations pursuant to this Agreement, except with respect to its obligations arising under Section 10 of this Agreement prior to such assignment and except with respect to its obligations under Sections 2(c)(i) and 15 hereof. This Agreement shall not be assigned by the Issuer without the prior written consent of the Servicer and the Trustee, except in the case of assignment by the Issuer to (i) an entity which is a successor to the Issuer permitted under the Indenture, in which case such successor organization shall be bound hereunder and by the terms of said assignment in the same manner as the Issuer is bound thereunder or (ii) the Trustee as contemplated by the Indenture. In the event of any assignment by the Issuer, the Issuer shall cause its successor to execute and deliver to the Servicer such documents as the Servicer shall consider reasonably necessary to effect fully such assignment. The Servicer hereby consents to the matters set forth in Article 15 of the Indenture.

14. Termination by the Issuer for Cause.

Subject to Section 12(e) above, this Agreement shall be terminated and the Servicer shall be removed by the Issuer for cause upon 10 days' prior written notice to the Servicer and upon written notice to the Holders of the Securities as set forth below, but only if directed to do so by (1) the Trustee, acting at the direction of a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) or (2) the Holders of a Majority of the Voting Preference Shares. For purposes of determining "cause" with respect to any such termination of this Agreement, such term shall mean any one of the following events:

(a) the Servicer willfully breaches in any respect, or takes any action that it knows violates in any respect, any provision of this Agreement or any terms of the Indenture applicable to it;

(b) the Servicer breaches in any material respect any provision of this Agreement or any terms of the Indenture or the Collateral Administration Agreement applicable to it, or any representation, warranty, certification or statement given in writing by the Servicer shall prove to have been incorrect in any material respect when made or given, and the Servicer fails to cure such breach or take such action so that the facts (after giving effect to such action) conform in all material respects to such representation, warranty, certificate or statement, in each case within 30 days of becoming aware of, or receiving notice from, the Trustee of, such breach or materially incorrect representation, warranty, certificate or statement;

(c) the Servicer is wound up or dissolved (other than a dissolution in which the remaining members elect to continue the business of the Servicer in accordance with its Governing Instruments) or there is appointed over it or a substantial portion of its assets a receiver, administrator, administrative receiver, trustee or similar officer, or the Servicer (i) ceases to be able to, or admits in writing its inability to, pay its debts as they become due and payable, or makes a general assignment for the benefit of or enters into any composition or arrangement with, its creditors generally; (ii) applies for or consents (by admission of material allegations of a petition or otherwise) to the appointment of a receiver, trustee, assignee, custodian, liquidator or sequestrator (or other similar official) of the Servicer

or of any substantial part of its properties or assets, or authorizes such an application or consent, or proceedings seeking such appointment are commenced without such authorization, consent or application against the Servicer and continue undismissed for 60 days; (iii) authorizes or files a voluntary petition in bankruptcy, or applies for or consents (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, arrangement, readjustment of debt, insolvency or dissolution, or authorizes such application or consent, or proceedings to such end are instituted against the Servicer without such authorization, application or consent and are approved as properly instituted and remain undismissed for 60 days or result in adjudication of bankruptcy or insolvency; or (iv) permits or suffers all or any substantial part of its properties or assets to be sequestered or attached by court order and the order remains undismissed for 60 days;

(d) the occurrence of any Event of Default under the Indenture that results from any breach by the Servicer of its duties under the Indenture or this Agreement, which breach or default is not cured within any applicable cure period; or

(e) (x) the occurrence of an act by the Servicer related to its activities in any servicing, securities, financial advisory or other investment business that constitutes fraud, (y) the Servicer being indicted, or any of its principals being convicted, of a felony criminal offense related to its activities in any servicing, securities, financial advisory or other investment business or (z) the Servicer being indicted for, adjudged liable in a civil suit for, or convicted of a violation of the Securities Act or any other United States Federal securities law or any rules or regulations thereunder.

If any of the events specified in this Section 14 shall occur, the Servicer shall give prompt written notice thereof to the Issuer, the Trustee and the Holders of all outstanding Notes and Preference Shares upon the Servicer's becoming aware of the occurrence of such event.

15. Action Upon Termination.

(a) From and after the effective date of termination of this Agreement, the Servicer shall not be entitled to compensation for further services hereunder, but shall be paid all compensation accrued to the date of termination, as provided in Section 8 hereof, and shall be entitled to receive any amounts owing under Section 10 hereof. Upon the effective date of termination of this Agreement, the Servicer shall as soon as practicable:

(i) deliver to the Issuer all property and documents of the Trustee or the Issuer or otherwise relating to the Collateral then in the custody of the Servicer; and

(ii) deliver to the Trustee an accounting with respect to the books and records delivered to the Trustee or the successor Servicer appointed pursuant to Section 12(e) hereof.

Notwithstanding such termination, the Servicer shall remain liable to the extent set forth herein (but subject to Section 10 hereof) for its acts or omissions hereunder arising prior to termination and for any expenses, losses, damages, liabilities, demands, charges and claims (including reasonable attorneys' fees) in respect of or arising out of a breach of the representations and warranties made by the Servicer in Section 16(b) hereof or from any failure of the Servicer to comply with the provisions of this Section 15.

(b) The Servicer agrees that, notwithstanding any termination of this Agreement, it shall reasonably cooperate in any Proceeding arising in connection with this Agreement, the Indenture or any of the Collateral (excluding any such Proceeding in which claims are asserted against

the Servicer or any Affiliate of the Servicer) upon receipt of appropriate indemnification and expense reimbursement.

16. Representations and Warranties.

(a) The Issuer hereby represents and warrants to the Servicer as follows:

(i) The Issuer has been duly registered and is validly existing under the laws of the Cayman Islands, has full power and authority to own its assets and the securities proposed to be owned by it and included in the Collateral and to transact the business in which it is presently engaged and is duly qualified under the laws of each jurisdiction where its ownership or lease of property or the conduct of its business requires, or the performance of its obligations under this Agreement, the Indenture or the Securities would require, such qualification, except for failures to be so qualified, authorized or licensed that would not in the aggregate have a material adverse effect on the business, operations, assets or financial condition of the Issuer.

(ii) The Issuer has full power and authority to execute, deliver and perform this Agreement, the other Transaction Documents and the Securities and all obligations required hereunder and thereunder and has taken all necessary action to authorize this Agreement, the other Transaction Documents and the Securities on the terms and conditions hereof and thereof and the execution by the Issuer, delivery and performance of this Agreement, the other Transaction Documents and the Securities and the performance of all obligations imposed upon it hereunder and thereunder. No consent of any other person including, without limitation, shareholders and creditors of the Issuer, and no license, permit, approval or authorization of, exemption by, notice or report to, or registration, filing or declaration with, any governmental authority, other than those that may be required under state securities or "blue sky" laws and those that have been or shall be obtained in connection with the other Transaction Documents and the Securities is required by the Issuer in connection with this Agreement, the other Transaction Documents and the Securities or the execution, delivery, performance, validity or enforceability of this Agreement, the other Transaction Documents and the Securities or the obligations imposed upon it hereunder or thereunder. This Agreement constitutes, and each instrument or document required hereunder, when executed and delivered hereunder, shall constitute, the legally valid and binding obligation of the Issuer enforceable against the Issuer in accordance with its terms, subject to (a) the effect of bankruptcy, insolvency or similar laws affecting generally the enforcement of creditors' rights and (b) general equitable principles.

(iii) The execution by the Issuer, delivery and performance of this Agreement and the documents and instruments required hereunder shall not violate any provision of any existing law or regulation binding on the Issuer, or any order, judgment, award or decree of any court, arbitrator or governmental authority binding on the Issuer, or the Governing Instruments of, or any securities issued by, the Issuer or of any mortgage, indenture, lease, contract or other agreement, instrument or undertaking to which the Issuer is a party or by which the Issuer or any of its assets may be bound, the violation of which would have a material adverse effect on the business, operations, assets or financial condition of the Issuer, and shall not result in or require the creation or imposition of any lien on any of its property, assets or revenues pursuant to the provisions of any such mortgage, indenture, lease, contract or other agreement, instrument or undertaking (other than the lien of the Indenture).

(iv) The Issuer is not in violation of its Governing Instruments or in breach or violation of or in default under the Indenture or any contract or agreement to which it is a party or by which it or any of its assets may be bound, or any applicable statute or any rule, regulation or order of any court, government agency or body having jurisdiction over the Issuer or its properties, the breach or violation of which or default under which would have a material adverse effect on the validity or enforceability of this Agreement or the performance by the Issuer of its duties hereunder.

(v) True and complete copies of the Indenture and the Issuer's Governing Instruments have been delivered to the Servicer.

The Issuer agrees to deliver a true and complete copy of each amendment to the documents referred to in Section 16(a)(v) above to the Servicer as promptly as practicable after its adoption or execution.

(b) The Servicer hereby represents and warrants to the Issuer as follows:

(i) The Servicer is a limited partnership duly organized and validly existing and in good standing under the laws of the State of Delaware, has full power and authority to own its assets and to transact the business in which it is currently engaged and is duly qualified and in good standing under the laws of each jurisdiction where its ownership or lease of property or the conduct of its business requires, or the performance of this Agreement would require such qualification, except for those jurisdictions in which the failure to be so qualified, authorized or licensed would not have a material adverse effect on the business, operations, assets or financial condition of the Servicer or on the ability of the Servicer to perform its obligations under, or on the validity or enforceability of, this Agreement and the provisions of the other Transaction Documents applicable to the Servicer.

(ii) The Servicer has full power and authority to execute, deliver and perform this Agreement and all obligations required hereunder and under the provisions of the other Transaction Documents applicable to the Servicer, and has taken all necessary action to authorize this Agreement on the terms and conditions hereof and the execution, delivery and performance of this Agreement and all obligations required hereunder and under the terms of the other Transaction Documents applicable to the Servicer. No consent of any other person, including, without limitation, creditors of the Servicer, and no license, permit, approval or authorization of, exemption by, notice or report to, or registration, filing or declaration with, any governmental authority is required by the Servicer in connection with this Agreement or the execution, delivery, performance, validity or enforceability of this Agreement or the obligations required hereunder or under the terms of the other Transaction Documents applicable to the Servicer. This Agreement has been, and each instrument and document required hereunder or under the terms of the other Transaction Documents applicable to the Servicer shall be, executed and delivered by a duly authorized partner of the Servicer, and this Agreement constitutes, and each instrument and document required hereunder or under the terms of the other Transaction Documents applicable to the Servicer when executed and delivered by the Servicer hereunder or under the terms of the other Transaction Documents applicable to the Servicer shall constitute, the valid and legally binding obligations of the Servicer enforceable against the Servicer in accordance with their terms, subject to (a) the effect of bankruptcy, insolvency or similar laws affecting generally the enforcement of creditors' rights and (b) general equitable principles.

(iii) The execution, delivery and performance of this Agreement and the terms of the other Transaction Documents applicable to the Servicer and the documents and instruments required hereunder or under the terms of the other Transaction Documents applicable to the Servicer shall not violate or conflict with any provision of any existing law or regulation binding on or applicable to the Servicer, or any order, judgment, award or decree of any court, arbitrator or governmental authority binding on the Servicer, or the Governing Instruments of, or any securities issued by the Servicer or of any mortgage, indenture, lease, contract or other agreement, instrument or undertaking to which the Servicer is a party or by which the Servicer or any of its assets may be bound, the violation of which would have a material adverse effect on the business, operations, assets or financial condition of the Servicer or its ability to perform its obligations under this Agreement and the provisions of the other Transaction Documents applicable to the Servicer, and shall not result in or require the creation or imposition of any lien on any of its material property, assets or revenues pursuant to the provisions of any such mortgage, indenture, lease, contract or other agreement, instrument or undertaking.

(iv) There is no charge, investigation, action, suit or proceeding before or by any court pending or, to the best knowledge of the Servicer, threatened that, if determined adversely to the Servicer, would have a material adverse effect upon the performance by the Servicer of its duties under, or on the validity or enforceability of, this Agreement and the provisions of the other Transaction Documents applicable to the Servicer.

(v) The Servicer is a registered investment adviser under the Investment Advisers Act.

(vi) The Servicer is not in violation of its Governing Instruments or in breach or violation of or in default under any contract or agreement to which it is a party or by which it or any of its property may be bound, or any applicable statute or any rule, regulation or order of any court, government agency or body having jurisdiction over the Servicer or its properties, the breach or violation of which or default under which would have a material adverse effect on the validity or enforceability of this Agreement or the provisions of the other Transaction Documents applicable to the Servicer, or the performance by the Servicer of its duties hereunder.

17. Notices.

Unless expressly provided otherwise herein, all notices, requests, demands and other communications required or permitted under this Agreement shall be in writing (including by telecopy) and shall be deemed to have been duly given, made and received when delivered against receipt or upon actual receipt of registered or certified mail, postage prepaid, return receipt requested, or, in the case of telecopy notice, when received in legible form, addressed as set forth below:

(a) If to the Issuer:

Brentwood CLO, Ltd.
c/o Maples Finance Limited
P.O. Box 1093GT
Queensgate House
South Church Street
George Town, Grand Cayman, Cayman Islands
Telephone: (345) 945-7099
Telecopy: (345) 945-7100
Attention: The Directors

(b) If to the Servicer:

Highland Capital Management, L.P.
Two Galleria Tower
13455 Noel Road, Suite 1300
Dallas, Texas 75240
Telephone: (972) 628-4100
Telecopy: (972) 628-4147
Attention: James Dondero

(c) If to the Trustee:

Investors Bank & Trust Company
200 Claredon Street
Mailcode: EUC-108
Boston, Massachusetts 02116
Telecopy: (617)351-4358
Attention: CDO Services – Brentwood CLO, Ltd.

(d) If to the Noteholders:

In accordance with Section 14.4 of the Indenture, at their respective addresses set forth on the Note Register.

(e) If to the Holders of the Preference Shares:

In accordance with Section 14.4 of the Indenture, to the Preference Shares Paying Agent at the address identified therein.

(f) if to the Rating Agencies:

In accordance with Section 14.3 of the Indenture, to the Rating Agencies at the address identified therein.

Any party may alter the address or telecopy number to which communications or copies are to be sent by giving notice of such change of address in conformity with the provisions of this Section 17 for the giving of notice.

18. Binding Nature of Agreement; Successors and Assigns.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and permitted assigns as provided herein. The Servicer hereby consents to the collateral assignment of this Agreement as provided in the Indenture and further agrees that the Trustee may enforce the Servicer's obligations hereunder.

19. Entire Agreement.

This Agreement contains the entire agreement and understanding among the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements, understandings, inducements and conditions, express or implied, oral or written, of any nature whatsoever with respect to the subject matter hereof. The express terms hereof control and supersede any course of performance and/or usage of the trade inconsistent with any of the terms hereof. This Agreement may not be modified or amended other than by an agreement in writing executed by the parties hereto and in accordance with the terms of Section 15.1(h) of the Indenture.

20. Conflict with the Indenture.

Subject to the last two sentences of Section 2(a)(i), in the event that this Agreement requires any action to be taken with respect to any matter and the Indenture requires that a different action be taken with respect to such matter, and such actions are mutually exclusive, the provisions of the Indenture in respect thereof shall control.

21. Priority of Payments.

The Servicer agrees that the payment of all amounts to which it is entitled pursuant to this Agreement and the Indenture shall be due and payable only in accordance with the priorities set forth in the Indenture and only to the extent funds are available for such payments in accordance with such priorities.

22. Governing Law.

THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE STATE OF NEW YORK, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION.

23. Indulgences Not Waivers.

Neither the failure nor any delay on the part of any party hereto to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power or privilege preclude any other or further exercise of the same or of any other right, remedy, power or privilege, nor shall any waiver of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and is signed by the party asserted to have granted such waiver.

24. Costs and Expenses.

Except as may otherwise be agreed in writing, the costs and expenses (including the fees and disbursements of counsel and accountants) incurred by each party in connection with the negotiation and preparation of and the execution of this Agreement, and all matters incident thereto, shall be borne by such party.

25. Titles Not to Affect Interpretation.

The titles of paragraphs and subparagraphs contained in this Agreement are for convenience only, and they neither form a part of this Agreement nor are they to be used in the construction or interpretation hereof.

26. Execution in Counterparts.

This Agreement may be executed in any number of counterparts by facsimile or other written form of communication, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

27. Provisions Separable.

In case any provision in this Agreement shall be invalid, illegal or unenforceable as written, such provision shall be construed in the manner most closely resembling the apparent intent of the parties with respect to such provision so as to be valid, legal and enforceable; provided, however, that if there is no basis for such a construction, such provision shall be ineffective only to the extent of such invalidity, illegality or unenforceability and, unless the ineffectiveness of such provision destroys the basis of the bargain for one of the parties to this Agreement, the validity, legality and enforceability of the remaining provisions hereof or thereof shall not in any way be affected or impaired thereby.

28. Number and Gender.

Words used herein, regardless of the number and gender specifically used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context requires.

29. Written Disclosure Statement.

The Issuer and the Trustee acknowledge receipt of Part II of the Servicer's Form ADV filed with the Securities and Exchange Commission, as required by Rule 204-3 under the Advisers Act, more than 48 hours prior to the date of execution of this Agreement.

30. Miscellaneous.

(a) In the event that any vote is solicited with respect to any Collateral Obligation, the Servicer, on behalf of the Issuer, shall vote or refrain from voting any such security in any manner permitted by the Indenture that the Servicer has determined in its reasonable judgment shall be in the best interests of the Holders of the Securities. In addition, with respect to any Defaulted Collateral Obligation, the Servicer, on behalf of the Issuer, may instruct the trustee for such Defaulted Collateral Obligation to enforce the Issuer's rights under the Underlying Instruments governing such Defaulted

Collateral Obligation and any applicable law, rule or regulation in any manner permitted under the Indenture that the Servicer has determined in its reasonable judgment shall be in the best interests of the Holders of the Securities. In the event any Offer is made with respect to any Collateral Obligation, the Servicer, on behalf of the Issuer, may take such action as is permitted by the Indenture and that the Servicer has determined in its reasonable judgment shall be in the best interests of the Holders of the Securities.

(b) In connection with taking or omitting any action under the Indenture or this Agreement, the Servicer may consult with counsel and may rely in good faith on the advice of such counsel or any opinion of counsel.

Any corporation, partnership or limited liability company into which the Servicer may be merged or converted or with which it may be consolidated, or any corporation, partnership or limited liability company resulting from any merger, conversion or consolidation to which the Servicer shall be a party, or any corporation, partnership or limited liability company succeeding to all or substantially all of the servicing and collateral management business of the Servicer, shall be the successor to the Servicer without any further action by the Servicer, the Co-Issuers, the Trustee, the Noteholders or any other person or entity.

31. Limitation of Liabilities.

The Issuer's obligations hereunder are solely the corporate obligations of the Issuer and the Servicer shall not have any recourse to any of the directors, officers, shareholders, members or incorporators of the Issuer with respect to any claims, losses, damages, liabilities, indemnities or other obligations in connection with any transactions contemplated hereby, except for any claims, losses, damages, liabilities, indemnities or other obligations caused by the gross negligence, bad faith or willful misconduct of such directors, officers, shareholders, members or incorporators of the Issuer. The obligations of the Issuer hereunder shall be limited to the net proceeds of the Collateral, if any, as applied in accordance with the Priorities of Payments pursuant to the Indenture, and following realization of the Collateral and its application in accordance with the Indenture, any outstanding obligations of the Issuer hereunder shall be extinguished and shall not thereafter revive. The provisions of this section shall survive termination of this Agreement.

32. Consent to Posting of Documents on Repository.

The Servicer hereby consents to (i) the posting of the final Offering Memorandum, the Indenture and any Hedge Agreements (collectively, the "Documents") and the periodic reports to be delivered pursuant to the Documents and any amendments or other modifications thereto on the Repository (as such term is defined in the Indenture) for use in the manner provided in the Repository; and (ii) the display of its name on the Repository in connection therewith.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as Servicer

By: _____
Name: Todd Travers
Title: Senior Portfolio Manager
Highland Capital Management, L.P.

BRENTWOOD CLO, LTD.,
as Issuer

By: _____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as Servicer

By:_____
Name:
Title:

BRENTWOOD CLO, LTD.,
as Issuer

By:_____
Name:
Title:

Chris Watler
Director

ANNEX 1

Certain Tax Provisions

Unless otherwise noted, references to the Issuer in this Annex 1 include the Servicer and any other person acting on the Issuer's behalf. Capitalized terms used but not defined herein will have the meanings ascribed to them in the Indenture.

For purposes of this Annex 1,

"Affiliate" means, with respect to a specified Person, (a) any other Person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the specified Person and (b) any Person that is a member, director, officer or employee of (i) the specified Person or (ii) a Person described in clause (a) of this definition; and

"Person" means an individual, a corporation, a limited liability company, a partnership, an association, a trust or any other entity or organization, including a government or political subdivision or an agency or instrumentality thereof.

Section I. General Restrictions.

As provided in this Annex 1, the Issuer (and the Servicer acting on the Issuer's behalf) shall only purchase debt securities, interests in loans and other assets (each a "Portfolio Collateral") only in secondary-market transactions and shall not engage in any lending or underwriting activities or otherwise participate in the structuring or origination of any Portfolio Collateral.

A. Communications and Negotiations.

1. The Issuer will not have any communications or negotiations with the obligor of a Portfolio Collateral or a Reference Obligation (directly or indirectly through an intermediary such as the seller of such Portfolio Collateral or the Synthetic Security) in connection with the issuance or funding of such Portfolio Collateral or Reference Obligation or commitments with respect thereto, except for communications of an immaterial nature or customary due diligence communications; provided, that the Servicer may provide comments as to mistakes or inconsistencies in loan documents (including with respect to any provisions that are inconsistent with the terms and conditions of purchase of the loan by the Issuer).

2. By way of example, permitted due diligence activities may include, but are not limited to, (a) attendance at an obligor's general "roadshow" or other presentations to investment professionals, (b) direct private discussions with personnel of the obligor, arranged by a sponsor, lead bank or other arranger, and (c) other due diligence activities of the kind customarily performed by offerees of the type of Portfolio Collateral being offered, but may not include any negotiations with the obligor, employees or agents of the obligor of any terms or conditions of the Portfolio Collateral being offered.

3. Negotiations between the Servicer and the underwriter, placement agent or broker of a Portfolio Collateral are permitted solely to the extent that they are limited to responses to customary pre-offering period and offering period inquiries by the underwriter or placement agent (e.g., "If we offered you 10-year senior subordinated bonds of XYZ company, what spread would it require to interest you?" or "If you will not buy the bonds as offered, would you buy if

we convinced the obligor to add a fixed charge coverage test?"). For purposes of this Section I.A., "negotiations" shall not include (i) commenting on offering documents to an unrelated underwriter or placement agent when the ability to comment was generally available to other offerees, or (ii) communicating certain objective criteria (such as the minimum yield or maturity) the Issuer generally uses in purchasing the relevant type of Portfolio Collateral.

4. The Issuer may consent or otherwise act with respect to amendments, supplements or other modifications of the terms of any Portfolio Collateral (other than a Subsidiary Obligation (as defined in Section III)) requiring consent or action after the date on which any such Portfolio Collateral is acquired by the Issuer if (a) such amendment, supplement or modification would not constitute a Significant Modification (as defined below), (b) (i) in the reasonable judgment of the Servicer, the obligor is in financial distress and such change in terms is desirable to protect the Issuer's interest and (ii) the Portfolio Collateral is described in clause 5(b) of this Section I.A., (c) the amendment or modification would not be treated as the acquisition of a new Portfolio Collateral under paragraph 5 of this Section I.A., or (d) otherwise, if it has received advice of counsel that its involvement in such amendment, supplement or modification will not cause the Issuer to be treated as engaged in a trade or business within the United States.

A "Significant Modification" means any amendment, supplement or other modification that involves (a) a change in the stated maturity or a change in the timing of any material payment of any Portfolio Collateral (including deferral of an interest payment), that would materially alter the weighted average life of the Portfolio Collateral, (b) any change (whether positive or negative) in the yield on the Portfolio Collateral immediately prior to the modification in excess of the greater of (i) 25 basis points or (ii) 5 percent of such unmodified yield, (c) any change involving a material new extension of credit, (d) a change in the obligor of any Portfolio Collateral (as determined for purposes of section 1001 of the Code), or (e) a material change in the collateral or security for any Portfolio Collateral, including the addition or deletion of a co-obligor or guarantor that results in a material change in payment expectations.

5. In the event the Issuer owns an interest in a Portfolio Collateral the terms of which are subsequently amended or modified, or in the case of a workout situation not described in Section III hereof, which Portfolio Collateral is subsequently exchanged for new obligations or other securities of the obligor of the Portfolio Collateral, such amendments or modifications or exchange will not be treated as the acquisition of an interest in a new Portfolio Collateral for purposes of this Annex 1, provided, that (a) the Issuer does not, directly or indirectly (through the Servicer or otherwise), seek the amendments or modifications or the exchange, or participate in negotiating the amendments or modifications or the exchange, and (b) at the time of original acquisition of the interest in the Portfolio Collateral, it was not reasonably anticipated that the terms of the Portfolio Collateral would, pursuant to a workout or other negotiation, subsequently be amended or modified.

B. Fees.

The Issuer will not earn or receive from any Person any fee or other compensation for services, however denominated, in connection with its purchase or sale of a Portfolio Collateral or entering into a Synthetic Security; the foregoing prohibition shall not be construed to preclude the Issuer from receiving (i) commitment fees or facility maintenance fees that are received by the Issuer in connection with revolving or delayed drawdown Loans; (ii) yield maintenance and prepayment penalty fees; (iii) fees on account of the Issuer's consenting to amendments, waivers or other modifications of the terms of any items of Portfolio Collateral; (iv) fees from permitted securities lending; or (v) upfront payments in lieu of

periodic payments under a Synthetic Security. The Issuer will not provide services to any Person; the foregoing prohibition shall not be construed to preclude the Issuer from activities relating to the receipt of income described in (i) through (v) of the preceding sentence.

Section II. Loans and Forward Purchase Commitments.

A. Any understanding or commitment to purchase a loan, a participation, a loan subparticipation or a collateralized loan obligation (collectively, "Loans") from a seller before completion of the closing and full funding of the Loan by such seller shall only be made pursuant to a forward sale agreement at an agreed price (stated as a dollar amount or as a percentage) (a "Forward Purchase Commitment"), unless such an understanding or commitment is not legally binding and neither the Issuer nor the Servicer is economically compelled (e.g., would otherwise be subject to a significant monetary penalty) to purchase the Loan following the completion of the closing and full funding of the Loan (i.e., the Servicer will make an independent decision whether to purchase such Loan on behalf of the Issuer after completion of the closing of the Loan) (a "Non-Binding Agreement").

B. No Forward Purchase Commitment or Non-Binding Agreement shall be made until after the seller (or a transferor to such seller of such Loan) has made a legally binding commitment to fully fund such Loan to the obligor thereof (subject to customary conditions), which commitment cannot be conditioned on the Issuer's ultimate purchase of such Loan from such seller.

C. In the event of any reduced or eliminated funding, the Issuer shall not receive any premium, fee, or other compensation in connection with having entered into the Forward Purchase Commitment or Non-Binding Agreement.

D. The Issuer shall not close any purchase of a Loan subject to a Forward Purchase Commitment or a Non-Binding Agreement earlier than 48 hours after the time of the closing of the Loan (i.e., execution of definitive documentation), and, in the case of a Forward Purchase Commitment, the Issuer's obligation to purchase such Loan is subject to the condition that no material adverse change has occurred in the financial condition of the Loan's obligor or the relevant market on or before the relevant purchase date.

E. The Issuer cannot have a contractual relationship with the obligor with respect to a Loan until the Issuer actually purchases the Loan.

F. The Issuer cannot be a signatory on the original lending agreement, and cannot be obligated to fund an assignment of or a participation in a Loan, prior to the time specified in subsection D above.

Section III. Distressed Debt.

A. The Issuer may only purchase a Debt Instrument that is a Potential Workout Obligation to the extent permitted by this Section III.

B. Neither the Issuer nor the Servicer on behalf of the Issuer shall purchase a Subsidiary Obligation from any Issuer Subsidiary.

C. Special Procedures for Subsidiary Obligations.

1. Potential Workout Obligations. On or prior to the date of acquisition, the Servicer on behalf of the Issuer shall identify each Portfolio Collateral that is a Potential Workout Obligation.

2. Transfer of Subsidiary Obligations. From and after the occurrence of a Workout Determination Date with respect to a Subsidiary Obligation, neither the Issuer nor the Servicer on behalf of the Issuer shall knowingly take any action in respect of such Subsidiary Obligation that may result in the Issuer being engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes. As soon as practicable, but in any event within 30 calendar days following a Workout Determination Date, the Servicer shall cause the Issuer either (i) to sell or dispose of any Subsidiary Obligation identified on such Workout Determination Date to a Person that is not an Affiliate of the Issuer or Servicer or (ii) to assign any Subsidiary Obligation identified on such Workout Determination Date to an Issuer Subsidiary.

For purposes of this Annex 1, an "Issuer Subsidiary" means any wholly-owned corporate subsidiary of the Issuer to which a Special Workout Obligation may be transferred in accordance with this Annex 1.

3. Consideration for Assignment of Subsidiary Obligations. Consideration given by an Issuer Subsidiary for the assignment to it of Subsidiary Obligations may be in the form of cash or in the form of indebtedness of, or equity interests in, such Issuer Subsidiary.

4. Classification of Issuer Subsidiaries. Each Issuer Subsidiary shall be an entity treated as a corporation for United States federal income tax purposes and formed under the laws of any state of the United States.

As used herein:

"Potential Workout Obligation" means any debt instrument (any such instrument, including an interest in a Loan, a "Debt Instrument") which, as of the date of acquisition by the Issuer or an Issuer Subsidiary, based on information specific to such Debt Instrument or the circumstances of the obligor thereof, is a Workout Obligation or, in the reasonable determination of the Servicer, has a materially higher likelihood of becoming a Workout Obligation as compared to debt obligations that par or other non-distressed debt purchasers or funds relating to that asset type customarily purchase and expect to hold to maturity.

"Subsidiary Obligation" means any Potential Workout Obligation (a) as to which the Issuer on any Workout Determination Date either (i) owns more than 40% of the aggregate principal amount of such class of Potential Workout Obligation outstanding or (ii) is one of the two largest holders of any class of debt of the obligor of such Potential Workout Obligation (based on the outstanding principal amount of such class of debt owned by the Issuer as a percentage of the aggregate outstanding principal amount of such class of debt) unless not fewer than three other holders and the Issuer collectively own at least 65% of such class of debt and, if the Issuer is the largest holder of such class, the Issuer's percentage of such class does not exceed the percentage held by the next largest holder of the debt by more than 5% of such class or (b) that would, upon foreclosure or exercise of similar legal remedies, result in the Issuer directly owning assets (other than securities treated as debt, equity in a partnership not engaged in a trade or business within the United States, or corporate equity for United States federal income tax

purposes, provided in the case of corporate equity that the corporation is not a "United States real property holding corporation" within the meaning of section 897 of the Code) which are "United States real property interests" within the meaning of section 897 of the Code or which the Servicer reasonably expects it would, on behalf of the Issuer, be required to actively manage to preserve the value of the Issuer's interest therein; provided that a Potential Workout Obligation shall not be treated as a Subsidiary Obligation if the Issuer obtains a Tax Opinion that, based on all the surrounding circumstances, the activities in which the Issuer intends to engage with respect to such Potential Workout Obligation will not cause the Issuer to be treated as engaged in a trade or business for United States federal income tax purposes.

"Workout Determination Date" means any date on which, in connection with the occurrence of any event described in clauses (a) through (c), inclusive, of the definition of Workout Obligation, either (a) any material action by the Issuer is required to be taken, (b) the Servicer receives written notice that such material action shall be required or (c) the Servicer reasonably determines that the taking of such material action is likely to be required.

"Workout Obligation" means any Debt Instrument as to which the Servicer on behalf of the Issuer (a) consents to a Significant Modification in connection with the workout of a defaulted Portfolio Collateral, (b) participates in an official or unofficial committee or similar official or unofficial body in connection with a bankruptcy, reorganization, restructuring or similar proceeding, or (c) exercises, or has exercised on its behalf, rights of foreclosure or similar judicial remedies.

Section IV. Purchases from the Servicer or its Affiliates.

A. If the Servicer or an Affiliate of the Servicer acted as an underwriter, placement or other agent, arranger, negotiator or structuror, or received any fee for services (it being understood that receipts described in clauses (i) through (v) of Section I.B. are not construed as so treated), in connection with the issuance or origination of a Portfolio Collateral or was a member of the original lending syndicate with respect to the Portfolio Collateral (any such Portfolio Collateral, a "Special Procedures Obligation"), the Issuer will not acquire any interest in such Special Procedures Obligation (including entering into a commitment or agreement, whether or not legally binding or enforceable, to acquire such obligation directly or synthetically), from the Servicer, an Affiliate of the Servicer, or a fund managed by the Servicer, unless (i) the Special Procedures Obligation has been outstanding for at least 90 days, (ii) the holder of the Special Procedures Obligation did not identify the obligation or security as intended for sale to the Issuer within 90 days of its issuance, (iii) the price paid for such Special Procedures Obligation by the Issuer is its fair market value at the time of acquisition by the Issuer, and (iv) the transaction is proposed to, and the ultimate purchase is approved on behalf of the Issuer by, one or more Independent Advisors to the Issuer in accordance with the provisions of Section IV.B. below. The Issuer will not acquire any Special Procedures Obligation if, immediately following such acquisition, the fair market value of all Special Procedures Obligations owned by the Issuer would constitute more than 49% of the fair market value of all of the Issuer's assets at such time.

B. An "Independent Advisor" is a Person who is not an Affiliate of the Issuer, the Servicer or any fund managed by the Servicer.

1. The Issuer may not purchase or commit to enter into any such Special Procedures Obligation without prior approval by an Independent Advisor. If the Independent Advisor declines to approve a proposed Special Procedures Obligation, at least three months must elapse before any proposal with respect to the acquisition of debt or other obligations of the same obligor are proposed or considered.

2. The Issuer shall engage the Independent Advisor in an agreement the terms of which shall in substantial form set forth:

(a) the representation of the Independent Advisor, which the Servicer shall not know to be incorrect, that it has significant financial and commercial expertise, including substantial expertise and knowledge in and of the loan market and related investment arenas;

(b) the agreement between the Independent Advisor, the Issuer and the Servicer generally to the effect that (i) the Independent Advisor will operate pursuant to procedures consistent with maintaining his or her independence from the Servicer and its Affiliates, (ii) the Independent Advisor will have the sole authority and discretion to approve or reject purchase proposals made by the Servicer with respect to any Special Procedures Obligation, (iii) all proposals for the Issuer to acquire any Special Procedures Obligation will be first submitted to the Independent Advisor, (iii) the Servicer will prepare the materials it deems necessary to describe the Special Procedures Obligation to the Independent Advisor, (iv) the Investment Advisor will not be required to make any decision to accept or decline a Special Procedures Obligation at the price offered prior to its review of the materials prepared, plus any additional information requested by the Independent Advisor, and (v) no Independent Advisor may be proposed to be replaced by the Servicer, unless for cause or in the event of a resignation of such Independent Advisor; and

(c) such other commercially reasonable terms and conditions, including terms and conditions to the effect that (i) the Independent Advisor will be paid a reasonable fee for its services plus reimbursement of any reasonable expenses incurred in performance of his or her responsibilities, (ii) the Independent Advisor may be removed or replaced only by a majority (whether by positive act or failure to object) of the probable equity owners (as determined for United States federal income tax purposes) of the Issuer, (iii) if at any time there is more than one Independent Advisor to the Issuer, a majority of such Independent Advisors must approve any Special Procedures Obligation subject to Independent Advisor approval, (iv) an Independent Advisor may not engage, directly or indirectly, in the negotiation of the terms of any Special Procedures Obligation to be acquired by the Issuer (provided however, that an Independent Advisor may negotiate with the Servicer or the seller with respect to the price and terms of the Issuer's purchase of the Special Procedures Obligation, provided further that the Independent Advisor will not make suggestions to the Servicer or any other person about alternative or modified terms of the underlying Special Procedures Obligation on which they might be willing to approve such a Special Procedures Obligation).

3. Any servicing agreement or other document under which the Servicer is granted signatory powers or other authority on behalf of the Issuer will provide that such powers or authority with respect to Special Procedures Obligations are conditioned upon the prior written approval of the Independent Advisor

4. No Special Procedures Obligation will be presented to an Independent Advisor until at least 90 days have elapsed since the later of (a) the execution of final documentation and (b) the funding in whole or part of the Special Procedures Obligation and there will have been no commitment or arrangement prior to that time that the Issuer will acquire any such Special Procedures Obligation; provided, further, that if the person from whom the Issuer will acquire the

Special Procedures Obligation is an Affiliate of the Servicer, such person will not be treated as owning the Special Procedures Obligation for any day during which it does not enjoy substantially all of the benefits and burdens of ownership (for example, because it has hedged its credit exposure to the Special Procedures Obligation).

5. The Issuer will have no obligation to, or understanding that it will refund, reimburse or indemnify any person (including an Affiliate of the Servicer), directly or indirectly, for "breakage" costs or other costs or expenses incurred by such person if the Independent Advisor determines that the Issuer should decline to purchase any Special Procedures Obligation.

6. Neither the Servicer nor any Affiliate of the Servicer will have any authority to enter into agreements, or take any action, on behalf of the Issuer with respect to Special Procedures Obligations without the prior written approval of an Independent Advisor. Except as may be conditioned upon such prior written approval, neither the Servicer nor any Affiliate of the Servicer may hold itself out as having signatory powers on behalf of the Issuer or authority to enter into agreements with respect to Special Procedures Obligations on behalf of the Issuer.

Section V. Synthetic Securities.

A. The Issuer shall not (i) acquire or enter into any Synthetic Security with respect to any Reference Obligation the direct acquisition of which would violate any provision of this Annex 1 or (ii) use Synthetic Securities as a means of making advances to the Synthetic Security Counterparty following the date on which the Synthetic Security is acquired or entered into (for the avoidance of doubt, the establishment of Synthetic Security collateral accounts and the payment of Synthetic Security Counterparties from the amounts on deposit therein, shall not constitute the making of advances).

B. With respect to each Synthetic Security, the Issuer will not acquire or enter into any Synthetic Security that does not satisfy all of the following additional criteria unless the Servicer has first received advice of counsel that the ownership and disposition of such Synthetic Security would not cause the Issuer to be engaged in a trade or business within the United States for United States federal income tax purposes:

1. the criteria used to determine whether to enter into any particular Synthetic Security was similar to the criteria used by the Servicer in making purchase decisions with respect to debt securities;

2. the Synthetic Security is acquired by or entered into by the Issuer for its own account and for investment purposes with the expectation of realizing a profit from income earned on the securities (and any potential rise in their value) during the interval of time between their purchase and sale or hedging purposes and not with an intention to trade or to sell for a short-term profit;

3. the Issuer enters into the Synthetic Security with a counterparty that is not a special purpose vehicle and is a broker-dealer or that holds itself out as in the business of entering into such contracts;

4. neither the Issuer nor any Person acting on behalf of the Issuer advertises or publishes the Issuer's ability to enter into Synthetic Securities;

5. except with respect to (x) credit-linked notes or similar Synthetic Securities and (y) any other Synthetic Securities where standard form ISDA documentation is not applicable, the Synthetic Security is written on standard form ISDA documentation;

6. the net payment from the Issuer to the Synthetic Security Counterparty is not determined based on an actual loss incurred by the Synthetic Security Counterparty or any other designated person;

7. there exists no agreement, arrangement or understanding that (i) the Synthetic Security Counterparty is required to own or hold the related Reference Obligation while the Synthetic Security remains in effect or (ii) the Synthetic Security Counterparty is economically or practically compelled to own or hold the related physical Reference Obligation while the Synthetic Security remains in effect;

8. the Synthetic Security provides for (i) all cash settlement, (ii) all physical settlement or (iii) the option to either cash settle or physically settle; provided that, in the latter two cases, physical settlement provides the settling party the right to settle the Synthetic Security by delivering deliverable obligations which *may* include the Reference Obligation and the settling party must not be required to deliver the related Reference Obligation upon the settlement of such Synthetic Security.

Notwithstanding the preceding paragraph, a Synthetic Security providing for physical settlement may require a party to deliver the related Reference Obligation if either:

(i) at the time the Issuer enters into such Synthetic Security, such Reference Obligation is readily available to purchasers generally in a liquid market; or

(ii) the advice of both United States federal income tax and insurance counsel of nationally recognized standing in the United States experienced in such matters is that, under the relevant facts and circumstances with respect to such Synthetic Security, the acquisition of such Synthetic Security will not cause the Issuer to be engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes or otherwise to be subject to United States federal income tax on a net basis and should not cause the Issuer to be treated as writing insurance in the United States under the law of the state in which the Synthetic Security Counterparty is organized.

9. the Synthetic Security is not treated by the Issuer as insurance or a financial guarantee sold by the Issuer for United States or Cayman Islands regulatory purposes.

As used herein:

"Reference Obligation" means a debt security or other obligation upon which a Synthetic Security is based.

"Synthetic Security" means any swap transaction or security, other than a participation interest in a Loan, that has payments associated with either payments of interest and/or principal on a Reference Obligation or the credit performance of a Reference Obligation.

"Synthetic Security Counterparty" means an entity (other than the Issuer) required to make payments on a Synthetic Security (including any guarantor).

Section VI. Other Types of Assets.

A. Equity Restrictions. The Issuer will not purchase any asset (directly or synthetically) that is:

1. not treated for U.S. federal income tax purposes as debt if the issuing entity is a "partnership"(within the meaning of Section 7701(a)(2) of the Code) unless such entity is not engaged in a trade or business within the United States, or

2. a "United States real property interest" as defined in section 897 of the Code and the Treasury Regulations promulgated thereunder.

The Issuer may cause an Issuer Subsidiary to acquire assets set forth in clause (i) or (ii) above (each, an "ETB/897 Asset") in connection with the workout of defaulted Portfolio Collaterals, so long as the acquisition of ETB/897 Assets by such Issuer Subsidiary will not cause the stock of such Issuer Subsidiary to be deemed to be an ETB/897 Asset.

B. Revolving Loans and Delayed Drawdown Loans. All of the terms of any advance required to be made by the Issuer under any revolving or delayed drawdown Loan will be fixed as of the date of the Issuer's purchase thereof (or will be determinable under a formula that is fixed as of such date), and the Issuer and the Servicer will not have any discretion (except for consenting or withholding consent to amendments, waivers or other modifications or granting customary waivers upon default) as to whether to make advances under such revolving or delayed drawdown Loan.

C. Securities Lending Agreements. The Issuer will not purchase any Portfolio Collateral primarily for the purpose of entering into a securities lending agreement with respect thereto.

Section VII. General Restrictions on the Issuer.

The Issuer itself shall not:

A. hold itself out, through advertising or otherwise, as originating Loans, lending funds, or making a market in or dealing in Loans or other assets;

B. register as, hold itself out as, or become subject to regulatory supervision or other legal requirements under the laws of any country or political subdivision thereof as, a broker-dealer, a bank, an insurance company, financial guarantor, a surety bond issuer, or a company engaged in Loan origination;

C. knowingly take any action causing it to be treated as a bank, insurance company, or company engaged in Loan origination for purposes of any tax, securities law or other filing or submission made to any governmental authority;

D. hold itself out, through advertising or otherwise, as originating, funding, guaranteeing or insuring debt obligations or as being willing and able to enter into transactions (either purchases or sales of debt obligations or entries into, assignments or terminations of hedging or derivative instruments, including Synthetic Securities) at the request of others;

E. treat Synthetic Securities as insurance, reinsurance, indemnity bonds, guaranties, guaranty bonds or suretyship contracts for any purpose;

F. allow any non-U.S. bank or lending institution who is a holder of a Security to control or direct the Servicer's or Issuer's decision to acquire a particular asset except as otherwise allowed to such a holder, acting in that capacity, under the related indenture or acquire a Portfolio Collateral conditioned upon a particular person or entity holding Securities;

G. acquire any asset the holding or acquisition of which the Servicer knows would cause the Issuer to be subject to income tax on a net income basis;

H. hold any security as nominee for another person; or

I. buy securities with the intent to subdivide them and sell the components or to buy securities and sell them with different securities as a package or unit.

Section VIII. Tax Opinion; Amendments.

A. In furtherance and not in limitation of this Annex 1, the Servicer shall comply with all of the provisions set forth in this Annex 1, unless, with respect to a particular transaction, the Servicer acting on behalf of the Issuer and the Trustee shall have received written advice of Skadden, Arps, Slate, Meagher & Flom LLP or Orrick, Herrington & Sutcliffe LLP or an opinion of other counsel of nationally recognized standing in the United States experienced in such matters (a "Tax Opinion"), that, under the relevant facts and circumstances with respect to such transaction, the Servicer's failure to comply with one or more of such provisions will not cause the Issuer to be engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes or otherwise to be subject to United States federal income tax on a net basis.

B. The provisions set forth in the Annex may be amended, eliminated or supplemented by the Servicer if the Issuer, the Servicer and the Trustee shall have received a Tax Opinion that the Servicer's compliance with such amended provisions or supplemental provisions or the failure to comply with such provisions proposed to be eliminated, as the case may be, will not cause the Issuer to be engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes or otherwise to be subject to United States federal income tax on a net basis.

EXHIBIT 25

EXHIBIT J

EXECUTION COPY

SERVICING AGREEMENT

This Servicing Agreement, dated as of March 27, 2008 is entered into by and among ABERDEEN LOAN FUNDING, LTD., an exempted company incorporated with limited liability under the laws of the Cayman Islands, with its registered office located at Walker House, 87 Mary Street, George Town, Grand Cayman, KY1-9002, Cayman Islands (together with successors and assigns permitted hereunder, the "Issuer"), and HIGHLAND CAPITAL MANAGEMENT, L.P., a Delaware limited partnership, with its principal offices located at Two Galleria Tower, 13455 Noel Road, Suite 1300, Dallas, Texas 75240, as servicer ("Highland" or, in such capacity, the "Servicer").

WITNESSETH:

WHEREAS, the Issuer and ABERDEEN LOAN FUNDING CORP. (the "Co-Issuer" and together with the Issuer, the "Co-Issuers") intend to issue U.S.$376,000,000 of their Class A Floating Rate Senior Secured Extendable Notes due 2018 (the "Class A Notes"), U.S.$29,500,000 of their Class B Floating Rate Senior Secured Extendable Notes due 2018 (the "Class B Notes"), U.S.$25,250,000 of their Class C Floating Rate Senior Secured Deferrable Interest Extendable Notes due 2018 (the "Class C Notes"), U.S.$19,250,000 of their Class D Floating Rate Senior Secured Deferrable Interest Extendable Notes due 2018 (the "Class D Notes"), and the Issuer intends to issue U.S.$17,250,000 of its Class E Floating Rate Senior Secured Deferrable Interest Extendable Notes due 2018 (the "Class E Notes" and together with the Class A Notes, Class B Notes, Class C Notes and Class D Notes, the "Notes") pursuant to the Indenture dated as of March 27, 2008 (the "Indenture"), among the Co-Issuers and State Street Bank and Trust Company, as trustee (the "Trustee") and the Issuer intends to issue 12,000 Class I Preference Shares, $0.01 par value (the "Class I Preference Shares") and 36,000 Class II Preference Shares, $0.01 par value (the "Class II Preference Shares" and, together with the Class I Preference Shares, the "Preference Shares" and, together with the Notes, the "Securities") pursuant to the Preference Shares Paying Agency Agreement dated as of March 27, 2008 (the "Preference Shares Paying Agency Agreement") between the Issuer and State Street Bank and Trust Company, as the Preference Shares Paying Agent, and pursuant to the Issuer's amended and restated memorandum and articles of association (the "Memorandum and Articles of Association") and certain resolutions of the board of directors of the Issuer;

WHEREAS, the Issuer intends to pledge certain Collateral Obligations, Eligible Investments and Cash (all as defined in the Indenture) and certain other assets (all as set forth in the Indenture) (collectively, the "Collateral") to the Trustee as security for the Notes;

WHEREAS, the Issuer wishes to enter into this Servicing Agreement, pursuant to which the Servicer agrees to perform, on behalf of the Issuer, certain duties with respect to the Collateral in the manner and on the terms set forth herein; and

WHEREAS, the Servicer has the capacity to provide the services required hereby and in the applicable provisions of the other Transaction Documents and is prepared to perform such services upon the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual agreements herein set forth, the parties hereto agree as follows:

1. Definitions.

Terms used herein and not defined below shall have the meanings set forth in the Indenture.

"Agreement" shall mean this Servicing Agreement, as amended from time to time.

"Governing Instruments" shall mean the memorandum, articles or certificate of incorporation or association and by-laws, if applicable, in the case of a corporation; the certificate of formation, if applicable, or the partnership agreement, in the case of a partnership; or the certificate of formation, if applicable, or the limited liability company agreement, in the case of a limited liability company.

"HFP" shall mean Highland Financial Partners, L.P. (which includes, for the avoidance of doubt, any subsidiary thereof).

"Offering Memorandum" shall mean the Offering Memorandum of the Issuer dated March 27, 2008 prepared in connection with the offering of the Securities.

"Servicer Breaches" shall have the meaning specified in Section 10(a).

"Servicing Fee" shall mean, collectively, the Senior Servicing Fee, the Subordinated Servicing Fee and the Supplemental Servicing Fee.

"Transaction Documents" shall mean the Indenture, the Preference Shares Paying Agency Agreement, the Servicing Agreement and the Collateral Administration Agreement.

2. General Duties of the Servicer.

(a) The Servicer shall provide services to the Issuer as follows:

(i) Subject to and in accordance with the terms of this Agreement and the other Transaction Documents, the Servicer shall supervise and direct the administration, acquisition and disposition of the Collateral, and shall perform on behalf of the Issuer those duties and obligations of the Servicer required by the Indenture and the other Transaction Documents, and including the furnishing of Issuer Orders, Issuer Requests and officer's certificates, and such certifications as are required of the Servicer under the Indenture with respect to permitted purchases and sales of the Collateral Obligations, Eligible Investments and other assets, and other matters, and, to the extent necessary or appropriate to perform such duties, the Servicer shall have the power to execute and deliver all necessary and appropriate documents and instruments on behalf of the Issuer with respect thereto. The Servicer shall, subject to the terms and conditions of this Agreement and the other Transaction Documents, perform its obligations hereunder and thereunder with reasonable care, using a degree of skill and attention no less than that which the Servicer exercises with respect to comparable assets that it services or manages for others having similar objectives and restrictions, and in a manner consistent with practices and procedures followed by institutional servicers or managers of national standing relating to assets of the nature and character of the Collateral for clients having

similar objectives and restrictions, except as expressly provided otherwise in this Agreement and/or the other Transaction Documents. To the extent not inconsistent with the foregoing, the Servicer shall follow its customary standards, policies and procedures in performing its duties under the Indenture and hereunder. The Servicer shall comply with all terms and conditions of the other Transaction Documents affecting the duties and functions to be performed hereunder. The Servicer shall not be bound to follow any amendment to any Transaction Document until it has received written notice thereof and until it has received a copy of the amendment from the Issuer or the Trustee; provided, however, that the Servicer shall not be bound by any amendment to any Transaction Document that affects the rights, powers, obligations or duties of the Servicer unless the Servicer shall have consented thereto in writing. The Issuer agrees that it shall not permit any amendment to the Indenture that (x) affects the rights, powers, obligations or duties of the Servicer or (y) affects the amount or priority of any fees payable to the Servicer to become effective unless the Servicer has been given prior written notice of such amendment and consented thereto in writing;

(ii) the Servicer shall select any Collateral which shall be acquired by the Issuer pursuant to the Indenture in accordance with the Collateral criteria set forth herein and in the Indenture;

(iii) the Servicer shall monitor the Collateral on an ongoing basis and provide to the Issuer all reports, certificates, schedules and other data with respect to the Collateral which the Issuer is required to prepare and deliver under the Indenture, in the form and containing all information required thereby and in reasonable time for the Issuer to review such required reports, certificates, schedules and data and to deliver them to the parties entitled thereto under the Indenture;

(iv) the Servicer shall undertake to determine to the extent reasonably practicable whether a Collateral Obligation has become a Defaulted Collateral Obligation;

(v) the Servicer, subject to and in accordance with the provisions of the Indenture may, at any time permitted under the Indenture, and shall, when required by the Indenture, direct the Trustee (x) to dispose of a Collateral Obligation, Equity Security or Eligible Investment or other securities received in respect thereof in the open market or otherwise, (y) to acquire, as security for the Notes in substitution for or in addition to any one or more Collateral Obligations or Eligible Investments included in the Collateral, one or more substitute Collateral Obligations or Eligible Investments, or (z) direct the Trustee to take the following actions with respect to a Collateral Obligation or Eligible Investment:

(1) retain such Collateral Obligation or Eligible Investment; or

(2) dispose of such Collateral Obligation or Eligible Investment in the open market or otherwise; or

(3) if applicable, tender such Collateral Obligation or Eligible Investment pursuant to an Offer; or

(4) if applicable, consent to any proposed amendment, modification or waiver pursuant to an Offer; or

(5) retain or dispose of any securities or other property (if other than cash) received pursuant to an Offer; or

(6) waive any default with respect to any Defaulted Collateral Obligation; or

(7) vote to accelerate the maturity of any Defaulted Collateral Obligation; or

(8) exercise any other rights or remedies with respect to such Collateral Obligation or Eligible Investment as provided in the related Underlying Instruments, including in connection with any workout situations, or take any other action consistent with the terms of the Indenture which is in the best interests of the Holders of the Securities; and

(vi) the Servicer shall (a) on or prior to any day which is a Redemption Date, direct the Trustee to enter into contracts to dispose of the Collateral Obligation and any other Collateral pursuant to the Indenture and otherwise comply with all redemption procedures and certification requirements in the Indenture in order to allow the Trustee to effect such redemption and (b) conduct auctions in accordance with the terms of the Indenture.

(b) In performing its duties hereunder, the Servicer shall seek to preserve the value of the Collateral for the benefit of the Holders of the Securities taking into account the Collateral criteria and limitations set forth herein and in the Indenture and the Servicer shall use reasonable efforts to select and service the Collateral in such a way that will permit a timely performance of all payment obligations by the Issuer under the Indenture; provided, that the Servicer shall not be responsible if such objectives are not achieved so long as the Servicer performs its duties under this Agreement in the manner provided for herein, and provided, further, that there shall be no recourse to the Servicer with respect to the Notes or the Preference Shares. The Servicer and the Issuer shall take such other action, and furnish such certificates, opinions and other documents, as may be reasonably requested by the other party hereto in order to effectuate the purposes of this Agreement and to facilitate compliance with applicable laws and regulations and the terms of this Agreement.

(c) The Servicer hereby agrees to the following:

(i) The Servicer agrees not to cause the filing of a petition in bankruptcy against the Issuer or the Co-Issuer until the payment in full of all Notes issued under the Indenture and the payment to the Preference Shares Paying Agent of all amounts payable with respect to the Preference Shares in accordance with the Priority of Payments and the expiration of a period equal to the greater of (A) the applicable preference period plus one day or (B) one year and one day following the payment. Notwithstanding the foregoing, the Servicer may commence any legal action that is not a bankruptcy, insolvency, liquidation or similar proceeding against the Issuer or the Co-Issuer or any of their properties and may take any action it deems appropriate at any time in any bankruptcy, insolvency, liquidation or similar proceeding and any other Proceeding voluntarily commenced by the Issuer or the Co-Issuer or involuntarily commenced against the Issuer or the Co-Issuer by anyone other than the Servicer or any

Affiliate of the Servicer. The provisions of this Section 2(c)(i) shall survive termination of this Agreement.

(ii) The Servicer shall cause each sale or purchase of any Collateral Obligation or Eligible Investment to be conducted on an arm's-length basis.

(d) The Servicer shall not act for the Issuer in any capacity except as provided in this Section 2. In providing services hereunder, the Servicer may employ third parties, including its Affiliates, to render advice (including advice with respect to the servicing of the Collateral) and assistance; provided, however, that the Servicer shall not be relieved of any of its duties or liabilities hereunder regardless of the performance of any services by third parties. Notwithstanding any other provision of this Agreement, the Servicer shall not be required to take any action required of it pursuant to this Agreement or the Indenture if such action would constitute a violation of any law.

(e) Notwithstanding any other provision of this Agreement or the Indenture, (i) any granted signatory powers or authority granted to the Servicer on behalf of the Issuer with respect to the Special Procedures Obligations (as defined in Annex 1) shall be conditioned upon the prior written approval of the Independent Advisor (as defined in Annex 1) and (ii) neither the Servicer nor any Affiliate of the Servicer shall have any authority to enter into agreements, or take any action, on behalf of the Issuer with respect to the Special Procedures Obligations without the prior written approval of the Independent Advisor.

3. Brokerage.

The Servicer shall seek to obtain the best prices and execution for all orders placed with respect to the Collateral, considering all reasonable circumstances. Subject to the objective of obtaining best prices and execution, the Servicer may take into consideration research and other brokerage services furnished to the Servicer or its Affiliates by brokers and dealers which are not Affiliates of the Servicer. Such services may be used by the Servicer or its Affiliates in connection with its other servicing or advisory activities or operations. The Servicer may aggregate sales and purchase orders of securities placed with respect to the Collateral with similar orders being made simultaneously for other accounts serviced or managed by the Servicer or with accounts of the Affiliates of the Servicer, if in the Servicer's reasonable judgment such aggregation shall result in an overall economic benefit to the Issuer, taking into consideration the advantageous selling or purchase price, brokerage commission and other expenses. In the event that a sale or purchase of a Collateral Obligation or Eligible Investment (in accordance with the terms of the Indenture) occurs as part of any aggregate sales or purchase orders, the objective of the Servicer (and any of its Affiliates involved in such transactions) shall be to allocate the executions among the accounts in an equitable manner and consistent with its obligations hereunder and under applicable law.

In addition to the foregoing and subject to the provisions of Section 2 and the limitations of Section 5, the objective of obtaining best prices and execution and to the extent permitted by applicable law, the Servicer may, on behalf of the Issuer, direct the Trustee to acquire any and all of the Eligible Investments or other Collateral from, or sell Collateral Obligations or other Collateral to, the Initial Purchaser, the Trustee or any of their respective Affiliates, or any other firm.

4. Additional Activities of the Servicer.

Nothing herein shall prevent the Servicer or any of its Affiliates from engaging in other businesses, or from rendering services of any kind to the Trustee, the Holders of the Securities, or any other Person or entity to the extent permitted by applicable law. Without prejudice to the generality of the foregoing, the Servicer and partners, directors, officers, employees and agents of the Servicer or its Affiliates may, among other things, and subject to any limits specified in the Indenture:

(a) serve as directors (whether supervisory or managing), officers, partners, employees, agents, nominees or signatories for any issuer of any obligations included in the Collateral or their respective Affiliates, to the extent permitted by their Governing Instruments, as from time to time amended, or by any resolutions duly adopted by the Issuer, its Affiliates or any issuer of any obligations included in the Collateral or their respective Affiliates, pursuant to their respective Governing Instruments; provided, that in the reasonable judgment of the Servicer, such activity shall not have a material adverse effect on the enforceability of Collateral or the ability of the Issuer to comply with each Overcollateralization Ratio and each Interest Coverage Test; provided, further, that nothing in this paragraph shall be deemed to limit the duties of the Servicer set forth in Section 2 hereof;

(b) receive fees for services of any nature rendered to the issuer of any obligations included in the Collateral or their respective Affiliates; provided, that in the reasonable judgment of the Servicer, such activity shall not have a material adverse effect on the enforceability of Collateral or the ability of the Issuer to comply with each Coverage Test; and provided, further, that if any portion of such services are related to the purchase by the Issuer of any obligations included in the Collateral, the portion of such fees relating to such obligations shall be applied to the purchase price of such obligations; and

(c) be a secured or unsecured creditor of, or hold an equity interest in, the Issuer, its Affiliates or any issuer of any obligation included in the Collateral; provided, that in the reasonable judgment of the Servicer, such activity shall not have a material adverse effect on the enforceability of Collateral or the ability of the Issuer to comply with each Coverage Test; provided, further, that nothing in this paragraph shall be deemed to limit the duties of the Servicer set forth in Section 2 hereof.

It is understood that the Servicer and any of its Affiliates may engage in any other business and furnish servicing, investment management and advisory services to others, including Persons which may have policies similar to those followed by the Servicer with respect to the Collateral and which may own securities of the same class, or which are the same type, as the Collateral Obligations or other securities of the issuers of Collateral Obligations. The Servicer shall be free, in its sole discretion, to make recommendations to others, or effect transactions on behalf of itself or for others, which may be the same as or different from those effected with respect to the Collateral.

Unless the Servicer determines in its reasonable judgment that such purchase or sale is appropriate, the Servicer may refrain from directing the purchase or sale hereunder of securities issued by (i) Persons of which the Servicer, its Affiliates or any of its or their officers, directors or employees are directors or officers, (ii) Persons for which the Servicer or its Affiliates act as financial adviser or underwriter or (iii) Persons about which the Servicer or any of its Affiliates have information which the Servicer deems confidential or non-public or otherwise might prohibit it from trading such securities in accordance with applicable law. The Servicer shall not be obligated to have or pursue any particular strategy or opportunity with respect to the Collateral.

5. Conflicts of Interest.

(a) The Servicer shall not direct the Trustee to acquire an obligation to be included in the Collateral from the Servicer or any of its Affiliates as principal or to sell an obligation to the Servicer or any of its Affiliates as principal unless (i) the Issuer shall have received from the Servicer such information relating to such acquisition or sale as it may reasonably require and shall have approved such acquisition, which approval shall not be unreasonably withheld, (ii) in the commercially reasonable judgment of the Servicer, such transaction is on terms no less favorable than would be obtained in a transaction conducted on an arm's length basis between third parties unaffiliated with each other and (iii) such transaction is permitted by the United States Investment Advisers Act of 1940, as amended.

(b) The Servicer shall not direct the Trustee to acquire an obligation to be included in the Collateral directly from any account or portfolio for which the Servicer serves as servicer or investment adviser, or direct the Trustee to sell an obligation directly to any account or portfolio for which the Servicer serves as servicer or investment adviser unless such acquisition or sale is (i) in the commercially reasonable judgment of the Servicer, on terms no less favorable than would be obtained in a transaction conducted on an arm's length basis between third parties unaffiliated with each other and (ii) permitted by the United States Investment Advisers Act of 1940, as amended.

(c) In addition, the Servicer shall not undertake any transaction described in this Section 5 unless such transaction is exempt from the prohibited transaction rules of ERISA and Section 4975 of the Code.

6. Records; Confidentiality.

The Servicer shall maintain appropriate books of account and records relating to services performed hereunder, and such books of account and records shall be accessible for inspection by a representative of the Issuer, the Trustee, the Collateral Administrator, the Holders of the Securities and the Independent accountants appointed by the Issuer pursuant to the Indenture at a mutually agreed time during normal business hours and upon not less than three Business Days' prior notice. At no time shall the Servicer make a public announcement concerning the issuance of the Notes or the Preference Shares, the Servicer's role hereunder or any other aspect of the transactions contemplated by this Agreement and the other Transaction Documents. The Servicer shall keep confidential any and all information obtained in connection with the services rendered hereunder and shall not disclose any such information to non-affiliated third parties except (i) with the prior written consent of the Issuer, (ii) such information as either Rating Agency shall reasonably request in connection with the rating of any Class of Securities, (iii) as required by law, regulation, court order or the rules or regulations of any self regulating organization, body or official having jurisdiction over the Servicer, (iv) to its professional advisers, (v) such information as shall have been publicly disclosed other than in violation of this Agreement, or (vi) such information that was or is obtained by the Servicer on a non-confidential basis; provided, that the Servicer does not know or have reason to know of any breach by such source of any confidentiality obligations with respect thereto. For purposes of this Section 6, the Trustee, the Collateral Administrator and the Holders of the Securities shall in no event be considered "non-affiliated third parties."

Notwithstanding anything in this Agreement or the Indenture to the contrary, the Servicer, the Co-Issuers, the Trustee and the Holders of the Securities (and the beneficial owners thereof) (and each of their respective employees, representatives or other agents) may disclose to any and all Persons, without limitation of any kind, the U.S. tax treatment and U.S. tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to them relating to such U.S. tax treatment and U.S. tax structure, as such terms are defined under U.S. federal, state or local tax law.

7. Obligations of Servicer.

Unless otherwise specifically required by any provision of the Indenture or this Agreement or by applicable law, the Servicer shall use its best reasonable efforts to ensure that no action is taken by it, and shall not intentionally or with reckless disregard take any action, which would (a) materially adversely affect the Issuer or the Co-Issuer for purposes of Cayman Islands law, United States federal or state law or any other law known to the Servicer to be applicable to the Issuer or the Co-Issuer, (b) not be permitted under the Issuer's Memorandum and Articles of Association or the Co-Issuer's Certificate of Incorporation or By-Laws, (c) violate any law, rule or regulation of any governmental body or agency having jurisdiction over the Issuer or the Co-Issuer including, without limitation, any Cayman Islands or United States federal, state or other applicable securities law the violation of which has or could reasonably be expected to have a material adverse effect on the Issuer, the Co-Issuer or any of the Collateral, (d) require registration of the Issuer, the Co-Issuer or the pool of Collateral as an "investment company" under the Investment Company Act, (e) cause the Issuer or the Co-Issuer to violate the terms of the Indenture, including, without limitation, any representations made by the Issuer or Co-Issuer therein, or any other agreement contemplated by the Indenture or (f) not be permitted by Annex 1 hereto and would subject the Issuer to U.S. federal or state income or franchise taxation or cause the Issuer to be engaged in a trade or business in the United States for U.S. federal income tax purposes. The Servicer covenants that it shall comply in all material respects with all laws and regulations applicable to it in connection with the performance of its duties under this Agreement and the Indenture. Notwithstanding anything in this Agreement to the contrary, the Servicer shall not be required to take any action under this Agreement or the Indenture if such action would violate any applicable law, rule, regulation or court order.

8. Compensation.

(a) The Issuer shall pay to the Servicer, for services rendered and performance of its obligations under this Agreement, the Servicing Fee, which shall be payable in such amounts and at such times as set forth in the Indenture. The provisions of the Indenture which relate to the amount and payment of the Servicing Fee shall not be amended without the written consent of the Servicer. If on any Payment Date there are insufficient funds to pay the Servicing Fee (and/or any other amounts due and payable to the Servicer) in full, the amount not so paid shall be deferred and shall be payable on such later Payment Date on which funds are available therefor as provided in the Indenture.

With respect to any Payment Date, the Servicer may, in its sole discretion, at any time waive a portion (or all) of its Servicing Fees then due and payable. All waived amounts will be paid to the Class II Preference Shares as Class II Preference Share Special Payments pursuant to the Indenture. For purposes of any calculation under this Agreement and the Indenture, the Servicer shall be deemed to have received the Servicing Fee in an amount equal to the sum of the Servicing Fee actually paid to the Servicer and the amount distributed to the Holders of the Class II Preference Shares as Class II Preference Share Special Payments.

In addition, notwithstanding anything set out above, the Servicer may, in its sole discretion waive all or any portion of the Subordinated Servicing Fee or Supplemental Servicing Fee, any funds representing the waived Subordinated Servicing Fees and Supplemental Servicing Fees to be retained in the Collection Account for distribution as either Interest Proceeds or Principal Proceeds (as determined by the Servicer) pursuant to the Priority of Payments.

(b) The Servicer shall be responsible for the ordinary expenses incurred in the performance of its obligations under this Agreement, the Indenture and the other Transaction Documents; provided, however, that any extraordinary expenses incurred by the Servicer in the

performance of such obligations (including, but not limited to, any fees, expenses or other amounts payable to the Rating Agencies, the Collateral Administrator, the Trustee and the accountants appointed by the Issuer, the reasonable expenses incurred by the Servicer to employ outside lawyers or consultants reasonably necessary in connection with the evaluation, transfer or restructuring of any Collateral Obligation or other unusual matters arising in the performance of its duties under this Agreement and the Indenture, any reasonable expenses incurred by the Servicer in obtaining advice from outside counsel with respect to its obligations under this Agreement, brokerage commissions, transfer fees, registration costs, taxes and other similar costs and transaction related expenses and fees arising out of transactions effected for the Issuer's account and the portion allocated to the Issuer of any other fees and expenses that the Servicer customarily allocates among all of the funds or portfolios that it services or manages, including reasonable expenses incurred with respect to any compliance requirements, including, but not limited to, compliance with the requirements of the Sarbanes-Oxley Act, related solely to the ownership or holding of any Securities by HFP or any of its subsidiaries) shall be reimbursed by the Issuer to the extent funds are available therefor in accordance with and subject to the Priority of Payments and other limitations contained in the Indenture.

(c) If this Agreement is terminated pursuant to Section 12, Section 14 or otherwise, the fees payable to the Servicer shall be prorated for any partial periods between Payment Dates during which this Agreement was in effect and shall be due and payable on the first Payment Date following the date of such termination and on any subsequent Payment Dates to the extent remaining unpaid and in accordance with, and to the extent provided in, the Indenture.

9. Benefit of the Agreement.

The Servicer agrees that its obligations hereunder shall be enforceable at the instance of the Issuer, the Trustee, on behalf of the Noteholders, or the requisite percentage of Noteholders or the Holders of the Preference Shares, as applicable, as provided in the Indenture or the Preference Shares Paying Agency Agreement, as applicable.

10. Limits of Servicer Responsibility; Indemnification.

(a) The Servicer assumes no responsibility under this Agreement other than to render the services called for hereunder and under the terms of the other Transaction Documents made applicable to it pursuant to the terms of this Agreement in good faith and, subject to the standard of liability described in the next sentence, shall not be responsible for any action of the Issuer or the Trustee in following or declining to follow any advice, recommendation or direction of the Servicer. The Servicer, its directors, officers, stockholders, partners, agents and employees, and its Affiliates and their directors, officers, stockholders, partners, agents and employees, shall not be liable to the Issuer, the Co-Issuer, the Trustee, the Preference Shares Paying Agent, the Holders of the Securities or any other person, for any losses, claims, damages, judgments, assessments, costs or other liabilities (collectively, "Liabilities") incurred by the Issuer, the Co-Issuer, the Trustee, the Preference Shares Paying Agent, the Holders of the Securities or any other person, that arise out of or in connection with the performance by the Servicer of its duties under this Agreement and under the terms of the other Transaction Documents made applicable to it pursuant to the terms of this Agreement, except by reason of (i) acts or omissions constituting bad faith, willful misconduct, gross negligence or breach of fiduciary duty in the performance, or reckless disregard, of the obligations of the Servicer hereunder and under the terms of the other Transaction Documents made applicable to it pursuant to the terms of this Agreement or (ii) with respect to any information included in the Offering Memorandum in the section entitled "The Servicer" that contains any untrue statement of material fact or omits to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading (the preceding clauses (i) and (ii) collectively being the "Servicer Breaches"). For the

avoidance of doubt, the Servicer shall have no duty to independently investigate any laws not otherwise known to it in connection with its obligations under this Agreement, the Indenture and the other Transaction Documents. The Servicer shall be deemed to have satisfied the requirements of the Indenture and this Agreement relating to not causing the Issuer to be treated as engaged in a trade or business in the United States for U.S. federal income tax purposes (including as those requirements relate to the acquisition (including manner of acquisition), ownership, enforcement, and disposition of Collateral) to the extent the Servicer complies with the requirements set forth in Annex 1 hereto (unless the Servicer knows that as a result of a change in law the investment restrictions set forth in Annex 1 may no longer be relied upon).

(b) The Issuer shall indemnify and hold harmless (the Issuer in such case, the "Indemnifying Party") the Servicer, its directors, officers, stockholders, partners, agents and employees (such parties collectively in such case, the "Indemnified Parties") from and against any and all Liabilities, and shall reimburse each such Indemnified Party for all reasonable fees and expenses (including reasonable fees and expenses of counsel) (collectively, the "Expenses") as such Expenses are incurred in investigating, preparing, pursuing or defending any claim, action, proceeding or investigation with respect to any pending or threatened litigation (collectively, the "Actions"), caused by, or arising out of or in connection with, the issuance of the Securities, the transactions contemplated by the Offering Memorandum, the Indenture or this Agreement, and/or any action taken by, or any failure to act by, such Indemnified Party; provided, however, that no Indemnified Party shall be indemnified for any Liabilities or Expenses it incurs as a result of any acts or omissions by any Indemnified Party constituting Servicer Breaches. Notwithstanding anything contained herein to the contrary, the obligations of the Issuer under this Section 10 shall be payable solely out of the Collateral in accordance with, and subject to, the Priority of Payments and shall survive termination of this Agreement.

(c) With respect to any claim made or threatened against an Indemnified Party, or compulsory process or request or other notice of any loss, claim, damage or liability served upon an Indemnified Party, for which such Indemnified Party is or may be entitled to indemnification under this Section 10, such Indemnified Party shall (or with respect to Indemnified Parties that are directors, officers, stockholders, agents or employees of the Servicer, the Servicer shall cause such Indemnified Party to):

(i) give written notice to the Indemnifying Party of such claim within ten (10) days after such Indemnified Party's receipt of actual notice that such claim is made or threatened, which notice to the Indemnifying Party shall specify in reasonable detail the nature of the claim and the amount (or an estimate of the amount) of the claim; provided, however, that the failure of any Indemnified Party to provide such notice to the Indemnifying Party shall not relieve the Indemnifying Party of its obligations under this Section 10 unless the Indemnifying Party is materially prejudiced or otherwise forfeits rights or defenses by reason of such failure;

(ii) at the Indemnifying Party's expense, provide the Indemnifying Party such information and cooperation with respect to such claim as the Indemnifying Party may reasonably require, including, but not limited to, making appropriate personnel available to the Indemnifying Party at such reasonable times as the Indemnifying Party may request;

(iii) at the Indemnifying Party's expense, cooperate and take all such steps as the Indemnifying Party may reasonably request to preserve and protect any defense to such claim;

(iv) in the event suit is brought with respect to such claim, upon reasonable prior notice, afford to the Indemnifying Party the right, which the Indemnifying Party may exercise in its sole discretion and at its expense, to participate in the investigation, defense and settlement of such claim;

(v) neither incur any material expense to defend against nor release or settle any such claim or make any admission with respect thereto (other than routine or incontestable admissions or factual admissions the failure to make which would expose such Indemnified Party to unindemnified liability) nor permit a default or consent to the entry of any judgment in respect thereof, in each case without the prior written consent of the Indemnifying Party; and

(vi) upon reasonable prior notice, afford to the Indemnifying Party the right, in its sole discretion and at its sole expense, to assume the defense of such claim, including, but not limited to, the right to designate counsel reasonably acceptable to the Indemnified Party and to control all negotiations, litigation, arbitration, settlements, compromises and appeals of such claim; provided, that if the Indemnifying Party assumes the defense of such claim, it shall not be liable for any fees and expenses of counsel for any Indemnified Party incurred thereafter in connection with such claim except that if such Indemnified Party reasonably determines that counsel designated by the Indemnifying Party has a conflict of interest in connection with its representation of such Indemnified Party, such Indemnifying Party shall pay the reasonable fees and disbursements of one counsel (in addition to any local counsel) separate from its own counsel for all Indemnified Parties in connection with any one action or separate but similar or related actions in the same jurisdiction arising out of the same general allegations or circumstances; provided, further, that prior to entering into any final settlement or compromise, such Indemnifying Party shall seek the consent of the Indemnified Party and use its commercially reasonable efforts in the light of the then prevailing circumstances (including, without limitation, any express or implied time constraint on any pending settlement offer) to obtain the consent of such Indemnified Party as to the terms of settlement or compromise. If an Indemnified Party does not consent to the settlement or compromise within a reasonable time under the circumstances, the Indemnifying Party shall not thereafter be obligated to indemnify the Indemnified Party for any amount in excess of such proposed settlement or compromise.

(d) In the event that any Indemnified Party waives its right to indemnification hereunder, the Indemnifying Party shall not be entitled to appoint counsel to represent such Indemnified Party nor shall the Indemnifying Party reimburse such Indemnified Party for any costs of counsel to such Indemnified Party.

(e) The U.S. federal securities laws impose liabilities under certain circumstances on persons who act in good faith; accordingly, notwithstanding any other provision of this Agreement, nothing herein shall in any way constitute a waiver or limitation of any rights which the Issuer or the Holders of the Securities may have under any U.S. federal securities laws.

11. No Partnership or Joint Venture.

The Issuer and the Servicer are not partners or joint venturers with each other and nothing herein shall be construed to make them such partners or joint venturers or impose any liability as such on either of them. The Servicer's relation to the Issuer shall be deemed to be that of an independent contractor.

12. Term; Termination.

(a) This Agreement shall commence as of the date first set forth above and shall continue in force and effect until the first of the following occurs: (i) the payment in full of the Notes, the termination of the Indenture in accordance with its terms and the redemption in full of the Preference Shares; (ii) the liquidation of the Collateral and the final distribution of the proceeds of such liquidation to the Holders of the Securities; or (iii) the termination of this Agreement in accordance with subsection (b), (c), (d) or (e) of this Section 12 or Section 14 of this Agreement.

(b) Subject to Section 12(e) below, the Servicer may resign, upon 90 days' written notice to the Issuer (or such shorter notice as is acceptable to the Issuer). If the Servicer resigns, the Issuer agrees to appoint a successor servicer to assume such duties and obligations in accordance with Section 12(e).

(c) This Agreement shall be automatically terminated in the event that the Issuer determines in good faith that the Issuer or the pool of Collateral has become required to be registered under the provisions of the Investment Company Act, and the Issuer notifies the Servicer thereof.

(d) If this Agreement is terminated pursuant to this Section 12, neither party shall have any further liability or obligation to the other, except as provided in Sections 2(c)(i), 8, 10 and 15 of this Agreement.

(e) No removal or resignation of the Servicer shall be effective unless:

(i) (A) the Issuer appoints a successor servicer at the written direction of a Majority of the Preference Shares (excluding any Preference Shares held by the retiring Servicer, any of its Affiliates or any account over which the retiring Servicer or its Affiliates have discretionary voting authority other than, with respect to the Class II Preference Shares owned by HFP or its subsidiaries; provided that, with respect to the voting authority of Class II Preference Shares owned by HFP or any of its subsidiaries, such vote shall not be excluded only if such vote is determined by a vote of the majority of the "independent directors" (determined in accordance with the governing documents of HFP or such subsidiaries and certified in writing to the Preference Shares Paying Agent by any of the "independent directors" of HFP) of HFP or such subsidiaries) (each such non-excluded Preference Share, a "Voting Preference Share"), (B) such successor servicer has agreed in writing to assume all of the retiring Servicer's duties and obligations pursuant to this Agreement and the Indenture and (C) such successor servicer is not objected to within 30 days after notice of such succession by either (x) a Super Majority of the Controlling Class of Notes (excluding any Notes held by the retiring Servicer, its Affiliates or any account over which the retiring Servicer or its Affiliates have discretionary voting authority other than HFP; provided that, with respect to the voting authority of Notes owned by HFP or any of its subsidiaries, such vote shall not be excluded only if such vote is determined by a vote of the majority of the "independent directors" (determined in accordance with the governing documents of HFP or such subsidiaries and certified in writing to the Trustee by any of the "independent directors" of HFP) of HFP or such subsidiaries) (each such non-excluded Note, a "Voting Note") or (y) a Majority in Aggregate Outstanding Amount of the Voting Notes (voting as a single class); or

(ii) if a Majority of the Voting Preference Shares has nominated two or more successor servicers that have been objected to pursuant to the preceding clause (i)(C) or has failed to appoint a successor servicer that has not been objected to pursuant to the preceding clause (i)(C) within 60 days of the date of notice of such removal or resignation of the Servicer, (A) the Issuer appoints a successor servicer at the written direction of a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes), (B) such successor servicer has agreed in writing to assume all of the retiring Servicer's duties and obligations pursuant to this Agreement and the Indenture and (C) such successor servicer is not objected to within 30 days after notice of such succession by either (x) a Majority of the Voting Preference Shares (voting as a single class) or (y) a Majority in Aggregate Outstanding Amount of the Voting Notes (voting as a single class); provided, that if a Majority of the Voting Preference Shares and a Super Majority of the Controlling Class (excluding any Notes that are not Voting Notes) have each nominated two or more successor servicers that have been objected to pursuant to the preceding clauses (i)(C) and (ii)(C) or have otherwise failed to appoint a successor servicer that has not been objected to pursuant to the preceding clause (i)(C) or (ii)(C) within 120 days of the date of notice of such removal or resignation of the Servicer, (A) any Holder of the Controlling Class (excluding any Notes that are not Voting Notes), any Holder of Voting Preference Shares or the Trustee petitions a court of competent authority to appoint a successor servicer, (B) such court appoints a successor servicer and (C) such successor servicer has agreed in writing to assume all of the retiring Servicer's duties and obligations pursuant to this Agreement and the Indenture.

In addition, any successor servicer must be an established institution which (i) has demonstrated an ability to professionally and competently perform duties similar to those imposed upon the Servicer hereunder, (ii) is legally qualified and has the capacity to act as Servicer hereunder, as successor to the Servicer under this Agreement in the assumption of all of the responsibilities, duties and obligations of the Servicer hereunder and under the applicable terms of the Indenture, (iii) shall not cause the Issuer or the pool of Collateral to become required to register under the provisions of the Investment Company Act, (iv) shall perform its duties as successor servicer under this Agreement and the Indenture without causing the Issuer, the Co-Issuer or any Holder of Preference Shares to become subject to tax in any jurisdiction where such successor servicer is established as doing business and (v) each Rating Agency has confirmed that the appointment of such successor servicer shall not cause its then-current rating of any Class of Notes to be reduced or withdrawn. No compensation payable to a successor servicer from payments on the Collateral shall be greater than that paid to the retiring Servicer without the prior written consent of a Super Majority of the Controlling Class of Notes, a Majority of the Noteholders and a Majority of the Preference Shares. The Issuer, the Trustee and the successor servicer shall take such action (or cause the retiring Servicer to take such action) consistent with this Agreement and the terms of the Indenture applicable to the Servicer, as shall be necessary to effectuate any such succession.

(f) In the event of removal of the Servicer pursuant to this Agreement, the Issuer shall have all of the rights and remedies available with respect thereto at law or equity, and, without limiting the foregoing, the Issuer or, to the extent so provided in the Indenture, the Trustee may by notice in writing to the Servicer as provided under this Agreement terminate all the rights and obligations of the Servicer under this Agreement (except those that survive termination pursuant to Section 12(d) above). Upon expiration of the applicable notice period with respect to termination specified in this Section 12 or Section 14 of this Agreement, as applicable, all authority and power of the Servicer under this Agreement, whether with respect to the Collateral or otherwise, shall automatically and without further action by any person or entity pass to and be vested in the successor servicer upon the appointment thereof.

13. Delegation; Assignments.

This Agreement, and any obligations or duties of the Servicer hereunder, shall not be delegated by the Servicer, in whole or in part, except to any entity that (i) is controlled by any of James Dondero, Mark Okada and Todd Travers and (ii) is one in which any of James Dondero, Mark Okada and Todd Travers is involved in the day to day management and operations (and in any such case pursuant to an instrument of delegation in form and substance satisfactory to the Issuer), without the prior written consent of the Issuer, a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) and a Majority of the Voting Preference Shares and, notwithstanding any such consent, no delegation of obligations or duties by the Servicer (including, without limitation, to an entity described above) shall relieve the Servicer from any liability hereunder.

Subject to Section 12, any assignment of this Agreement to any Person, in whole or in part, by the Servicer shall be deemed null and void unless (i) such assignment is consented to in writing by the Issuer, a Majority of Noteholders and the Holders of a Majority of the Preference Shares (excluding Notes and Preference Shares held by the Servicer or any of its Affiliates other than HFP) and (ii) the Rating Condition is satisfied with respect to any such assignment. Any assignment consented to by the Issuer, a Majority of Noteholders and the Holders of Preference Shares shall bind the assignee hereunder in the same manner as the Servicer is bound. In addition, the assignee shall execute and deliver to the Issuer and the Trustee a counterpart of this Agreement naming such assignee as Servicer. Upon the execution and delivery of such a counterpart by the assignee and consent thereto by the Issuer, a Majority of Noteholders and the Holders of the Preference Shares, the Servicer shall be released from further obligations pursuant to this Agreement, except with respect to its obligations arising under Section 10 of this Agreement prior to such assignment and except with respect to its obligations under Sections 2(c)(i) and 15 hereof. This Agreement shall not be assigned by the Issuer without the prior written consent of the Servicer and the Trustee, except in the case of assignment by the Issuer to (i) an entity which is a successor to the Issuer permitted under the Indenture, in which case such successor organization shall be bound hereunder and by the terms of said assignment in the same manner as the Issuer is bound thereunder or (ii) the Trustee as contemplated by the Indenture. In the event of any assignment by the Issuer, the Issuer shall cause its successor to execute and deliver to the Servicer such documents as the Servicer shall consider reasonably necessary to effect fully such assignment. The Servicer hereby consents to the matters set forth in Article 15 of the Indenture.

14. Termination by the Issuer for Cause.

Subject to Section 12(e) above, this Agreement shall be terminated and the Servicer shall be removed by the Issuer for cause upon 10 days' prior written notice to the Servicer and upon written notice to the Holders of the Securities as set forth below, but only if directed to do so by the Trustee acting at the direction of (1) a Super Majority of the Controlling Class of Notes (excluding any Notes that are not Voting Notes) or (2) a Majority of the Voting Preference Shares (excluding any Preference Shares that are not Voting Preference Shares). For purposes of determining "cause" with respect to any such termination of this Agreement, such term shall mean any one of the following events:

(a) the Servicer willfully breaches in any respect, or takes any action that it knows violates in any respect, any provision of this Agreement or any terms of the Indenture applicable to it;

(b) the Servicer breaches in any material respect any provision of this Agreement or any terms of the Indenture or the Collateral Administration Agreement applicable to it, or any representation, warranty, certification or statement given in writing by the Servicer shall prove to have been incorrect in any material respect when made or given, and the Servicer fails to cure such breach

or take such action so that the facts (after giving effect to such action) conform in all material respects to such representation, warranty, certificate or statement, in each case within 30 days of becoming aware of, or receiving notice from, the Trustee of, such breach or materially incorrect representation, warranty, certificate or statement;

(c) the Servicer is wound up or dissolved (other than a dissolution in which the remaining members elect to continue the business of the Servicer in accordance with its Governing Instruments) or there is appointed over it or a substantial portion of its assets a receiver, administrator, administrative receiver, trustee or similar officer, or the Servicer (i) ceases to be able to, or admits in writing its inability to, pay its debts as they become due and payable, or makes a general assignment for the benefit of or enters into any composition or arrangement with, its creditors generally; (ii) applies for or consents (by admission of material allegations of a petition or otherwise) to the appointment of a receiver, trustee, assignee, custodian, liquidator or sequestrator (or other similar official) of the Servicer or of any substantial part of its properties or assets, or authorizes such an application or consent, or proceedings seeking such appointment are commenced without such authorization, consent or application against the Servicer and continue undismissed for 60 days; (iii) authorizes or files a voluntary petition in bankruptcy, or applies for or consents (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, arrangement, readjustment of debt, insolvency or dissolution, or authorizes such application or consent, or proceedings to such end are instituted against the Servicer without such authorization, application or consent and are approved as properly instituted and remain undismissed for 60 days or result in adjudication of bankruptcy or insolvency; or (iv) permits or suffers all or any substantial part of its properties or assets to be sequestered or attached by court order and the order remains undismissed for 60 days;

(d) the occurrence of any Event of Default under the Indenture that results from any breach by the Servicer of its duties under the Indenture or this Agreement, which breach or default is not cured within any applicable cure period; or

(e) (x) the occurrence of an act by the Servicer related to its activities in any servicing, securities, financial advisory or other investment business that constitutes fraud, (y) the Servicer being indicted, or any of its principals being convicted, of a felony criminal offense related to its activities in any servicing, securities, financial advisory or other investment business or (z) the Servicer being indicted for, adjudged liable in a civil suit for, or convicted of a violation of the Securities Act or any other United States Federal securities law or any rules or regulations thereunder.

If any of the events specified in this Section 14 shall occur, the Servicer shall give prompt written notice thereof to the Issuer, the Trustee and the Holders of all outstanding Notes and Preference Shares upon the Servicer's becoming aware of the occurrence of such event.

15. Action Upon Termination.

(a) From and after the effective date of termination of this Agreement, the Servicer shall not be entitled to compensation for further services hereunder, but shall be paid all compensation accrued to the date of termination, as provided in Section 8 hereof, and shall be entitled to receive any amounts owing under Section 10 hereof. Upon the effective date of termination of this Agreement, the Servicer shall as soon as practicable:

(i) deliver to the Issuer all property and documents of the Trustee or the Issuer or otherwise relating to the Collateral then in the custody of the Servicer; and

(ii) deliver to the Trustee and the Preference Shares Paying Agent an accounting with respect to the books and records delivered to the Trustee and the Preference Shares Paying Agent or the successor servicer appointed pursuant to Section 12(e) hereof.

Notwithstanding such termination, the Servicer shall remain liable to the extent set forth herein (but subject to Section 10 hereof) for its acts or omissions hereunder arising prior to termination and for any expenses, losses, damages, liabilities, demands, charges and claims (including reasonable attorneys' fees) in respect of or arising out of a breach of the representations and warranties made by the Servicer in Section 16(b) hereof or from any failure of the Servicer to comply with the provisions of this Section 15.

(b) The Servicer agrees that, notwithstanding any termination of this Agreement, it shall reasonably cooperate in any Proceeding arising in connection with this Agreement, the Indenture or any of the Collateral (excluding any such Proceeding in which claims are asserted against the Servicer or any Affiliate of the Servicer) upon receipt of appropriate indemnification and expense reimbursement.

16. Representations and Warranties.

(a) The Issuer hereby represents and warrants to the Servicer as follows:

(i) The Issuer has been duly incorporated and is validly existing under the laws of the Cayman Islands, has full power and authority to own its assets and the securities proposed to be owned by it and included in the Collateral and to transact the business in which it is presently engaged and is duly qualified under the laws of each jurisdiction where its ownership or lease of property or the conduct of its business requires, or the performance of its obligations under this Agreement, the Indenture or the Securities would require, such qualification, except for failures to be so qualified, authorized or licensed that would not in the aggregate have a material adverse effect on the business, operations, assets or financial condition of the Issuer.

(ii) The Issuer has full power and authority to execute, deliver and perform its obligations pursuant to this Agreement, the other Transaction Documents and the Securities and all obligations required hereunder and thereunder and has taken all necessary action to authorize this Agreement, the other Transaction Documents and the Securities on the terms and conditions hereof and thereof and the execution by the Issuer, delivery and performance of its obligations pursuant to this Agreement, the other Transaction Documents and the Securities and the performance of all obligations imposed upon it hereunder and thereunder. No consent of any other person including, without limitation, shareholders and creditors of the Issuer, and no license, permit, approval or authorization of, exemption by, notice or report to, or registration, filing or declaration with, any governmental authority, other than those that may be required under state securities or "blue sky" laws and those that have been or shall be obtained in connection with the other Transaction Documents and the Securities is required by the Issuer in connection with this Agreement, the other Transaction Documents and the Securities or the execution, delivery, performance, validity or enforceability of this Agreement, the other Transaction Documents and the Securities or the obligations imposed upon it hereunder or thereunder. This Agreement constitutes, and each instrument or document required hereunder, when executed and delivered hereunder, shall constitute, the legally valid and binding obligation of the Issuer enforceable against

the Issuer in accordance with its terms, subject to (a) the effect of bankruptcy, insolvency or similar laws affecting generally the enforcement of creditors' rights and (b) general equitable principles.

(iii) The execution by the Issuer, delivery and performance of this Agreement and the documents and instruments required hereunder shall not violate any provision of any existing law or regulation binding on the Issuer, or any order, judgment, award or decree of any court, arbitrator or governmental authority binding on the Issuer, or the Governing Instruments of, or any securities issued by, the Issuer or of any mortgage, indenture, lease, contract or other agreement, instrument or undertaking to which the Issuer is a party or by which the Issuer or any of its assets may be bound, the violation of which would have a material adverse effect on the business, operations, assets or financial condition of the Issuer, and shall not result in or require the creation or imposition of any lien on any of its property, assets or revenues pursuant to the provisions of any such mortgage, indenture, lease, contract or other agreement, instrument or undertaking (other than the lien of the Indenture).

(iv) The Issuer is not in violation of its Governing Instruments or in breach or violation of or in default under the Indenture or any contract or agreement to which it is a party or by which it or any of its assets may be bound, or any applicable statute or any rule, regulation or order of any court, government agency or body having jurisdiction over the Issuer or its properties, the breach or violation of which or default under which would have a material adverse effect on the validity or enforceability of this Agreement or the performance by the Issuer of its duties hereunder.

(v) True and complete copies of the Indenture and the Issuer's Governing Instruments have been delivered to the Servicer.

The Issuer agrees to deliver a true and complete copy of each amendment to the documents referred to in Section 16(a)(v) above to the Servicer as promptly as practicable after its adoption or execution.

(b) The Servicer hereby represents and warrants to the Issuer as follows:

(i) The Servicer is a limited partnership duly organized and validly existing and in good standing under the laws of the State of Delaware, has full power and authority to own its assets and to transact the business in which it is currently engaged and is duly qualified and in good standing under the laws of each jurisdiction where its ownership or lease of property or the conduct of its business requires, or the performance of this Agreement would require such qualification, except for those jurisdictions in which the failure to be so qualified, authorized or licensed would not have a material adverse effect on the business, operations, assets or financial condition of the Servicer or on the ability of the Servicer to perform its obligations under, or on the validity or enforceability of, this Agreement and the provisions of the other Transaction Documents applicable to the Servicer.

(ii) The Servicer has full power and authority to execute, deliver and perform this Agreement and all obligations required hereunder and under the provisions of the other Transaction Documents applicable to the Servicer, and has taken all necessary action to authorize this Agreement on the terms and conditions hereof and the execution, delivery and performance of this Agreement and all obligations required

hereunder and under the terms of the other Transaction Documents applicable to the Servicer. No consent of any other person, including, without limitation, creditors of the Servicer, and no license, permit, approval or authorization of, exemption by, notice or report to, or registration, filing or declaration with, any governmental authority is required by the Servicer in connection with this Agreement or the execution, delivery, performance, validity or enforceability of this Agreement or the obligations required hereunder or under the terms of the other Transaction Documents applicable to the Servicer. This Agreement has been, and each instrument and document required hereunder or under the terms of the other Transaction Documents applicable to the Servicer shall be, executed and delivered by a duly authorized partner of the Servicer, and this Agreement constitutes, and each instrument and document required hereunder or under the terms of the other Transaction Documents applicable to the Servicer when executed and delivered by the Servicer hereunder or under the terms of the other Transaction Documents applicable to the Servicer shall constitute, the valid and legally binding obligations of the Servicer enforceable against the Servicer in accordance with their terms, subject to (a) the effect of bankruptcy, insolvency or similar laws affecting generally the enforcement of creditors' rights and (b) general equitable principles.

(iii) The execution, delivery and performance of this Agreement and the terms of the other Transaction Documents applicable to the Servicer and the documents and instruments required hereunder or under the terms of the other Transaction Documents applicable to the Servicer shall not violate or conflict with any provision of any existing law or regulation binding on or applicable to the Servicer, or any order, judgment, award or decree of any court, arbitrator or governmental authority binding on the Servicer, or the Governing Instruments of, or any securities issued by the Servicer or of any mortgage, indenture, lease, contract or other agreement, instrument or undertaking to which the Servicer is a party or by which the Servicer or any of its assets may be bound, the violation of which would have a material adverse effect on the business, operations, assets or financial condition of the Servicer or its ability to perform its obligations under this Agreement and the provisions of the other Transaction Documents applicable to the Servicer, and shall not result in or require the creation or imposition of any lien on any of its material property, assets or revenues pursuant to the provisions of any such mortgage, indenture, lease, contract or other agreement, instrument or undertaking.

(iv) There is no charge, investigation, action, suit or proceeding before or by any court pending or, to the best knowledge of the Servicer, threatened that, if determined adversely to the Servicer, would have a material adverse effect upon the performance by the Servicer of its duties under, or on the validity or enforceability of, this Agreement and the provisions of the other Transaction Documents applicable to the Servicer.

(v) The Servicer is a registered investment adviser under the Investment Advisers Act.

(vi) The Servicer is not in violation of its Governing Instruments or in breach or violation of or in default under any contract or agreement to which it is a party or by which it or any of its property may be bound, or any applicable statute or any rule, regulation or order of any court, government agency or body having jurisdiction over the Servicer or its properties, the breach or violation of which or default under which would have a material adverse effect on the validity or enforceability of this Agreement

or the provisions of the other Transaction Documents applicable to the Servicer, or the performance by the Servicer of its duties hereunder.

17. Notices.

Unless expressly provided otherwise herein, all notices, requests, demands and other communications required or permitted under this Agreement shall be in writing (including by telecopy) and shall be deemed to have been duly given, made and received when delivered against receipt or upon actual receipt of registered or certified mail, postage prepaid, return receipt requested, or, in the case of telecopy notice, when received in legible form, addressed as set forth below:

(a) If to the Issuer:

Aberdeen Loan Funding, Ltd.
c/o Walkers SPV Limited
Walker House
87 Mary Street
George Town, Grand Cayman, KY1-9002, Cayman Islands
Telephone: (345) 945-3727
Telecopy: (345) 945-4757
Attention: The Directors

(b) If to the Servicer:

Highland Capital Management, L.P.
Two Galleria Tower
13455 Noel Road, Suite 1300
Dallas, Texas 75240
Telephone: (972) 628-4100
Telecopy: (972) 628-4147
Attention: James Dondero

(c) If to the Trustee:

State Street Bank and Trust Company
200 Clarendon Street
Mail Code: EUC-108
Boston, Massachusetts 02116
Telecopy: (617) 351-4358
Attention: CDO Services Group

(d) If to the Noteholders:

In accordance with Section 14.3 of the Indenture, at their respective addresses set forth on the Note Register.

(e) If to the Holders of the Preference Shares:

In accordance with Section 14.3 of the Indenture, to the Preference Shares Paying Agent at the address identified therein.

(f) if to the Rating Agencies:

In accordance with Section 14.3 of the Indenture, to the Rating Agencies at the address identified therein.

Any party may alter the address or telecopy number to which communications or copies are to be sent by giving notice of such change of address in conformity with the provisions of this Section 17 for the giving of notice.

18. Binding Nature of Agreement; Successors and Assigns.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and permitted assigns as provided herein. The Servicer hereby consents to the collateral assignment of this Agreement as provided in the Indenture and further agrees that the Trustee may enforce the Servicer's obligations hereunder.

19. Entire Agreement.

This Agreement contains the entire agreement and understanding among the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements, understandings, inducements and conditions, express or implied, oral or written, of any nature whatsoever with respect to the subject matter hereof. The express terms hereof control and supersede any course of performance and/or usage of the trade inconsistent with any of the terms hereof. This Agreement may not be modified or amended other than by an agreement in writing executed by the parties hereto and in accordance with the terms of Section 15.1(h) of the Indenture.

20. Conflict with the Indenture.

Subject to the last two sentences of Section 2(a)(i), in the event that this Agreement requires any action to be taken with respect to any matter and the Indenture requires that a different action be taken with respect to such matter, and such actions are mutually exclusive, the provisions of the Indenture in respect thereof shall control.

21. Priority of Payments.

The Servicer agrees that the payment of all amounts to which it is entitled pursuant to this Agreement and the Indenture shall be due and payable only in accordance with the priorities set forth in the Indenture and only to the extent funds are available for such payments in accordance with such priorities.

22. Governing Law.

THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE STATE OF NEW YORK, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION.

23. Indulgences Not Waivers.

Neither the failure nor any delay on the part of any party hereto to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or

partial exercise of any right, remedy, power or privilege preclude any other or further exercise of the same or of any other right, remedy, power or privilege, nor shall any waiver of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and is signed by the party asserted to have granted such waiver.

24. Costs and Expenses.

Except as may otherwise be agreed in writing, the costs and expenses (including the fees and disbursements of counsel and accountants) incurred by each party in connection with the negotiation and preparation of and the execution of this Agreement, and all matters incident thereto, shall be borne by such party.

25. Titles Not to Affect Interpretation.

The titles of paragraphs and subparagraphs contained in this Agreement are for convenience only, and they neither form a part of this Agreement nor are they to be used in the construction or interpretation hereof.

26. Execution in Counterparts.

This Agreement may be executed in any number of counterparts by facsimile or other written form of communication, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

27. Provisions Separable.

In case any provision in this Agreement shall be invalid, illegal or unenforceable as written, such provision shall be construed in the manner most closely resembling the apparent intent of the parties with respect to such provision so as to be valid, legal and enforceable; provided, however, that if there is no basis for such a construction, such provision shall be ineffective only to the extent of such invalidity, illegality or unenforceability and, unless the ineffectiveness of such provision destroys the basis of the bargain for one of the parties to this Agreement, the validity, legality and enforceability of the remaining provisions hereof or thereof shall not in any way be affected or impaired thereby.

28. Number and Gender.

Words used herein, regardless of the number and gender specifically used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context requires.

29. Written Disclosure Statement.

The Issuer and the Trustee acknowledge receipt of Part II of the Servicer's Form ADV filed with the Securities and Exchange Commission, as required by Rule 204-3 under the Investment Advisers Act, more than 48 hours prior to the date of execution of this Agreement.

30. Miscellaneous.

(a) In the event that any vote is solicited with respect to any Collateral Obligation, the Servicer, on behalf of the Issuer, shall vote or refrain from voting any such security in any manner permitted by the Indenture that the Servicer has determined in its reasonable judgment shall be in the best interests of the Holders of the Securities. In addition, with respect to any Defaulted Collateral Obligation, the Servicer, on behalf of the Issuer, may instruct the trustee for such Defaulted Collateral Obligation to enforce the Issuer's rights under the Underlying Instruments governing such Defaulted Collateral Obligation and any applicable law, rule or regulation in any manner permitted under the Indenture that the Servicer has determined in its reasonable judgment shall be in the best interests of the Holders of the Securities. In the event any Offer is made with respect to any Collateral Obligation, the Servicer, on behalf of the Issuer, may take such action as is permitted by the Indenture and that the Servicer has determined in its reasonable judgment shall be in the best interests of the Holders of the Securities.

(b) In connection with taking or omitting any action under the Indenture or this Agreement, the Servicer may consult with counsel and may rely in good faith on the advice of such counsel or any opinion of counsel.

Any corporation, partnership or limited liability company into which the Servicer may be merged or converted or with which it may be consolidated, or any corporation, partnership or limited liability company resulting from any merger, conversion or consolidation to which the Servicer shall be a party, or any corporation, partnership or limited liability company succeeding to all or substantially all of the asset servicing and collateral management business of the Servicer, shall be the successor to the Servicer without any further action by the Servicer, the Co-Issuers, the Trustee, the Preference Shares Paying Agent , the Holders of the Securities or any other person or entity.

31. Limitation of Liabilities.

The Issuer's obligations hereunder are solely the corporate obligations of the Issuer and the Servicer shall not have any recourse to any of the directors, officers, shareholders, members or incorporators of the Issuer with respect to any claims, losses, damages, liabilities, indemnities or other obligations in connection with any transactions contemplated hereby. The obligations of the Issuer hereunder shall be limited to the net proceeds of the Collateral, if any, and following realization of the Collateral and its application in accordance with the Indenture, any outstanding obligations of the Issuer hereunder shall be extinguished and shall not thereafter revive. The provisions of this section shall survive termination of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as Servicer

BY: STRAND ADVISORS, INC.,
as General Partner

By:_____
Name:
Title:

ABERDEEN LOAN FUNDING, LTD.,
as Issuer

By:_____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as Servicer

BY: STRAND ADVISORS, INC.,
as General Partner

By:_____
Name:
Title:

ABERDEEN LOAN FUNDING, LTD.,
as Issuer

By:
Name: John Cullinane
Title: Director

ANNEX 1

Certain Asset Acquisition Provisions

Unless otherwise noted, references to the Issuer in this Annex 1 include the Servicer and any other person acting on the Issuer's behalf. Capitalized terms used but not defined herein will have the meanings ascribed to them in the Indenture.

For purposes of this Annex 1,

"Affiliate" means, with respect to a specified Person, (a) any other Person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the specified Person and (b) any Person that is a member, director, officer or employee of (i) the specified Person or (ii) a Person described in clause (a) of this definition; and

"Person" means an individual, a corporation, a limited liability company, a partnership, an association, a trust or any other entity or organization, including a government or political subdivision or an agency or instrumentality thereof.

Section I. General Investment Restrictions.

Except as may otherwise be provided in this Annex 1, the Issuer (and the Servicer acting on the Issuer's behalf) shall only purchase debt securities, interests in loans and other assets (each a "Portfolio Obligation") only in secondary-market transactions and shall not engage in any lending or underwriting activities or otherwise participate in the structuring or origination of any Portfolio Obligation.

A. Communications and Negotiations.

1. The Issuer will not have any communications or negotiations with the obligor of a Portfolio Obligation or a Reference Obligation (directly or indirectly through an intermediary such as the seller of such Portfolio Obligation or the Synthetic Security) in connection with the issuance or funding of such Portfolio Obligation or Reference Obligation or commitments with respect thereto, except for communications of an immaterial nature or customary due diligence communications; provided, that the Servicer may provide comments as to mistakes or inconsistencies in loan documents (including with respect to any provisions that are inconsistent with the terms and conditions of purchase of the loan by the Issuer).

2. By way of example, permitted due diligence activities may include, but are not limited to, (a) attendance at an obligor's general "roadshow" or other presentations to investment professionals, (b) direct private discussions with personnel of the obligor, arranged by a sponsor, lead bank or other arranger, and (c) other due diligence activities of the kind customarily performed by offerees of the type of Portfolio Obligation being offered, but may not include any negotiations

with the obligor, employees or agents of the obligor of any terms or conditions of the Portfolio Obligation being offered.

3. Negotiations between the Servicer and the underwriter, placement agent or broker of a Portfolio Obligation are permitted solely to the extent that they are limited to responses to customary pre-offering period and offering period inquiries by the underwriter or placement agent (e.g., "If we offered you 10-year senior subordinated bonds of XYZ company, what spread would it require to interest you?" or "If you will not buy the bonds as offered, would you buy if we convinced the obligor to add a fixed charge coverage test?"). For purposes of this Section I.A., "negotiations" shall not include (i) commenting on offering documents to an unrelated underwriter or placement agent when the ability to comment was generally available to other offerees, or (ii) communicating certain objective criteria (such as the minimum yield or maturity) the Issuer generally uses in purchasing the relevant type of Portfolio Obligation.

4. The Issuer may consent or otherwise act with respect to amendments, supplements or other modifications of the terms of any Portfolio Obligation (other than a Subsidiary Obligation (as defined in Section III)) requiring consent or action after the date on which any such Portfolio Obligation is acquired by the Issuer if (a) such amendment, supplement or modification would not constitute a Significant Modification (as defined below), (b) (i) in the reasonable judgment of the Servicer, the obligor is in financial distress and such change in terms is desirable to protect the Issuer's interest and (ii) the Portfolio Obligation is described in clause 5(b) of this Section I.A., (c) the amendment or modification would not be treated as the acquisition of a new Portfolio Obligation under paragraph 5 of this Section I.A., or (d) otherwise, if it has received advice of counsel that its involvement in such amendment, supplement or modification will not cause the Issuer to be treated as engaged in a trade or business within the United States.

A "Significant Modification" means any amendment, supplement or other modification that involves (a) a change in the stated maturity or a change in the timing of any material payment of any Portfolio Obligation (including deferral of an interest payment), that would materially alter the weighted average life of the Portfolio Obligation, (b) any change (whether positive or negative) in the yield on the Portfolio Obligation immediately prior to the modification in excess of the greater of (i) 25 basis points or (ii) 5 percent of such unmodified yield, (c) any change involving a material new extension of credit, (d) a change in the obligor of any Portfolio Obligation, or (e) a material change in the collateral or security for any Portfolio Obligation, including the addition or deletion of a co-obligor or guarantor that results in a material change in payment expectations (all as determined for purposes of section 1001 of the Code).

5. In the event the Issuer owns an interest in a Portfolio Obligation the terms of which are subsequently amended or modified, or in the case of a workout situation not described in Section III hereof, which Portfolio Obligation is

subsequently exchanged for new obligations or other securities of the obligor of the Portfolio Obligation, such amendments or modifications or exchange will not be treated as the acquisition of an interest in a new Portfolio Obligation for purposes of this Annex 1, provided, that (a) the Issuer does not, directly or indirectly (through the Servicer or otherwise), seek the amendments or modifications or the exchange, or participate in negotiating the amendments or modifications or the exchange, and (b) at the time of original acquisition of the interest in the Portfolio Obligation, it was not reasonably anticipated that the terms of the Portfolio Obligation would, pursuant to a workout or other negotiation, subsequently be amended or modified.

B. Fees. The Issuer will not earn or receive from any Person any fee or other compensation for services, however denominated, in connection with its purchase or sale of a Portfolio Obligation or entering into a Synthetic Security; the foregoing prohibition shall not be construed to preclude the Issuer from receiving (i) commitment fees, facility maintenance fees or other similar fees that are received by the Issuer in connection with revolving or delayed drawdown Loans or synthetic or pre-funded letter of credit Loans; (ii) yield maintenance and prepayment penalty fees; (iii) fees on account of the Issuer's consenting to amendments, waivers or other modifications of the terms of any Portfolio Obligations; (iv) fees from permitted securities lending; or (v) upfront payments in lieu of periodic payments under a Synthetic Security. The Issuer will not provide services to any Person; the foregoing prohibition shall not be construed to preclude the Issuer from activities relating to the receipt of income described in (i) through (v) of the preceding sentence.

Section II. Loans and Forward Purchase Commitments.

A. Any understanding or commitment to purchase a loan, a participation, or a loan subparticipation (collectively, "Loans") from a seller before completion of the closing and full funding of the Loan by such seller shall only be made pursuant to a forward sale agreement at an agreed price (stated as a dollar amount or as a percentage) (a "Forward Purchase Commitment"), unless such an understanding or commitment is not legally binding and neither the Issuer nor the Servicer is economically compelled (e.g., would otherwise be subject to a significant monetary penalty) to purchase the Loan following the completion of the closing and full funding of the Loan (i.e., the Servicer will make an independent decision whether to purchase such Loan on behalf of the Issuer after completion of the closing of the Loan) (a "Non-Binding Agreement").

B. No Forward Purchase Commitment or Non-Binding Agreement shall be made until after the seller (or a transferor to such seller of such Loan) has made a legally binding commitment to fully fund such Loan to the obligor thereof (subject to customary conditions), which commitment cannot be conditioned on the Issuer's ultimate purchase of such Loan from such seller.

C. In the event of any reduced or eliminated funding, the Issuer shall not receive any premium, fee, or other compensation in connection with having entered into the Forward Purchase Commitment or Non-Binding Agreement.

D. The Issuer shall not close any purchase of a Loan subject to a Forward Purchase Commitment or a Non-Binding Agreement earlier than 48 hours after the time of the closing of the Loan (i.e., execution of definitive documentation), and, in the case of a Forward Purchase Commitment, the Issuer's obligation to purchase such Loan is subject to the condition that no material adverse change has occurred in the financial condition of the Loan's obligor or the relevant market on or before the relevant purchase date.

E. The Issuer cannot have a contractual relationship with the obligor with respect to a Loan until the Issuer actually purchases the Loan.

F. The Issuer cannot be a signatory on the original lending agreement, and cannot be obligated to fund an assignment of or a participation in a Loan, prior to the time specified in subsection D above.

G. In addition to the restrictions otherwise applicable to Loans, the Issuer shall not acquire any synthetic or pre-funded letter of credit Loan unless (1) the cash collateral deposit with respect to such Loan was fully funded by a predecessor in interest with respect to such Loan; (2) the Loan is part of a credit facility that includes another Loan (other than a synthetic or pre-funded letter of credit Loan) to the same obligor, and is being acquired in connection with the acquisition of such other Loan and from the same seller as such other Loan, with the intent to hold both parts and with the amount of the other Loan being significantly in excess of the amount of the synthetic or pre-funded letter of credit Loan; (3) such synthetic or pre-funded letter of credit Loan satisfies the requirements set forth in Section VI.B., treating the synthetic or pre-funded letter of credit Loan, for this purpose, as though it were a delayed drawdown or revolving Loan; and (4) at no time may more than 5% of the aggregate principal amount of Portfolio Obligations consist of synthetic or pre-funded letter of credit Loans.

Section III. Distressed Debt

A. The Issuer may only purchase a Debt Instrument that is a Potential Workout Obligation to the extent permitted by this Section III.

B. Neither the Issuer nor the Servicer on behalf of the Issuer shall purchase a Subsidiary Obligation from any Issuer Subsidiary.

C. Special Procedures for Subsidiary Obligations.

1. Potential Workout Obligations. On or prior to the date of acquisition, the Servicer on behalf of the Issuer shall identify each Portfolio Obligation that is a Potential Workout Obligation.

2. Transfer of Subsidiary Obligations. From and after the occurrence of a Workout Determination Date with respect to a Subsidiary Obligation, neither the Issuer nor the Servicer on behalf of the Issuer shall knowingly take any action in respect of such Subsidiary Obligation that may result in the Issuer being engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes. As soon as practicable, but in any event within

30 calendar days following a Workout Determination Date, the Servicer shall cause the Issuer either (i) to sell or dispose of any Subsidiary Obligation identified on such Workout Determination Date to a Person that is not an Affiliate of the Issuer or Servicer or (ii) to assign any Subsidiary Obligation identified on such Workout Determination Date to an Issuer Subsidiary.

For purposes of this Annex 1, an "Issuer Subsidiary" means any wholly-owned corporate subsidiary of the Issuer to which a Special Workout Obligation may be transferred in accordance with this Annex 1.

3. Consideration for Assignment of Subsidiary Obligations. Consideration given by an Issuer Subsidiary for the assignment to it of Subsidiary Obligations may be in the form of cash or in the form of indebtedness of, or equity interests in, such Issuer Subsidiary.

4. Classification of Issuer Subsidiaries. Each Issuer Subsidiary shall be an entity treated as a corporation for United States federal income tax purposes.

As used herein:

"Potential Workout Obligation" means any debt instrument (any such instrument, including an interest in a Loan, a "Debt Instrument") which, as of the date of acquisition by the Issuer or an Issuer Subsidiary, based on information specific to such Debt Instrument or the circumstances of the obligor thereof, is a Workout Obligation or, in the reasonable determination of the Servicer, has a materially higher likelihood of becoming a Workout Obligation as compared to debt obligations that par or other non-distressed debt purchasers or funds relating to that asset type customarily purchase and expect to hold to maturity.

"Subsidiary Obligation" means any Potential Workout Obligation (a) as to which the Issuer on any Workout Determination Date either (i) owns more than 40% of the aggregate principal amount of such class of Potential Workout Obligation outstanding or (ii) is one of the two largest holders of any class of debt of the obligor of such Potential Workout Obligation (based on the outstanding principal amount of such class of debt owned by the Issuer as a percentage of the aggregate outstanding principal amount of such class of debt) unless not fewer than three other holders and the Issuer collectively own at least 65% of such class of debt and, if the Issuer is the largest holder of such class, the Issuer's percentage of such class does not exceed the percentage held by the next largest holder of the debt by more than 5% of such class or (b) that would, upon foreclosure or exercise of similar legal remedies, result in the Issuer directly owning assets (other than securities treated as debt, equity in a partnership not engaged in a trade or business within the United States, or corporate equity for United States federal income tax purposes, provided in the case of corporate equity that the corporation is not a "United States real property holding corporation" within the meaning of section 897 of the Code) which are "United States real property interests" within the meaning of section 897 of the Code or which the Servicer reasonably expects it

would, on behalf of the Issuer, be required to actively manage to preserve the value of the Issuer's interest therein; provided that a Potential Workout Obligation shall not be treated as a Subsidiary Obligation if the Issuer obtains a Tax Opinion that, based on all the surrounding circumstances, the activities in which the Issuer intends to engage with respect to such Potential Workout Obligation will not cause the Issuer to be treated as engaged in a trade or business for United States federal income tax purposes.

"Workout Determination Date" means any date on which, in connection with the occurrence of any event described in clauses (a) through (c), inclusive, of the definition of Workout Obligation, either (a) any material action by the Issuer is required to be taken, (b) the Servicer receives written notice that such material action shall be required or (c) the Servicer reasonably determines that the taking of such material action is likely to be required.

"Workout Obligation" means any Debt Instrument as to which the Servicer on behalf of the Issuer (a) consents to a Significant Modification in connection with the workout of a defaulted Portfolio Obligation, (b) participates in an official or unofficial committee or similar official or unofficial body in connection with a bankruptcy, reorganization, restructuring or similar proceeding, or (c) exercises, or has exercised on its behalf, rights of foreclosure or similar judicial remedies.

Section IV. Purchases from the Servicer or its Affiliates.

A. If the Servicer or an Affiliate of the Servicer acted as an underwriter, placement or other agent, arranger, negotiator or structuror, or received any fee for services (it being understood that receipts described in clauses (i) through (v) of Section I.B. are not construed as so treated), in connection with the issuance or origination of a Portfolio Obligation or was a member of the original lending syndicate with respect to the Portfolio Obligation (any such Portfolio Obligation, a "Special Procedures Obligation"), the Issuer will not acquire any interest in such Special Procedures Obligation (including entering into a commitment or agreement, whether or not legally binding or enforceable, to acquire such obligation directly or synthetically), from the Servicer, an Affiliate of the Servicer, or a fund managed by the Servicer, unless (i) the Special Procedures Obligation has been outstanding for at least 90 days, (ii) the holder of the Special Procedures Obligation did not identify the obligation or security as intended for sale to the Issuer within 90 days of its issuance, (iii) the price paid for such Special Procedures Obligation by the Issuer is its fair market value at the time of acquisition by the Issuer, and (iv) the transaction is proposed to, and the ultimate purchase is approved on behalf of the Issuer by, one or more Independent Advisors to the Issuer in accordance with the provisions of Section IV.B. below. The Issuer will not acquire any Special Procedures Obligation if, immediately following such acquisition, the fair market value of all Special Procedures Obligations owned by the Issuer would constitute more than 49% of the fair market value of all of the Issuer's assets at such time.

B. An "Independent Advisor" is a Person who is not an Affiliate of the Issuer, the Servicer or any fund managed by the Servicer.

1. The Issuer may not purchase or commit to enter into any such Special Procedures Obligation without prior approval by an Independent Advisor. If the Independent Advisor declines to approve a proposed Special Procedures Obligation, at least three months must elapse before any proposal with respect to the acquisition of debt or other obligations of the same obligor are proposed or considered.

2. The Issuer shall engage the Independent Advisor in an agreement the terms of which shall in substantial form set forth:

(a) the representation of the Independent Advisor, which the Servicer shall not know to be incorrect, that it has significant financial and commercial expertise, including substantial expertise and knowledge in and of the loan market and related investment arenas;

(b) the agreement between the Independent Advisor, the Issuer and the Servicer generally to the effect that (i) the Independent Advisor will operate pursuant to procedures consistent with maintaining his or her independence from the Servicer and its Affiliates, (ii) the Independent Advisor will have the sole authority and discretion to approve or reject purchase proposals made by the Servicer with respect to any Special Procedures Obligation, (iii) all proposals for the Issuer to acquire any Special Procedures Obligation will be first submitted to the Independent Advisor, (iii) the Servicer will prepare the materials it deems necessary to describe the Special Procedures Obligation to the Independent Advisor, (iv) the Investment Advisor will not be required to make any decision to accept or decline a Special Procedures Obligation at the price offered prior to its review of the materials prepared, plus any additional information requested by the Independent Advisor, and (v) no Independent Advisor may be proposed to be replaced by the Servicer, unless for cause or in the event of a resignation of such Independent Advisor; and

(c) such other commercially reasonable terms and conditions, including terms and conditions to the effect that (i) the Independent Advisor will be paid a reasonable fee for its services plus reimbursement of any reasonable expenses incurred in performance of his or her responsibilities, (ii) the Independent Advisor may be removed or replaced only by a majority (whether by positive act or failure to object) of the probable equity owners (as determined for United States federal income tax purposes) of the Issuer, (iii) if at any time there is more than one Independent Advisor to the Issuer, a majority of such Independent Advisors must approve any Special Procedures Obligation subject to Independent Advisor approval, (iv) an Independent Advisor may not engage, directly or indirectly, in the negotiation of the terms of any Special Procedures Obligation to be acquired by the Issuer (provided however, that an Independent Advisor may

negotiate with the Servicer or the seller with respect to the price and terms of the Issuer's purchase of the Special Procedures Obligation, provided further that the Independent Advisor will not make suggestions to the Servicer or any other person about alternative or modified terms of the underlying Special Procedures Obligation on which they might be willing to approve such a Special Procedures Obligation).

3. Any servicing agreement or other document under which the Servicer is granted signatory powers or other authority on behalf of the Issuer will provide that such powers or authority with respect to Special Procedures Obligations are conditioned upon the prior written approval of the Independent Advisor

.

4. No Special Procedures Obligation will be presented to an Independent Advisor until at least 90 days have elapsed since the later of (a) the execution of final documentation and (b) the funding in whole or part of the Special Procedures Obligation and there will have been no commitment or arrangement prior to that time that the Issuer will acquire any such Special Procedures Obligation; provided, further, that the Special Procedures Obligation will not be treated as outstanding for any day on which the Issuer enjoys the benefits and burdens of ownership (for example, because any Person has hedged its credit exposure to the Special Procedures Obligation with the Issuer).

5. The Issuer will have no obligation to, or understanding that it will refund, reimburse or indemnify any person (including an Affiliate of the Servicer), directly or indirectly, for "breakage" costs or other costs or expenses incurred by such person if the Independent Advisor determines that the Issuer should decline to purchase any Special Procedures Obligation.

6. Neither the Servicer nor any Affiliate of the Servicer will have any authority to enter into agreements, or take any action, on behalf of the Issuer with respect to Special Procedures Obligations without the prior written approval of an Independent Advisor. Except as may be conditioned upon such prior written approval, neither the Servicer nor any Affiliate of the Servicer may hold itself out as having signatory powers on behalf of the Issuer or authority to enter into agreements with respect to Special Procedures Obligations on behalf of the Issuer.

Section V. Synthetic Securities.

A. The Issuer shall not (i) acquire or enter into any Synthetic Security with respect to any Reference Obligation the direct acquisition of which would violate any provision of this Annex 1 or (ii) use Synthetic Securities as a means of making advances to the Synthetic Security Counterparty following the date on which the Synthetic Security is acquired or entered into (for the avoidance of doubt, the establishment of Synthetic Security collateral accounts and the payment of Synthetic Security Counterparties from the amounts on deposit therein, shall not constitute the making of advances).

B. With respect to each Synthetic Security, the Issuer will not acquire or enter into any Synthetic Security that does not satisfy all of the following additional criteria unless the Servicer has first received advice of counsel that the ownership and disposition of such Synthetic Security would not cause the Issuer to be engaged in a trade or business within the United States for United States federal income tax purposes:

1. the criteria used to determine whether to enter into any particular Synthetic Security was similar to the criteria used by the Servicer in making purchase decisions with respect to debt securities;

2. the Synthetic Security is acquired by or entered into by the Issuer for its own account and for investment purposes with the expectation of realizing a profit from income earned on the securities (and any potential rise in their value) during the interval of time between their purchase and sale or hedging purposes and not with an intention to trade or to sell for a short-term profit;

3. the Issuer enters into the Synthetic Security with a counterparty that is not a special purpose vehicle and is a broker-dealer or that holds itself out as in the business of entering into such contracts;

4. neither the Issuer nor any Person acting on behalf of the Issuer advertises or publishes the Issuer's ability to enter into Synthetic Securities;

5. except with respect to (x) credit-linked notes or similar Synthetic Securities and (y) any other Synthetic Securities where standard form ISDA documentation is not applicable, the Synthetic Security is written on standard form ISDA documentation;

6. the net payment from the Issuer to the Synthetic Security Counterparty is not determined based on an actual loss incurred by the Synthetic Security Counterparty or any other designated person;

7. there exists no agreement, arrangement or understanding that (i) the Synthetic Security Counterparty is required to own or hold the related Reference Obligation while the Synthetic Security remains in effect or (ii) the Synthetic Security Counterparty is economically or practically compelled to own or hold the related physical Reference Obligation while the Synthetic Security remains in effect;

8. the Synthetic Security provides for (i) all cash settlement, (ii) all physical settlement or (iii) the option to either cash settle or physically settle; provided that, in the latter two cases, physical settlement provides the settling party the right to settle the Synthetic Security by delivering deliverable obligations which *may* include the Reference Obligation and the settling party must not be required to deliver the related Reference Obligation upon the settlement of such Synthetic Security.

Notwithstanding the preceding paragraph, a Synthetic Security providing for physical settlement may require a party to deliver the related Reference Obligation if either:

(i) at the time the Issuer enters into such Synthetic Security, such Reference Obligation is readily available to purchasers generally in a liquid market; or

(ii) the advice of both United States federal income tax and insurance counsel of nationally recognized standing in the United States experienced in such matters is that, under the relevant facts and circumstances with respect to such Synthetic Security, the acquisition of such Synthetic Security will not cause the Issuer to be engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes or otherwise to be subject to United States federal income tax on a net basis and should not cause the Issuer to be treated as writing insurance in the United States under the law of the state in which the Synthetic Security Counterparty is organized.

9. the Synthetic Security is not treated by the Issuer as insurance or a financial guarantee sold by the Issuer for United States or Cayman Islands regulatory purposes.

As used herein:

"Reference Obligation" means a debt security or other obligation upon which a Synthetic Security is based.

"Synthetic Security" means any swap transaction or security, other than a participation interest in a Loan, that has payments associated with either payments of interest and/or principal on a Reference Obligation or the credit performance of a Reference Obligation.

"Synthetic Security Counterparty" means an entity (other than the Issuer) required to make payments on a Synthetic Security (including any guarantor).

Section VI. Other Types of Assets.

A. Equity Restrictions. The Issuer will not purchase any asset (directly or synthetically) that is:

1. not treated for U.S. federal income tax purposes as debt if the issuing entity is a "partnership"(within the meaning of Section 7701(a)(2) of the Code) unless such entity is not engaged in a trade or business within the United States, or

2. a "United States real property interest" as defined in section 897 of the Code and the Treasury Regulations promulgated thereunder.

3. a residual interest in a "REMIC" or an ownership interest in a "FASIT" (as such terms are as defined in the Code).

The Issuer may cause an Issuer Subsidiary to acquire assets set forth in clause (i) or (ii) above (each, an "ETB/897 Asset") in connection with the workout of defaulted Portfolio Obligations, so long as the acquisition of ETB/897 Assets by such Issuer Subsidiary will not cause the stock of such Issuer Subsidiary to be deemed to be an ETB/897 Asset.

B. Revolving Loans and Delayed Drawdown Loans. All of the terms of any advance required to be made by the Issuer under any revolving or delayed drawdown Loan will be fixed as of the date of the Issuer's purchase thereof (or will be determinable under a formula that is fixed as of such date), and the Issuer and the Servicer will not have any discretion (except for consenting or withholding consent to amendments, waivers or other modifications or granting customary waivers upon default) as to whether to make advances under such revolving or delayed drawdown Loan.

C. Securities Lending Agreements. The Issuer will not purchase any Portfolio Obligation primarily for the purpose of entering into a securities lending agreement with respect thereto.

D. Exception From Secondary Market Rule for Debt Securities. Any purchase of a Portfolio Obligation other than a Loan (a "Debt Security") pursuant to a commitment, arrangement or other understanding made before or contemporaneously with completion of the closing and funding of such Debt Security issuance shall be made only in connection with one of the following:

(i) an underwriting of a registered public offering in which the seller has made a firm underwriting commitment to the issuer of such Debt Security where none of the Servicer or any Affiliate thereof acted as an underwriter or placement agent or participated in negotiating or structuring the terms of the Debt Security (other than to comment on offering documents to an unrelated underwriter or placement agent where the ability to comment was generally available to investors and to undertake due diligence of the kind customarily performed by investors in securities),

(ii) a private placement to qualified investors (pursuant to Rule 144A or Section 4(2) under the Securities Act or other similar arrangement) in which such Debt Security was originally issued pursuant to an offering circular, private placement memorandum, or similar offering document and none of the Servicer or any Affiliate thereof acted as a placement agent or underwriter or participated in negotiating or structuring the terms of the Debt Security (other than to comment on offering documents to an unrelated underwriter or placement agent where the ability to comment was generally available to investors and to undertake due diligence of the kind customarily performed by investors in securities), or

(iii) an acquisition of or entry into a Synthetic Obligation in accordance with Section V. above;

If an Affiliate of the Servicer is acting as an underwriter or placement agent or an Affiliate of the Servicer or an employee of an Affiliate of the Servicer participated in the structuring of an issuance otherwise described in clause (i) or clause (ii) of this paragraph D, one of the following additional conditions must be met:

(x) the Servicer did not participate in negotiating or structuring the terms of the obligation or security (other than to comment on offering documents to an unrelated underwriter or placement agent where the ability to comment was generally available to investors and to undertake due diligence of the kind customarily performed by investors in securities) and the Issuer purchases no more than 33% of the aggregate principal amount of the tranche of securities (or other instruments) of which such Debt Security is a part and more than 50% of the aggregate principal amount of such tranche is substantially contemporaneously sold to one or more Persons unrelated to the Servicer (and who have not given the Servicer discretionary trading authority) on terms and conditions substantially the same as those on which the Issuer is to purchase,

(y) the Servicer did not participate in negotiating or structuring the terms of the obligation or security (other than to comment on offering documents to an unrelated underwriter or placement agent where the ability to comment was generally available to investors and to undertake due diligence of the kind customarily performed by investors in securities) and the Issuer purchases less than 33% of the aggregate principal amount of all tranches issued as part of the transaction in which the Debt Security was issued and more than 50% of the aggregate principal amount of such tranches are substantially contemporaneously sold to one or more Persons unrelated to the Servicer (and who have not given the Servicer discretionary trading authority) on terms and conditions substantially the same as those on which the Issuer is to purchase, or

(z) such security or obligation satisfies the requirements and procedures applicable to Special Procedures Obligations in Section IV as though it were a Loan;

provided, however, in either of (x) or (y), the Affiliate of the Servicer was (or the employees of the Affiliate of the Servicer were) acting as an underwriter or placement agent (or otherwise participated in the structuring of such issuance) solely as, or solely as an employee of, a Permitted Affiliate (as defined below).

"Permitted Affiliate" means any Affiliate (i) that is a separate legal entity that is operated independently of the Servicer, (ii) whose personnel are not managed by and who do not report to the personnel of the Servicer, and (iii) whose personnel are not compensated based upon the performance of the Servicer.

Section VII. General Restrictions on the Issuer. The Issuer itself shall not:

A. hold itself out, through advertising or otherwise, as originating Loans, lending funds, or making a market in or dealing in Loans or other assets;

B. register as, hold itself out as, or become subject to regulatory supervision or other legal requirements under the laws of any country or political subdivision thereof as, a broker-dealer, a bank, an insurance company, financial guarantor, a surety bond issuer, or a company engaged in Loan origination;

C. knowingly take any action causing it to be treated as a bank, insurance company, or company engaged in Loan origination for purposes of any tax, securities law or other filing or submission made to any governmental authority;

D. hold itself out, through advertising or otherwise, as originating, funding, guaranteeing or insuring debt obligations or as being willing and able to enter into transactions (either purchases or sales of debt obligations or entries into, assignments or terminations of hedging or derivative instruments, including Synthetic Securities) at the request of others;

E. treat Synthetic Securities as insurance, reinsurance, indemnity bonds, guaranties, guaranty bonds or suretyship contracts for any purpose;

F. allow any non-U.S. bank or lending institution who is a holder of a Security to control or direct the Servicer's or Issuer's decision to acquire a particular asset except as otherwise allowed to such a holder, acting in that capacity, under the related indenture or acquire a Portfolio Obligation conditioned upon a particular person or entity holding Securities;

G. acquire any asset the holding or acquisition of which the Servicer knows would cause the Issuer to be subject to income tax on a net income basis;

H. hold any security as nominee for another person; or

I. buy securities with the intent to subdivide them and sell the components or to buy securities and sell them with different securities as a package or unit.

Section VIII. Tax Opinion; Amendments.

A. In furtherance and not in limitation of this Annex 1, the Servicer shall comply with all of the provisions set forth in this Annex 1, unless, with respect to a particular transaction, the Servicer acting on behalf of the Issuer and the Trustee shall have received written advice of counsel of nationally recognized standing in the United States experienced in such matters (a "Tax Opinion"), that, under the relevant facts and circumstances with respect to such transaction, the Servicer's failure to comply with one or more of such provisions will not cause the Issuer to be engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes or otherwise to be subject to United States federal income tax on a net basis.

B. The provisions set forth in the Annex 1 may be amended, eliminated or supplemented by the Servicer if the Issuer, the Servicer and the Trustee shall have received a Tax Opinion that the Servicer's compliance with such amended provisions or supplemental provisions or the failure to comply with such provisions proposed to be

eliminated, as the case may be, will not cause the Issuer to be engaged, or deemed to be engaged, in a trade or business within the United States for United States federal income tax purposes or otherwise to be subject to United States federal income tax on a net basis.

EXHIBIT 26

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Wednesday, February 3, 2021
	9:30 a.m. Docket
Debtor.	
	CONFIRMATION HEARING [1808]
	AGREED MOTION TO ASSUME [1624]
	Continued from 02/02/2021

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Debtors:	Ira D. Kharasch PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

Exhibit D

APPEARANCES, cont'd.:

For James Dondero:	Clay M. Taylor BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300
For Certain Funds and Advisors:	Davor Rukavina Julian Vasek MUNSCH, HARDT, KOPF & HARR 500 N. Akard Street, Suite 3800 Dallas, TX 75201-6659 (214) 855-7587
For the NexPoint Parties:	Lauren K. Drawhorn WICK PHILLIPS 3131 McKinney Avenue, Suite 100 Dallas, TX 75204 (214) 692-6200
For the U.S. Trustee:	Lisa L. Lambert OFFICE OF THE UNITED STATES TRUSTEE 1100 Commerce Street, Room 976 Dallas, TX 75242 (214) 767-8967
For Scott Ellington, Isaac Leventon, Thomas Surgent, and Frank Waterhouse:	Debra A. Dandeneau BAKER & MCKENZIE, LLP 452 Fifth Avenue New York, NY 10018 (212) 626-4875
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Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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

DALLAS, TEXAS - FEBRUARY 3, 2021 - 9:38 A.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, the Honorable Stacey Jernigan presiding.

THE COURT: Good morning. Please be seated. All right. We are ready for Day Two of the confirmation hearing in Highland Capital Management, LP, Case No. 19-34054. I'll just make sure we've got the key parties at the moment. Do we have Mr. Pomerantz, Mr. Morris, for the Debtor team?

MR. POMERANTZ: Yes. Good morning, Your Honor. Jeff Pomerantz for the Debtors.

MR. MORRIS: And I'm here as well, Your Honor.

THE COURT: All right. Good.

All right. For our objecting parties, do we have Mr. Taylor and your crew for Mr. Dondero?

MR. TAYLOR: Yes, Your Honor.

THE COURT: Good morning.

All right. For Dugaboy Trust and Get Good Trust, do we have Mr. Draper? (No response.) All right. I do see Mr. Draper. I didn't hear an appearance. You must be on mute.

MR. DRAPER: I'm present, --

THE COURT: Okay.

MR. DRAPER: -- Your Honor.

THE COURT: Okay. Good morning.

MR. DRAPER: I'm present, Your Honor.

THE COURT: Good morning. I heard you that time. Thank you.

All right. And now for what I'll call the Funds and Advisors Objectors, do we have Ms. Rukavina present?

MR. RUKAVINA: Yes, Your Honor. Good morning.

THE COURT: Good morning. All right. And I will check. Do we have Mr. Clemente or your team there?

MR. CLEMENTE: Yes. Good morning, Your Honor. Matt Clemente from Sidley Austin on behalf of the Committee.

THE COURT: All right. Ms. Drawhorn, do we have you there for the NexPoint Real Estate Partners and related funds?

MS. DRAWHORN: Yes, Your Honor. Good morning.

THE COURT: Good morning. All right. Did I miss -- I think that captured all of our Objectors. Anyone who I've missed?

All right. Well, when we recessed yesterday, Mr. Morris, I think you were about to call your third witness; is that correct?

MR. MORRIS: It is, Your Honor. But if I may, I'd like to just address the objections to the remaining exhibits, since I hope that won't take too long.

THE COURT: All right. You may.

MR. POMERANTZ: Actually, Your Honor, before we go there, we filed the supplemental declaration of Patrick Leatham, as we indicated we would do yesterday. We just

wanted to get confirmation again that nobody intends to cross-examine him, so that he doesn't have to sit through the festivities today.

THE COURT: All right. Well, I did see that you filed that.

Does anyone anticipate wanting to cross-examine Mr. Leatham, the balloting agent?

MR. RUKAVINA: Your Honor, I take it that that declaration is part of the record. As long as the Court confirms that, I do not intend to call the gentlemen.

THE COURT: All right. Well, I will take judicial notice of it and make it part of the record. It appears at Docket Entry No. 1887. Again, it was filed -- well, it was actually filed early this morning, I think. So, all right. So, with --

MR. MORRIS: And to avoid --

THE COURT: Go ahead.

MR. MORRIS: To -- I was just going to say, to avoid any ambiguity, Your Honor, the Debtor respectfully moves that document into the evidentiary record.

THE COURT: All right. The Court will --

(Interruption.)

THE COURT: Someone needs to put their phone on mute, perhaps. Unless someone was intentionally speaking.

All right. So, I will grant that request. Docket Entry

No. 1887 will be part of the confirmation evidence of this hearing.

(Debtor's Patrick Leatham Declaration at Docket 1887 is received into evidence.)

THE COURT: All right. Anything else? There were other exhibits I think you were going to talk about?

MR. MORRIS: Yeah. Let me just go through them one at a time, if I may, Your Honor.

THE COURT: Okay.

MR. MORRIS: All right. So, I'm going to deal with the transcripts that have been objected to one at a time. And I'll just take them in order. The first one can be found at Exhibit B. It is on Docket No. 1822.

THE COURT: Okay.

MR. MORRIS: Exhibit B is the deposition transcript from the December 16, 2020 hearing on the Advisor and the Funds' motion for an order restricting the Debtor from engaging in certain CLO-related transactions.

During that hearing, the Court heard the testimony of Dustin Norris. Mr. Norris is an executive vice president for each of the Funds and each of the Advisors.

We would be offering the transcript for the limited purposes of establishing Mr. Dondero's ownership and control over the Advisors.

Mr. Norris also gave some pretty substantial testimony

concerning the so-called independent board of the Funds.

And as a general matter, Your Honor, to the extent that the objection is on hearsay grounds, the transcript -- at least the portions relating to Mr. Norris's testimony -- simply are not hearsay under Evidentiary Rule 801(d)(2). These are statements of an opposing party, and I think we fall well within that.

So, we would respectfully request that the Court admit into the record the transcript from December 16th, at least the portions of which are Mr. Norris's testimony.

THE COURT: All right. And, again, these appear at -- I think I heard you say B and then E. Is that correct?

MR. MORRIS: Just B. Just B at the moment. B as in boy.

THE COURT: Okay. Just B at the moment?

All right. Any objections to that?

MR. RUKAVINA: Your Honor, I had objected, but now that it's offered for that limited purpose, I withdraw my objection.

THE COURT: All right. Then B -- I'm sorry. Was there anyone else speaking?

B will be admitted. And, again, it appears at Docket Entry 1822.

(Debtor's Exhibit B, Docket Entry 1822, is received into evidence.)

MR. MORRIS: Okay. Next, the next transcript can be found at Exhibit 6R, and that's Docket 1866. Exhibit 6R is the transcript of the January 9, 2020 hearing where the Court approved the corporate governance settlement. We think that that transcript is highly relevant, Your Honor, because it reflects not only Mr. Dondero's notice and active participation in the consummation of the corporate governance agreement, but it also reflects the Court and the parties' views and expectations that were established at that time, such that if anybody contends that there's any ambiguity about any aspect of the order, I believe that that would be the best evidence to resolve any such disputes.

So, for the purpose of establishing Mr. Dondero's notice, Mr. Dondero's participation, and the parties' discussions and expectations with regard to every aspect of the corporate governance settlement, including Mr. Dondero's stipulation, the order that emerged from it, and the term sheet, we think that that's properly into evidence.

THE COURT: Any objection?

All right. 6R will be admitted. Again, at Docket Entry 1822.

(Debtor's Exhibit 6R, Docket Entry 1822, is received into evidence.)

MR. MORRIS: Next, Your Honor, we've got Exhibits 6S as in Sam and 6T as in Thomas. They're companions. And they

can be found at Docket 1866. And those are the transcripts. The first one is from the October 27th disclosure statement hearing, and the second one actually is from the Patrick Daugherty, I believe, lift stay motion.

I'll deal with the first one first, Your Honor. We believe that the transcript of the October 27th hearing goes to the good faith nature of the Debtor's proposed plan. It shows that the Debtor and the Committee were not always aligned on every interest. It shows that the Committee, in fact, strenuously objected to certain aspects of the then-proposed plan by the Debtors. And we just think it goes to the heart of the good faith argument.

The transcript for the 28th, we would propose to offer for the limited purpose of the commentary that you offered at the end of that hearing, where Your Honor made it clear that employee releases would not be -- would not likely be acceptable to the Court unless there was some consideration paid.

And it was really, frankly, Your Honor's comments that helped spur the Committee and the Debtor to discuss over the next few weeks the resolution of the issues concerning the employee releases.

So we're not offering Exhibit 6T for anything having to do with Mr. Daugherty or his claim, but just the latter portion relating to the discussion about the employee releases. And,

with that, we'd move those transcripts into evidence.

THE COURT: Any objection?

MR. RUKAVINA: Your Honor, yes, I do object. 6S is hearsay, and under Rule 804(b)(1) it's admissible only if the witnesses are unavailable to be called. There's been no suggestion that they're not.

As far as 6T, what Your Honor says is not hearsay, so as long as it's just what Your Honor was saying, I do not object to 6T. I object to the balance of it.

THE COURT: Okay. What about that objection on 6S?

MR. MORRIS: Yeah. One second, Your Honor. I would go to the residual exception to the hearsay rule under 807. 807 specifically applies if the statement being offered is supported by sufficient guarantees of trustworthiness and it's more probative on the point -- and the point here is simply to help buttress the Debtor's good faith argument -- and it's more probative on the point than any other evidence. And I'm not sure what better evidence there would be than an on-the-record discussion between the Debtor and the Committee as to the disputes they were having on the disclosure statement.

THE COURT: All right. I'm going to overrule the objection and accept that 807 exception as being valid here. So, I am admitting both 6S and 6T. And for the record, I think you said they appeared at 1866. They actually appear at 1822.

MR. MORRIS: Okay, Your Honor. I am corrected. It is 6S and 6T, and they are indeed at 1822. Forgive me.

THE COURT: Okay.

(Debtor's Exhibits 6S and 6T, Docket Entry 1822, is received into evidence.)

MR. MORRIS: The next transcript and the last one is 6U, which is also at 1822. 6U is the transcript from the December 10th hearing on the Debtor's motion for a TRO against Mr. Dondero. We believe the entirety of that transcript is highly relevant, and it relates specifically to the Debtor's request for the exculpation, gatekeeper, and injunction provisions of their plan. And on that basis, we would offer that into evidence.

THE COURT: Any objection?

MR. TAYLOR: Yes, Your Honor. This is Clay Taylor on behalf of Mr. Dondero.

We do object, on the same basis that it is hearsay. There has certainly been plenty of testimony before this Court and on the record as to why the Debtor believes that its plan provisions are appropriate and allowable, and there's no need to allow hearsay in for that. All of the witnesses were available to be called by the Debtor. The Debtor is in the midst of its case and can call whoever else it needs to call to get these into evidence or to get those docs into evidence. And therefore, we don't believe that any residual exception

should apply.

THE COURT: Mr. Morris, your response?

MR. MORRIS: First, Your Honor, any statements made by or on behalf of Mr. Dondero would not be hearsay under 801(d)(2).

And secondly, there is no other evidence of the Debtor's motion of the -- of the argument that was had. There is no other evidence, let alone better evidence, than the transcript itself. And I believe 807 is certainly the best rule to capture that.

It is a statement that's supported by sufficient guarantees of trustworthiness. Again, these are the litigants appearing before Your Honor. It may not be sworn testimony, but I would hope that everybody is doing their best to comply with the guarantee of trustworthiness in that regard, putting aside advocacy.

And it is more probative on the point for which we're offering -- and that is on the very issues of exculpation, gatekeeper, and injunction -- than anything else we can offer in that regard.

THE COURT: All right. I overrule the objection and I will admit 6U. Okay.

(Debtor's Exhibit 6U, Docket Entry 1822, is received into evidence.)

MR. MORRIS: All right. Going back to the top, Your

Honor, Companions Exhibit D as in David and E as in Edward, which are at Docket 1822.

Exhibit D is an email string that relates to the Debtor's communications with the Creditors' Committee concerning a transaction known as SSP, which stands for Steel Products -- Structural and Steel Products. So that was an asset that the Debtor was selling, trying to sell at a particular point in time. And Exhibit E is a deck that the Debtor had prepared for the benefit of the UCC.

And if we looked that those documents, Your Honor, you'd see that the Debtor was properly following the protocols that were put in place in connection with the January 9th corporate governance settlement. And the Committee is being informed by the Debtor of what the Debtor intends to do with that particular asset.

And the reason that it's particularly relevant here, Your Honor, is Dustin Norris had submitted a declaration in support of their motion that was heard on September -- on December 16th. That declaration is an exhibit to what is Exhibit A on Docket 1822. Exhibit A on the docket is the Advisor and the Funds' motion. Okay? So, Exhibit A is the motion. Attached to that Exhibit A is an exhibit, which is Mr. Norris's declaration.

At Paragraph 9 of Mr. Norris's declaration, he takes issue with the Debtor's process for the sale of that particular

asset.

And so, having admitted already into the record Mr. Norris's declaration, we believe that these documents rebut the statements made in Mr. Norris's declaration, and indeed, were part of the transcript that has now already been admitted into evidence. So we think the documents are needed because they were exhibits during that hearing.

THE COURT: All right. Any objection?

MR. RUKAVINA: Your Honor, yes, I object based on authenticity. This document has not been authenticated, nor has the attachment. And on hearsay. And I don't think that the Debtor can introduce one exhibit just to introduce another to rebut the first.

THE COURT: Your response?

MR. MORRIS: You know, in all honesty, I wish that the authenticity objection had been made yesterday and I might have been able to deal with that.

These documents have already been admitted by the Court against these very same parties. I think it would be a little unfair for them now to exclude the document that they had no objection to the first time around. They clearly relate to Paragraph 9 of Mr. Norris's declaration, which was admitted into evidence in this case without objection.

THE COURT: All right. I overrule the objection. D and E are admitted.

(Debtor's Exhibits D and E, Docket Entry 1822, is received into evidence.)

MR. MORRIS: Next, Your Honor, we have Exhibits 4D as in David, 4E as in Edward, and 4G as in Gregory. And those can all be found on Docket 1822. And to just cut to the chase, Your Honor, these are the K&L Gates letter that were sent in late December and my firm's responses to those letters.

Those letters are being offered, again, to support -- well, the Debtor contends that, in the context of this case, and at the time and under the circumstances, the letters constituted interference and evinces a disregard for the January 9th order, for Mr. Dondero's TRO, and for the Court's comments at the December 16th hearing. And they go specifically to the Debtor's request for the gatekeeper, exculpation, and injunction provisions.

To the extent that those exhibits contain the letters that were sent on behalf of the Funds and on behalf of the Advisors, they would simply not be hearsay under 801(d)(2). And to the extent the objection goes to my firm's response, I think just as a matter of completeness the Court -- I won't offer them for the truth of the matter asserted. I'll simply offer the Pachulski responses at those exhibits for the purpose of stating the Debtor's position, without regard to the truth of the matter asserted.

THE COURT: All right. Any objection?

MR. RUKAVINA: Your Honor, with that understanding, I'll withdraw my objection to these exhibits.

THE COURT: All right. So, 4D, 4E, and 4G are admitted.

(Debtor's Exhibits 4D, 4E, and 4G, Docket Entry 1822, are received into evidence.)

MR. MORRIS: Next, Your Honor, we've got Exhibit 5T as in Thomas. That document can be found at Docket No. 1822. Your Honor, that document is a schedule of a long list of promissory notes that are owed to the Debtor by the Advisors, Dugaboy, and Mr. Dondero. But I think that, upon reflection, I'll withdraw that exhibit.

THE COURT: All right.

(Debtor's Exhibit 5T is withdrawn.)

MR. MORRIS: And then, finally, just one last one. I think Mr. Rukavina objected to Exhibit 7O as in Oscar, which can be found at Docket No. 1877. Exhibit 7O are the documents that were admitted in the January 21st hearing, and I believe that they all go -- they're being offered to support the Debtor's application for the gatekeeper, exculpation, and injunction provisions.

THE COURT: All right. 7O is being offered. Any objection?

MR. RUKAVINA: Yes, Your Honor. I do object. Those

are exhibits from a separate adversary proceeding that has not been concluded. In fact, my witness is still on the stand in that.

And I'll note that that's another 20,000 pages that's very duplicative of the current record, and we already are going to have an unwieldy record. So I question why Mr. Norris -- why Mr. Morris would even need this.

So that's my objection, Your Honor.

MR. MORRIS: You know what? That's a fair point, Your Honor. And -- that is a fair point, and I guess what I'd like to do is at some point this morning see if I can single out documents that are not duplicative and come back to you with very specific documents. I think that's a very fair point.

THE COURT: All right.

MR. MORRIS: And with that, Your Honor, I think we've now addressed every single document that the Debtor has offered into evidence, and I believe, other than the withdrawal of --

THE COURT: 5T.

MR. MORRIS: -- 5T --

THE COURT: Uh-huh.

MR. MORRIS: -- and the open question on 7O, I believe every single document at Docket 1822, 1866, and 1877 has been admitted. Do I have that right?

THE COURT: All right. Yes, because I did admit yesterday 7F through 7Q, minus 7O, at 1877. So, yes, I agree with what you just said.

MR. RUKAVINA: Your Honor, I apologize. And Mr. Morris. I have that 5S -- or six -- that 5S and 6C, Legal Entities List, have not been admitted. But if I'm wrong on that, then I apologize.

THE COURT: Okay. 5S was part of 1866, which I admitted entirely.

And what was the other thing?

MR. RUKAVINA: I'm counting letters, Your Honor. One, two, three, four. 6D, Legal Entities List, Redacted.

THE COURT: Okay. 6B would have been --

MR. RUKAVINA: D, Your Honor, as in dog. I'm sorry. 6-dog.

THE COURT: Okay. 6D, yeah, that was part of 1822 that I admitted *en masse* yesterday.

MR. MORRIS: Yeah, I didn't hear an objection to that one yesterday, and I agree, Your Honor. My records show that it was already admitted.

MR. RUKAVINA: Then I apologize to the Court.

THE COURT: All right. Any --

MR. MORRIS: No worries. Let's get --

THE COURT: Any other housekeeping matters before we go to the next witness?

MR. MORRIS: No, Your Honor. Not from the Debtor.

THE COURT: Anyone else?

All right. Well, let's hear from the next witness.

MR. MORRIS: All right, Your Honor. The Debtor calls as its next and last witness Marc Tauber.

THE COURT: All right. Mr. --

MR. MORRIS: Mr. Tauber, if you're on the phone, please identify yourself.

(No response.)

THE COURT: Mr. Tauber, we're not hearing you. Perhaps you are on mute. Could you unmute your device?

(No response.)

THE COURT: All right. If it's a phone, you need to hit *6.

Hmm. Any -- do you know which caller he is?

THE CLERK: I'm trying to find out.

THE COURT: All right. We've got well over a hundred people, so we can't easily identify where he is at the moment.

All right. Mr. Tauber, Marc Tauber? This is Judge Jernigan. We cannot hear you, so -- all right. Well, maybe we can --

MR. MORRIS: Can we just take a three-minute break and let me see if I can track him down?

THE COURT: Yes. Why don't you do that? So let's take a three-minute break.

MR. MORRIS: Thank you, Your Honor.

THE COURT: Okay.

(A recess ensued from 10:02 a.m. until 10:04 a.m.)

MR. MORRIS: Your Honor, if we may, he'll be dialing in in a moment. But I've been reminded that there is one more exhibit. It's the exhibit I used on rebuttal yesterday with Mr. Seery. There was the one document that was on the docket, and that was the Debtor's omnibus reply to the plan objections, where we looked at Paragraph 135, I believe. And we would offer that into evidence for the purpose of just establishing that the Debtor had given notice no later than January 22nd of its agreement in principle to assume the CLO management contracts.

And then the second exhibit that we had offered that I think I suggested could be marked as Exhibit 10A was the email string between my firm and counsel for the CLO Issuers where they agreed to the agreement in principle for the Debtor's assumption of the CLO management contracts.

And we would offer both of those documents into evidence as well.

THE COURT: All right. Any objections?

All right. Well, I will admit them.

As far as this email string with the CLO Issuers that you called 10A, does that appear on the docket? I remember you putting it on the screen, but, if not, you'll need to file a

supplement to the record, a supplemental exhibit.

MR. MORRIS: We will, Your Honor. We'll do that for both of those exhibits.

THE COURT: And then as -- okay, for both? Because I -- I've read that reply, and I could reference the docket number if we need to.

MR. MORRIS: We'll clean that up, Your Honor.

THE COURT: Okay.

(Debtor's Exhibit 10A is received into evidence.)

(Clerk advises Court re new caller.)

THE COURT: Oh, okay. Just a minute. I was looking up something.

(Pause.)

THE COURT: All right. Well, you're going to file -- hmm, I really wanted to just reference where that reply brief appears on the record. There were a heck of a lot of things filed on January 22nd.

(Interruption.)

THE COURT: Okay. We'll --

MR. MORRIS: All right. We're just going to need one more minute with Mr. Tauber. It's my fault, Your Honor.

THE COURT: Okay.

MR. MORRIS: I didn't send him easily-digestible dial-in instructions. He'll be just a moment.

THE COURT: Okay.

(Court confers with Clerk regarding exhibit.)

THE COURT: Oh, it's at 1807? Okay. So, the reply brief that we talked about Paragraph 35, that is at Docket No. 1807. Okay? All right.

(Debtor's Omnibus Reply to Plan Objections, Docket 1807, is received into evidence.)

(Pause.)

MR. TAUBER: Hi. It's Marc Tauber.

THE COURT: All right.

MR. MORRIS: Excellent.

THE COURT: Mr. Tauber, this is Judge Jernigan. I can hear you, but I can't see you. Do you have a video --

MR. TAUBER: Yeah, I don't know why it's not working.

THE COURT: Hmm.

MR. TAUBER: I'm on WebEx all day. Usually it works no problem.

THE COURT: Okay. Well, do you want to give it another try or two?

MR. TAUBER: Yeah. It looks like it's starting to come up. It's all -- pictures, so --

THE COURT: Okay.

MR. TAUBER: -- hopefully you'll be able to see me in a second.

THE COURT: Okay. The first thing I'm going to need to do is swear you in, so we'll see if the video comes up here

in a minute.

MR. TAUBER: Okay.

THE COURT: Can you see us, Mr. Tauber?

MR. TAUBER: I can see four people. The rest are just names still.

THE COURT: Okay.

MR. TAUBER: I can go out and try to come back in, if you think that's --

THE COURT: I'm afraid of losing you. So, your audio, is it on your phone or is it on --

MR. TAUBER: No.

THE COURT: -- a computer?

MR. TAUBER: On the computer. Yeah.

THE COURT: Okay. So you're coming through loud and clear on your computer.

MR. TAUBER: Yeah. Like I said, we use WebEx for work, so I have them on all day long without any issues, typically.

THE COURT: Okay.

(Court confers with Clerk.)

THE COURT: Okay. Our court reporter thinks it's a bandwidth issue on your end, so I don't --

MR. TAUBER: There's only two of us here at home on the line right now, so I don't know why. It looks like it's trying to come in, and then just keeps --

THE COURT: I at least see your name on the screen now, which I did not before.

MR. TAUBER: Yeah.

THE COURT: So hopefully we're going to -- ah. We got you.

MR. TAUBER: There it is.

THE COURT: All right.

MR. TAUBER: Yeah.

MR. MORRIS: There we go.

MR. TAUBER: I might lose you, though. Give me one second, because I have a thing saying the WebEx meeting has stopped working. Let me close that.

THE COURT: Okay. We've still got you. Please raise your right hand.

MR. TAUBER: Okay.

MARC TAUBER, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Thank you. Mr. Morris?

MR. MORRIS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good morning, Mr. Tauber.

A Good morning.

Q I apologize for the delay in getting you the information. Are you currently employed, sir?

A Yes, sir.

Q By whom?
A Aon Financial Services.
Q And does Aon Financial Services provide insurance brokerage services among its services?
A Yes.
Q And what position do you currently hold?
A Vice president.
Q How long have you been a vice president at Aon?
A Since October of 2019.
Q Can you just describe for the Court generally your professional background?
A Sure. I spent about 20 years on Wall Street, working in a variety of jobs, in research, trading, and as the COO of a hedge fund. And then in 2010 I switched to the insurance world. I was an underwriter for ten-plus years for Zurich and QBE. And then in 2019 switched to the brokering side for Aon.
Q And what are your duties and responsibilities as a vice president at Aon?
A Well, we're responsible or my team and I are responsible for creating bespoke insurance programs, focusing on D&O and E&O insurance for our insureds.
Q And what is, for the benefit of the record, what do you mean by bespoke insurance program?
A Well, each client is different, so the programs and the policies that we put in place might be off-the-shelf policies,

but we endorse and amend them as needed to meet the needs of the individual client.

Q And during your work, both as an underwriter and now as a broker, have you familiarized yourself with the market for D&O and E&O insurance policies?

A Yes.

Q All right. Let's talk about the early part of this case. Did there come a time in early 2020 when Aon was asked to place insurance on behalf of the board of Strand Advisors?

A Yes.

Q Can you describe for the Court how that came about?

A Sure. One of our account executives, a man by the name of Jim O'Neill, had a relationship with a man named John Dubel, who was one of the appointees to serve on -- as a member of Strand, which was being appointed, as we understood it, to be the general partner of Highland Capital Management by the Bankruptcy Court. And they -- we had done -- or, Jim and John had a longstanding relationship. I had actually underwritten an account for a previous appointment of John's when I was an underwriter, so I had some familiarity with John as well, and actually brokered a subsequent deal for John at Aon.

So I had, again, some familiarity with John, and we were, you know, tasked with going out and finding a program for Strand.

Q Can you describe what happened next? How did you go about

accomplishing that task?
A So, there are a number of markets or insurance companies that provide management liability insurance, which this was a management liability-type policy. D&O is a synonym for management liability, I guess you'd say. And we approached the, I think, 14 or 15 markets that we knew to provide insurance in this space and that would be willing to buy the type of policy we were seeking and have interest in a risk like this, which had a little hair on it. Obviously, there was the Dondero involvement, as well as the bankruptcy.
Q As part of that process, did you and your firm put together a package of information for prospective interested parties?
A Yes.
Q Can you describe for the Court what was contained in the package?
A Had the *C.V.s*, some relevant pleadings from the case, court order. I'd have to go back and look exactly. But sort of just general, you know, general information that was available about the situation at hand and Strand's appointment.
Q And the court order that you just mentioned, is that the one that had that gatekeeper provision in it?
A Correct.
Q And can you explain to the Court why you and your team

decided to include the order with the gatekeeper provision in the package that you were delivering to prospective carriers?
A Sure. In our initial conversations to discuss our engagement, the gatekeeper function was explained to us by John. And I'm not sure who else was on the initial call. And, but it was explained to us that I guess Judge Jernigan would sit as the gatekeeper between any potential claimant against the insureds and, you know, would basically have to approve any claim that would be made against (indecipherable), which would thereby prevent any frivolous claims from happening.
Q All right. Let's just talk for a moment. How did you and your firm decide which underwriters to present the package to?
A Again, you know, I -- my background, or my Wall Street background, obviously, sort of made me have a -- it was very unique for the insurance world when I switched over, so I had sort of risen to a certain level of expertise within the space. And, you know, our team also is very experienced, and decades of experience in the insurance world. So we're very familiar with the markets that are willing to provide these types of policies and the markets that would be likely to take a look at a risk such as this.
Q Okay. You mentioned that there was -- I think your words were a little hair on this, and one of the things you mentioned was bankruptcy. How did the fact that Strand was

the general partner of a debtor in bankruptcy impact your ability to solicit D&O insurance?

A Well, it's just not a plain vanilla situation, so people are somewhat, you know, are -- I think -- so, the type of insurance, D&O insurance, that we write is very different from auto insurance, as an example. Auto insurance, people expect there to be a certain amount of claims, and they expect the premiums to cover the claims plus the expenses and then provide them a reasonable profit on top of that.

Our insurance is really much more by binary. The expectation for underwriters is that they will be completing ignoring -- or, avoiding risk at all costs, wherever possible. So anytime there is a situation that looks a little risky, so the premium might be a little higher, the deductible might be a little higher, but, again, the underwriters are really making a bet that they will not have a claim. Because the premiums pale in comparison to the limits that are available to the policyholder.

Q And so --

A So, -- I'm sorry. What were you going to say?

Q I didn't mean to interrupt.

A Yeah.

Q Have you finished your answer?

A Sure.

Q Okay. So, were some of the 14 or 15 markets that you

contacted reluctant to underwrite because there was a bankruptcy ongoing?

A Well, I think that probably -- I mean, there are certain markets that we didn't go to in the beginning because they would be very reluctant to write a risk that had that kind of hair on it, based on our experience from dealing with them. And, you know, I think the bankruptcy was certainly a little bit of an issue. And then, obviously, as people did their research and -- or if they weren't already familiar with Highland and got to know, you know, got -- I will just say for a simple Google search and learned a little bit about Mr. Dondero, I think there was definitely some significant reluctance to write this program.

Q Was the fact that the Debtor -- was the fact that the Debtor is a partnership an issue that came up, in your -- in your process?

A There are certainly some carriers who won't write what's known as general partnership liability insurance. So, yes, that is part of that. It was part of the limiting factor in terms of who we went to.

Q Okay. And, finally, you mentioned Mr. Dondero. What role did he play in your ability to obtain insurance for the Strand board?

A Well, that's a very significant role. As, you know, as mentioned, the underwriters are very risk-averse, so the

litigiousness of Mr. Dondero is a very strong red flag prohibiting a number of people from writing the insurance at all. And the ones that were writing, that were willing to provide options, were looking for protections from Mr. Dondero.

Q And what kind of protections were they looking for?

A Well, the gatekeeper function was a key factor. That was really the only way we could even start a conversation with any of the people that we were able to engage. And in addition, they wanted a, you know, sort of a belts and suspenders additional protection of having an exclusion preventing any litigation brought by or on behalf of Mr. Dondero.

Q Were you able to identify any carrier who was prepared to underwrite D&O insurance for Strand without the gatekeeper provision or without a Dondero exclusion?

A We were not.

Q Okay. Let's fast-forward now. Has your firm been requested to obtain professional management insurance for the contemplated post-confirmation debtor entities and individuals associated with those entities?

A Yes.

Q Okay. So let's just talk about the entities first, the Claimant Trust and the Litigation Trust. In response to that request, have you and your team gone out into the marketplace

to try to find an underwriter willing to underwrite a policy for those entities?
A Yes.
Q And have you been able to find any carrier who's willing to provide coverage for the Claimant Trust and the Litigation Trust?
A Yes.
Q And how many -- how many have expressed a willingness to do that?
A Two.
Q And have those two carriers indicated that there would be conditions to coverage for the entities?
A Both will require a -- the continuation of the gatekeeper function, as well as a Dondero exclusion.
Q Okay. Have you also been tasked with the responsibility of trying to find coverage for the individuals associated with the Claimant Trust and the Litigation Trust, meaning the Claimant Trustee, the Litigation Trustee, and the Oversight Board?
A Yes. So we did it concurrently.
Q Okay. So, are the two firms that you just mentioned willing to provide insurance for the individuals as well as the entities?
A Correct. With the same stipulations.
Q They require -- they both require the gatekeeper and the

Dondero exclusion?
A That's correct.
Q Is there any other firm who has indicated a willingness to consider providing D&O insurance for the individuals?
A There is one that is willing to do so, as long as the gatekeeper function remains in place. They have indicated that if the gatekeeper function was to be removed, that they would then add a Dondero exclusion to their coverage.
Q So is there any insurance carrier that you're aware of who is prepared to insure either the individuals or the entities without a gatekeeper provision?
A No.
Q And that last company, I just want to make sure the record is clear: If the gatekeeper provision is overturned on appeal or is otherwise not effective, do you have an understanding as to what happens to the insurance coverage?
A They will either add an exclusion for any claims brought by or on behalf of Mr. Dondero or cancel the coverage altogether.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: All right. Cross of this witness?

CROSS-EXAMINATION

BY MR. RUKAVINA:
Q Mr. Tauber, I'm a little confused. So, the insurance that's being written now for the post-bankruptcy entities, did

I hear you say that there is one carrier that would give that insurance subject to having a Dondero exclusion?

A So, first of all, there's nothing currently being written. We have solicited quotes. So, just to make sure that that -- I want to make sure that's clear.

We have three carriers that are willing to provide varying levels of coverage. All three will only do so with the existence of the gatekeeper function continuing to be in place. One of the three has -- two of those three will also provide the coverage with -- even with the gatekeeper function and the Dondero exclusion. The third one was not requiring a Dondero exclusion unless the gatekeeper function goes away.

Q Okay. So the third one, you believe, will, whatever the term is, write the insurance or provide the coverage without a gatekeeper, as long as there is a strong Dondero exclusion?

A No. Their initial requirement is that the gatekeeper function remains in place. That is their preferred option. If the gatekeeper function is removed, then they will add a Dondero exclusion in place of the gatekeeper exclusion. In addition, that carrier is only willing to provide coverage for the individuals, not for the entities.

Q Okay. Thank you.

MR. RUKAVINA: I'll pass the witness, Your Honor.

THE COURT: All right. Other cross?

MR. TAYLOR: Clay Taylor on behalf of Mr. Dondero.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. TAYLOR:

Q Good morning, Mr. Tauber.

A Good morning.

Q Are you generally familiar with placing D&O insurance at distressed debt level private equity firms?

A I am familiar with it probably more from the underwriting side, and I also worked at a fund that was distressed and had to be liquidated, so I -- as the COO, so I have a fair amount of familiarity, yes.

Q Okay. Before taking this to market for the first time for the pre-confirmation policies that you have in place, did your firm conduct any due diligence or analysis of comparing the amount of litigation the Highland entities and Mr. Dondero were involved in as compared to other comparable firms in the marketplace? Say, you know, Apollo, Fortress, Cerberus, other similar market participants?

A Well, it wouldn't really be our role as the broker. That's the role of the underwriter.

Q Are you familiar if any of the underwriters undertook any such analysis?

A I would assume that they did, since they all had concerns about Mr. Dondero almost immediately.

Q Do you have any -- you didn't conduct any personal due

diligence on comparing the amount of litigation that the Highland entities were involved in as compared to, say, Fortress, do you?

A Well, again, that wouldn't really be my role as the broker. But I will say that I used to write the primary insurance for Fortress Investment Group when I was at Zurich. So I'm extremely familiar with Fortress, to use your example, and I would say that the level of litigation at Fortress was much, just out of personal knowledge, was significantly less than I had encountered or than I had read about at Highland.

Q That you have read about? Is that based upon a number of cases where Fortress was a plaintiff as compared to Highland was a plaintiff? Over what time period?

A Again, not my role. Not something that I've done. I'm just generally familiar with Fortress and I'm generally familiar with Highland.

Q All right. So you're generally familiar and you say that -- you're telling me and this Court that Fortress is involved in less litigation. Could you quantify that for me, please?

A No, but it's really irrelevant to the situation at hand. The issue is not my feelings whatsoever. The issue is the underwriters' feelings and their concern with Mr. Dondero, not mine or anybody else's.

Q So, I appreciate your answer and thank you for that, but I believe the question that was before you is, have you

quantitatively -- do you have any quantitative analysis by which you can back up the statement that Fortress is less litigious than Highland?

A I wouldn't even try, no.

Q Okay. Do you have any quantitative analysis for -- that Cerberus is any less litigious than Highland?

A I don't have any real knowledge of Cerberus's litigiousness.

Q Same question as to Apollo.

A Again, the Fortress, you just happened to mention Fortress, which was a special case because I used to be their primary underwriter. I don't have any specific -- I'm not a claims attorney. I don't have any specific knowledge of the level of litigiousness.

And, again, it's not up to me, my decision. It's the underwriters' decision of whether or not they're willing to write the coverage, not mine.

Q You mentioned that the -- when you took this out to market, it had a little hair on it. Correct?

A Correct.

Q And you put together a package of materials that you sent out to 14 or 15 market participants; is -- did I get that correct?

A Yes.

Q And in that package, you had certain pleadings, including

the court order, correct?
A Yes. I believe that's correct.
Q And that was after your initial conversation with John and -- where he pointed out the gatekeeper role. Correct?
A Correct.
Q And so when you went out to market, presumably you highlighted the gatekeeper role to all the people you solicited offers from because you thought it included less risk, correct?
A It offered a level of protection that was not -- that's not common. So it's, yes, it's a huge selling point for the risk.
Q Okay. So, to be clear, you never went out to the market to even see if you could get underwriting the first time without the gatekeeper function; is that correct?
A Well, it's my job as a broker to present the risk in the best possible light. So if we have a fact that makes the risk a better write for the underwriters, we, of course, will highlight it. So, no, I did not do that.
Q Okay. So, the quick answer to the question is no, you did not go out and solicit any bids without the gatekeeper function?
A Correct.
Q When you have approached the market for the post-confirmation potential coverage, did you approach the same 14

or 15 parties that you did before?
A I don't have the two lists in front of me. They would have been vastly similar, yes.
Q Okay. And so, again, all of the 14 or 15 parties or the lists that you solicited were already familiar with the gatekeeper function, correct?
A Yes.
Q And so therefore they already had that right; they're not going to trade against themselves and therefore say that, without it, we'll go ahead and write coverage. Correct?
A I -- I -- it'd be hard to answer that question. I don't know.
Q Okay. Because you didn't try that, did you?
A I would have had no reason to, no.
Q Okay. So you don't know if a market exists without the gatekeeper function because you haven't asked, have you?
A I guess that's fair, yeah.
MR. TAYLOR: I have no further questions.
THE COURT: All right. Any other Objectors with cross-examination?
MR. DRAPER: I have no questions for the witness, Your Honor.
THE COURT: All right. Anyone else? Mr. Morris, redirect?
MR. MORRIS: Just one.

REDIRECT EXAMINATION

BY MR. MORRIS:

Q One question, Mr. Tauber. Is there any -- do all underwriters -- any underwriters for Fortress require, as a condition to underwriting the D&O insurance, require a gatekeeping provision?

A In my, you know, 11, 12 years of experience in this industry, in this space, I have never seen that gatekeeper function be available, as an underwriter or as a broker. So, no.

MR. MORRIS: No further questions, Your Honor.

THE COURT: Any recross on that redirect?

All right. Well, Mr. Tauber, you are excused. We thank you for your testimony today. So you can log off.

THE WITNESS: Thank you.

THE COURT: Okay.

(The witness is excused.)

THE COURT: Mr. Morris, does the Debtor rest?

MR. MORRIS: The Debtor does rest, Your Honor.

THE COURT: All right. Well, what are we going to have from the Objectors as far as evidence?

MR. RUKAVINA: Your Honor, I will be very short. I will call Mr. Seery for less than ten minutes. I will call Mr. Post for less than ten minutes. I will have one exhibit. And I think that that's it for all the Objectors, unless I'm

mistaken, gentlemen.

MR. TAYLOR: Your Honor, I had one witness, Mr. Sevilla, under subpoena to testify, and needed a brief moment to discuss with my colleagues whether we're going to call him, and if so, put him on notice that he would be coming up probably about -- I don't know your schedule, Your Honor, but probably, I'm guessing, either before lunch or after, and I need to let him know that also.

So I do need a brief three to five minutes to confer with my colleagues and some direction from the Court to, if we decide to call him, as to when we would tell him to be available.

THE COURT: All right. Well, before I get to that, Mr. Draper, do you have any witnesses?

MR. DRAPER: I do not.

THE COURT: All right. Well, let's see. It's 10:34. We're making good time this morning. If Seery is truly ten minutes of direct, and Post is truly ten minutes of direct, and I don't know how long the documentary exhibits are going to take, it sounds to me like we are very likely to get to Mr. Sevilla before a lunch break.

So if you want to -- you know, I don't know what that involves, you sending text messages or making a quick phone call. Do you need a five-minute break for that?

MR. TAYLOR: Yes, Your Honor. It involves a phone

call and an email. Just a confirmatory phone call just to make sure that the guy -- just so you know who he is, he is actually a Highland employee, but he's represented by separate counsel, and so we do need to go through him just because that's the right thing to do.

THE COURT: All right. Well, again, I mean, I never know how long cross is going to take, but I'm guessing, you know, we're going to get to him in an hour or so, if not sooner, it sounds like. So, all right. So, do we need a five-minute break?

MR. RUKAVINA: And Your Honor, it might make more sense to make it a ten-minute break. I suspect that Mr. Taylor will be able to release his witness if he and I will just be able to talk. So I would ask the Court's indulgence for a ten-minuter.

THE COURT: Okay. We'll take a ten-minute break. We'll come back at 10:46 Central time.

THE CLERK: All rise.

(A recess ensued from 10:36 a.m. until 10:46 a.m.)

THE CLERK: All rise.

THE COURT: Please be seated. We're going back on the record in the Highland confirmation hearing. Are the Objectors ready to proceed?

MR. RUKAVINA: Your Honor, Davor Rukavina. We are.

THE COURT: All right. Well, Mr. Rukavina, are you

going to call your witnesses first?

MR. RUKAVINA: Yes, I will. Before that, if it might help the Court and Mr. Morris: Mr. Morris, with respect to that last exhibit, I do not object to the admission of any of the exhibits that were admitted at that PI hearing.

But I do think, Your Honor, for the record, that -- and I would ask Mr. Morris that he should refile those exhibits here in this case, except for those that are duplicative. Because, again, there's 10,000 pages of indentures, et cetera.

MR. MORRIS: Thank you very much, sir.

Your Honor, if that's acceptable to you, we'll do that as soon as possible.

THE COURT: All right. And let me make sure the record is clear. Are we talking about what you've described as 7O? I'm getting mixed up now. Am I --

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay.

MR. MORRIS: It's 7O, which is the documents that were introduced into evidence in the prior hearing. And Mr. Rukavina is exactly right, that there is substantial overlap between that and other documents that have already been admitted in the record in this case. So we'll just file an abridged version of Exhibit O that only includes non-duplicative documents.

THE COURT: All right. So that will be admitted, and

we'll look for your filed abridged version to show up on the docket. 70.

(Debtor's Exhibit 70 is received into evidence as specified.)

THE COURT: All right. What's next?

MR. RUKAVINA: Your Honor, Jim Seery, please. Mr. James Seery.

THE COURT: All right. Mr. Seery, welcome back. Please raise your right hand.

MR. SEERY: Can you -- can you hear me, Your Honor?

THE COURT: I can now.

JAMES P. SEERY, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

THE COURT: All right. Thank you.

Mr. Rukavina, go ahead.

DIRECT EXAMINATION

BY MR. RUKAVINA:

Q Mr. Seery, --

MR. RUKAVINA: Thank you.

BY MR. RUKAVINA:

Q Mr. Seery, good morning.

MR. RUKAVINA: Mr. Vasek, if you'll please pull up the schedules.

What we have here, Your Honor, is Docket 247, the Debtor's schedules. I'd ask the Court to take judicial notice of it.

THE COURT: All right. The Court will do so.

BY MR. RUKAVINA:
Q Mr. Seery, are you familiar with these entities listed here on the Debtor's schedules?
A Generally. Each one a little bit different.
Q Okay. Do you agree that the Debtor still owns equity interests in these entities?
A I believe it does, yes.
Q Okay. Is it true that none of these entities are publicly traded?
A I don't believe any of these are publicly-traded entities, no.
Q Okay. And none of these, to your knowledge, are debtors in this bankruptcy case, right?
A No. We only have one debtor in the case.
Q Okay. So, Highland Select Equity Fund, LP, the Debtor owns more than 20 percent of the equity in that entity, right?
A I believe the Debtor owns the majority of that entity. That is a fund with an on- and offshore feeder. And I, off the top of my head, don't recall exactly how the allocations of equity work. But I believe we do.
Q Does 67 percent refresh your memory? Are you prepared to say that the Debtor owns 67 percent of that equity?
A I'm not prepared to say that, no.
Q Okay. Wright, Ltd. Does the Debtor own more than 20 percent of that equity?

A There's about -- I don't recall. There's about at least 25 artist, designers, or designs. Wright, AMES, Hockney, Rothco, all own in different places, and they all own in turn some other thing. So I don't know what each of them, off the top of my head, own. There's -- they're part of a myriad of corporate structures here.

Q Strak, Ltd. Do you know whether the Debtor owns more than 20 percent of the equity of that entity?

A Stark? I don't know.

Q Okay. I don't know how to pronounce the next one. Eamis (phonetic) Ltd. Do you know whether the Debtor owns more than 20 percent of that equity?

A Off the top of my head, I don't recall.

Q What about Maple Avenue Holdings, LLC?

A I believe, I don't know if it's directly or indirectly, that we own a hundred percent of that entity. But I'm not sure.

Q What about Highland Capital Management Korea, Ltd.?

A Effectively, Highland Capital Management is owned a hundred percent.

Q What about Highland Capital Management Singapore Pte. Ltd.?

A We are in the process of shutting it down, so I don't know that -- what the equity percentages are. It's really just a question -- it's -- it's dissolved save for a signature from a

Singaporean.
Q Okay. But did the Debtor own more than 20 percent of that entity?
A I don't know the specific allocations of equity ownership.
Q Okay. What about Pennant (phonetic) Management, LP? Do you know whether the Debtor owns or owned more than 20 percent of that entity?
A I don't recall, no.
MR. RUKAVINA: You can take that exhibit down, Mr. Vasek.
BY MR. RUKAVINA:
Q Mr. Seery, very quick, are you familiar with Bankruptcy Rule 2015.3?
A I am, yes.
Q Okay. Has the Debtor filed any Rule 2015.3 statements in this case?
A I don't believe we have.
Q Okay.
MR. RUKAVINA: Thank you, Your Honor. I'll pass the witness.
THE COURT: All right. Any other Objector questioning? None from Mr. Taylor, none from Mr. Draper, none from Ms. Drawhorn?
All right. Any cross -- any examination from you, Mr. Morris?

MR. MORRIS: Just one question.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. MORRIS:

Q Mr. Seery, do you know why the Debtor has not yet filed the 2015.3 statement?

A I have a recollection of it, yes.

Q Can you just describe that for the Court?

A When we -- when we initially filed, when the Debtor filed and it was transferred over, we started trying to get all the various rules completed. There are, as the Court is aware, at least a thousand and maybe more, more like three thousand, entities in the total corporate structure.

We pushed our internal counsel to try to get that done, and were never able to really get it completed. We did not have -- we were told we didn't have separate consolidating statements for every entity, and it would be difficult. And just in the rush of things that happened from the first quarter into the COVID into the year, we just didn't complete that filing. There was no reason for it other than we didn't get it done initially and I think it fell through the cracks.

MR. MORRIS: Nothing further, Your Honor.

THE COURT: All right. Anything further, Mr. Rukavina?

REDIRECT EXAMINATION

BY MR. RUKAVINA:

Q Mr. Seery, I appreciate that answer. But you never sought leave from the Bankruptcy Court to postpone the deadlines for filing 2015.3, did you?

A No. If it hadn't fallen through the cracks, it would have been something we recalled and we would have done something with it. But, frankly, it just fell off the -- through the cracks. We didn't deal with it.

Q Okay.

MR. RUKAVINA: Thank you, Your Honor. Thank you, Mr. Seery.

THE COURT: All right. Any other Objector examination?

Mr. Morris, anything further on that point?

MR. MORRIS: No, thank you, Your Honor. No further questions.

THE COURT: All right. Mr. Seery, thank you. You're excused once again from the witness stand.

(The witness is excused.)

THE COURT: Your next witness?

MR. SEERY: Thank you, Your Honor.

THE COURT: Uh-huh.

MR. RUKAVINA: Your Honor, I'll call Jason Post. Mr. Post, if you're listening, which I believe you are, if you'll please activate your camera.

THE COURT: Mr. Post, we do not see or hear you yet.

MR. RUKAVINA: Talk, Mr. Post, and I think it'll focus on you.

MR. POST: Yes. Can you hear me now?

THE COURT: We can hear you. We cannot see you yet. Could you say, "Testing, one, two; testing, one, two"?

MR. POST: Testing, one, two. Testing, one, two.

THE COURT: There you are. Okay. Please raise your right hand.

JASON POST, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

THE COURT: All right. Thank you. You may proceed.

DIRECT EXAMINATION

BY MR. RUKAVINA:

Q Mr. Post, good morning. State your name for the record, please.

A Robert Jason Post.

Q How are you employed?

A I'm employed by NexPoint Advisors, LP.

Q What is your title?

A Chief compliance officer.

Q Were you ever employed by the Debtor here?

A Yes.

Q Between when and when? Approximately?

A I believe it was July of '08 through October of 2020.

Q What was your last title while you were employed at the

Debtor?
A Still chief compliance officer. For the retail funds.
Q Okay. Very, very quickly, what does a chief compliance officer do? Or what do you do?
A It's multiple things. Interaction with the regulators. Adherence to prospectus and SAI limitations for the funds. And then establishment of written policies and procedures to prevent and detect violations of the federal securities laws and then testing those on a frequent basis.
Q And I believe you mentioned you're the CCO for NexPoint Advisors and Highland Capital Management Fund Advisors. Are you also the CCO for any funds that they advise?
A Yes. For all the funds that they advise.
Q Okay. Does that include so-called retail funds?
A Yes. They're all retail funds.
Q What is a retail fund?
A It typically constitutes funds that are subject to the Investment Company Act of 1940, such as open-end mutual funds, closed-end funds, ETFs.
Q Obviously, you know who my clients are. Are any of my clients so-called retail funds that you just described?
A Yes.
Q Name them, please.
A You've got NexPoint Capital, Inc., Highland Income Fund, and NexPoint Strategic Opportunities Fund.

Q Do those three retails funds hold any voting preference shares in the CLOs that the Debtor manages?
A Yes.
MR. RUKAVINA: Mr. Vasek, if you'll please pull up Exhibit 2.
Your Honor, I believe I have a stipulation with Mr. Morris that this exhibit can be admitted, so I'll move for its admission.
MR. MORRIS: No objection, Your Honor.
THE COURT: All right. Exhibit 2 will be admitted. And let's be clear. That appears at -- is it Docket No. -- let's see. Is it 1673 that you have your -- no, no, no, no. 1670? Is that where your exhibits are?
MR. RUKAVINA: No, Your Honor. It's 1863. I think we did an amended one because we numbered our exhibits instead of having seventeen Os and Ps. So it's 1863.
THE COURT: 1863? Okay. All right. There it is. Okay. Again, this is -- I'm sorry. I got sidetracked. What exhibit? It's Exhibit 2, is admitted. Okay.
MR. RUKAVINA: Thank you, Your Honor.
(Certain Funds and Advisors' Exhibit 2 is received into evidence.)
BY MR. RUKAVINA:
Q Real quick, Mr. Seery. What do these HIF, NSOF, NC, what do they stand for? Do they stand for the retail funds you

just named?

MR. SEERY: I don't think he meant me.

THE WITNESS: Yeah.

BY MR. RUKAVINA:

Q I'm sorry, Mr. Post. I didn't hear you.

A You addressed me as Mr. Seery.

Q Oh. I apologize. What do those initials stand for?

A The names of the funds that I mentioned.

Q Okay. And what do these percentages show?

A The percentages show the amount of shares outstanding and the preference shares that each of the respective funds hold of the named CLOs.

Q And those CLOs on the left there, those are the CLOs that the Debtor manages pursuant to agreements, correct?

A Yes. Those are some of them, correct.

Q Yes. The ones that the retail funds you mentioned have interests in, correct?

A Correct.

Q And what does the far-right column summarize or show?

A That would be the aggregate across the three retail funds.

Q In each of those CLOs?

A Correct.

Q Thank you.

MR. RUKAVINA: Mr. Vasek, you may pull this down.

BY MR. RUKAVINA:

Q Mr. Post, in the aggregate, how much do those three retail funds have invested in those CLOs, ballpark?
A I believe it's approximately $130 million, give or take.
Q Is it closer to 140 or 130?
A A hundred -- I think it's 140, actually.
Q Okay. Thank you. Who controls those three retail funds?
A Ultimately, the board --
Q And what --
A -- of the funds.
Q What is -- what do you mean by the board? Do they have independent boards?
A Yes. They have a majority independent board, the funds do.
Q Do you report to that board?
A Yes.
Q Does Mr. Dondero sit on those boards?
A He does not.
Q Okay.

MR. RUKAVINA: I'll pass the witness, Your Honor. Thank you, Mr. Post.

THE COURT: All right. Any other Objector examination of Mr. Post?

All right. Mr. Morris, do you have cross?

MR. MORRIS: Yes, Your Honor, I do.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. MORRIS:

Q Mr. Post, can you hear me okay, sir?

A Yes, I can hear you.

Q Okay. Nice to see you again. When did you first join Highland?

A I believe it was July of '08.

Q So you've worked with the Highland family of companies for about a dozen years now; is that right?

A Yes.

Q And you were actually employed by the Debtor from 2008 until October 2020; is that right?

A Correct.

Q And you left at that time and went to join Mr. Dondero as the chief compliance office of the Advisors; do I have that right?

A Yes. I transitioned to NexPoint Advisors shortly, I believe, after Mr. Dondero left, but I was already the named CCO for that entity.

Q Right, but your employment status changed from being an employee of the Debtor to being an employee of NexPoint; is that right?

A Correct.

Q And that happened shortly after Mr. Dondero resigned from the Debtor and went to NexPoint Advisors, correct?

A Correct.
Q Okay. You mentioned that the funds are controlled by independent boards; do I have that right?
A It's a majority independent board, correct.
Q Okay. There's no independent board member testifying in this hearing, is there?
A I --
MR. RUKAVINA: Your Honor, Mr. Post wouldn't know that, but I'll stipulate to that as a fact.
THE COURT: All right.
MR. MORRIS: Okay.
BY MR. MORRIS:
Q Did you -- do you speak with the board members from time to time?
A Yes.
Q Did you tell them that it might be best if they came and identified themselves and helped persuade the Court that they were, in fact, independent?
A They have counsel to assist them with that determination. I never mentioned anything along those line to them.
Q Okay. Can you tell me who the board members are?
A Yes. Ethan Powell, Bryan Ward, Dr. Bob Froehlich, John Honis, and then Ed Constantino. He is only a board member, though, for NSOF. NexPoint Strategic Opportunities Fund.
Q All right. Mr. Honis, is he -- has he been determined to

be an interested director, for purposes of the securities laws?
A Yes.
Q Okay. Mr. Froeh..., do you know much about his background?
A I believe he worked at Deutsche Bank and a couple of the other -- or maybe a couple of other investment firms in the past. And he also owns a minor league baseball team.
Q Do you know how long he served as a director of the funds?
A I don't know, approximately. I think maybe seven -- six, seven years.
Q Okay. How about Mr. Ward? Did Mr. Froehlich ever work for Highland?
A Not that I can recall.
Q Did Mr. Ward ever work for Highland?
A Not that I can recall.
Q Do you recall how long he's been serving as a director of the funds?
A Mr. Ward?
Q Yes.
A I believe -- I'd be -- I don't recall specifically. I think it's been, you know, 10 to 12 years, give or take.
Q He was a director when you got to Highland; isn't that right?
A He was on the board of directors.

Q Yeah. So fair to say that Mr. Ward has been a director since at least the mid to late oughts? 2005 to 2008?
A I'm sorry, you cut out. Late what?
Q The late oughts. Withdrawn. Is it fair to say that Mr. Ward's been a director of the funds since somewhere between 2005 and 2008?
A Again, I don't recall specifically. You know, I joined the complex, the retail complex as the named CCO in 2015, and he had been serving in that role prior to that, and I believe it was for probably a period of five to seven years, so that sounds in line.
Q Did you have a chance to review Dustin Norris's testimony from the December 16th hearing?
A I did not.
Q Do you know -- are you aware that he testified at some length regarding the relationship of each of these directors to Mr. Dondero and Highland?
A I didn't review anything, so I don't know what he said or how long it took.
Q Do you know if Mr. Powell's ever worked for Highland?
A He has.
Q Do you know in what capacity and during what time periods?
A He was -- I think his last title was -- I believe was chief product strategist, I believe. And he was also the named PM for one of -- or, a suite of ETF funds. I think he

was last employed maybe --from my recollection, 2014, possibly. Or 2015. Somewhere around in there.

Q Okay. And to the best of your knowledge, did Mr. Dondero appoint Mr. Powell to be the chief product strategist?

A I don't -- I don't know. I wasn't involved in the decision for his appointment. I don't know how he attained that role.

Q To the best of your knowledge, did Mr. Dondero appoint Mr. Powell as the PM of the ETF funds?

A Again, I wasn't involved in that determination, but he probably would have had a role in making the determination on who was the PM, along with probably some other investment professionals.

Q Okay. And did Mr. Powell join the board of the funds before or after he left Highland around 2015?

A I can't recall specifically if he was already on the board or was an interested member, but I believe he, you know, I believe he joined shortly after he left.

Q Okay. So he went from being an employee and being a portfolio manager at Highland to being on the board of these funds. Do I have that right?

A Again, I can't recall specifically. He may have already been on the board as an interested board member. But, you know, I believe, you know, if that wasn't the case, he would have joined the board shortly after leaving.

Q And Mr. Ward, I think you said, has been on the funds' board since somewhere between 2005 and 2008. Does that sound right?
A I think that was a time frame you referenced, and I think that was kind of in line, walking it back. But I don't recall specifically when he joined.
Q And to the best of your knowledge, have the Advisors for which you serve as the chief compliance officer managed the Funds for which Mr. Ward has served as a director since the time he became a director?
A I'm sorry. Can you repeat the question?
Q Yeah. I'm just trying to understand if the advisors -- withdrawn. The Advisors manage the Funds; do I have that right?
A They provide investment advice on behalf of the Funds.
Q And they do that pursuant to written agreements; do I have that right?
A Correct.
Q And is it your understanding that, for the entire time that Mr. Ward has served as a member of the board of the Funds, the Advisors have provided the investment advice to each of those Funds?
A Yes, in one form or fashion. I believe at one period in time, historically, the Advisor may have changed its name, but it would have been, you know, at the end of the day, one or

more -- one of either NexPoint Advisors or Highland Capital Management Fund Advisors would have advised those Funds.

Q Is it fair to say that each of the Advisors for which you serve as the chief compliance officer has always been managed by an Advisor owned and controlled by Mr. Dondero?

A I believe so, yes.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: All right. Any redirect?

MR. RUKAVINA: Yes.

THE COURT: Okay. Mr. Rukavina?

MR. RUKAVINA: Your Honor, was I on mute? I apologize.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. RUKAVINA:

Q Mr. Post, why did you leave Highland?

A It -- because I was a HCMLP employee and it was -- basically, there was conflicts that were created by being an employee of the Debtor and by also serving as the CCO to the named Funds and the Advisors, and it coincided with Jim toggling over from HCMLP to NexPoint. It just made sense more functionally and from a silo perspective for me to be the named CCO for that entity since he was no longer an employee of HCMLP.

Q And by Jim, you mean Jim Dondero?

A Yes, sorry. Jim Dondero.
Q You're not some kind of lackey for Mr. Dondero, where you go wherever he goes, are you?
MR. MORRIS: Objection to the question.
THE WITNESS: No.
THE COURT: Overruled. He can answer.
MR. RUKAVINA: Okay.
THE WITNESS: No.
MR. RUKAVINA: Okay. Thank you, Your Honor. I'll pass the witness.
THE COURT: Any other Objector examination?
All right. Any recross, Mr. Morris?

RECROSS-EXAMINATION

BY MR. MORRIS:
Q Just one question, sir. The conflicts that you just mentioned, they were in existence for the one-year period between the petition date and the date you left; isn't that right?
A I think -- I believe so, and I think they became more evident as, you know, time progressed.
Q Okay. But they existed on day one of the bankruptcy proceeding; isn't that right?
A Yes, I believe so.
Q All right.
MR. MORRIS: No further questions, Your Honor.

THE COURT: All right. Thank you, Mr. Post. You're excused from the virtual witness stand.

(The witness is excused.)

THE COURT: All right. Your next witness?

MR. RUKAVINA: Your Honor, my exhibit has been admitted, I promised I'd be short, and my evidentiary presentation is done. Thank you.

THE COURT: All right. Well, Mr. Taylor, your evidence?

MR. TAYLOR: First of all, given the testimony that we have received just recently, we have released Mr. Sevilla from his subpoena and are not going to call him.

With that being said, we do have some documents that we would like to get into evidence. We filed our witness and exhibit list at Docket No. 1874. I don't believe any of these are controversial. I'm trying to keep from duplicating those that are already into evidence by the Debtor. And therefore I would like to offer into evidence Exhibits No. 6 through 12 and 17. And that is it, Your Honor.

THE COURT: Okay. Is there any objection to Dondero Exhibits 6 through 12 and 17, appearing at Docket 1874?

MR. MORRIS: I just want to be clear that Exhibits 6 and 7, which are letters, I believe, from Mr. Lee (phonetic) are not being offered for the truth of the matter asserted in either letter.

MR. TAYLOR: That is correct, Your Honor. Just merely that those requests and the words that were stated in there were indeed sent on those dates.

MR. MORRIS: And the same comment, Your Honor, with respect to Exhibits 9 through 12, that those documents are not being offered for the truth of the matter asserted.

MR. TAYLOR: Again, just that those requests were sent and those responses as stated were sent.

And I apologize. I missed one, Your Honor. Also No. 15. 6 through 12, 15, and 17.

MR. MORRIS: Your Honor, the Debtor has no objection to Exhibits 15, 16, and 17.

THE COURT: All right. So, so they are all admitted with the representation that 6 and 9 through 12 are not being offered for the truth of the matter asserted. With that representation, you have no objection, Mr. Morris?

MR. MORRIS: That's right. I do just want to get confirmation that Exhibits 1 through 5 and 13 through 16 -- 13 and 14 are not being offered at all.

THE COURT: Mr. Taylor?

MR. TAYLOR: So, that -- that is correct. 1 through 5 would be duplicative of what has already been introduced into the record by Mr. Morris, so I am not offering those. And do not believe that 13 and 14 are relevant anymore, and so therefore did not offer those.

THE COURT: Okay. So, with that, I have admitted 6 through 12, 15, 16, and 17 at Docket Entry 1874.

(Dondero Exhibits 6 through 12 and 15 through 17 are received into evidence.)

THE COURT: All right. Anything else, Mr. Taylor?

MR. TAYLOR: No, Your Honor. We are not calling any witnesses.

THE COURT: All right. Mr. Draper, what about you? Any evidence?

MR. DRAPER: No evidence or witnesses. The evidence that's been introduced by Mr. Taylor and Mr. Rukavina are sufficient for me.

THE COURT: All right. Ms. Drawhorn, anything from you?

MS. DRAWHORN: No additional evidence, Your Honor.

THE COURT: All right. Well, then, Mr. Morris, did you have anything in rebuttal?

MR. MORRIS: No, Your Honor. I think we can proceed to closing statements. I would just appreciate confirmation by the Objecting Parties that they rest.

THE COURT: All right. Well, I guess we'll get that clear if it is isn't clear. All of the Objectors rest. Confirm, yes, Mr. Rukavina?

MR. RUKAVINA: Confirm.

THE COURT: And Mr. Taylor?

MR. TAYLOR: Confirmed, Your Honor.

THE COURT: Okay. And Draper and Drawhorn?

MR. DRAPER: Yes, Your Honor.

MS. DRAWHORN: Confirmed, Your Honor.

THE COURT: All right. By the way, I assume Mr. Dondero has been participating this morning. I didn't actually get that clarification before we started. Mr. Taylor, is he there with you this morning?

MR. TAYLOR: Your Honor, he is. He has been participating. He is sitting directly to my left about slightly more than six feet apart.

THE COURT: Okay. All right. Good.

All right. Well, let's talk about our closing arguments and let me figure out, do we have -- should we break a bit before starting? I have an idea in my brain about a time limitation, but before I do that, let me ask. Mr. Morris, first I'll ask you. How much time do you think you need for a closing argument?

MR. MORRIS: Your Honor, --

MR. POMERANTZ: Your Honor?

MR. MORRIS: -- I'll defer to Mr. Pomerantz, who's going to deliver that portion of our presentation today.

THE COURT: All right. Mr. Pomerantz?

MR. POMERANTZ: Your Honor, I will be making -- yes, Your Honor. I will be making the majority portion of the

argument. Mr. Kharasch will be making the portion of the argument dealing with the Advisor and Funds' objection. But I expect my closing to be quite lengthy, given the 1129 requirements, all the legal issues, which I plan to spend a fair amount of time. So I would anticipate a range of an hour and 45 minutes.

THE COURT: An hour and 45 minutes? All right. Well, --

MR. POMERANTZ: Correct.

THE COURT: I'm getting an echo.

MR. CLEMENTE: Your Honor, it's Matt Clemente on behalf on the Committee. I'll have 15 minutes or less, Your Honor. Just some things I would like to touch on.

THE COURT: All right. So, two hours. If I were to --

MR. POMERANTZ: And then you need, Your Honor, to add Mr. Kharasch. I think he's on. He can indicate how long his part of the closing will be.

THE COURT: Mr. Kharasch?

MR. KHARASCH: Yes. I would figure my argument would probably be about 20 minutes to 30 minutes.

THE COURT: Okay.

MR. RUKAVINA: Your Honor, let me interject something that I think will help everyone out. With the CLOs having consented through their counsel to the assumption, the bulk of

my objection is now moot. We no longer can and will argue that the contracts are unassignable under 365(b) or (c) because we do have now their consent. So that will hopefully help the Debtor on that issue.

MR. KHARASCH: Your Honor, Ira Kharasch again. I was not anticipating that. I believe that that will take away the bulk of my argument. I'm still going to be dealing with some of the other non-assumption-type arguments raised by the CLO Objectors, kind of dovetailing with Mr. Pomerantz's arguments on the injunction. But that will greatly reduce, Your Honor, my argument.

THE COURT: All right. So if I say two hours of argument for the Debtor and Creditors' Committee, Rukavina, Taylor and Draper and Drawhorn, can you collectively manage to share that two hours? Have a two-hour argument in the aggregate? That seems fair to me.

MR. RUKAVINA: Your Honor, I think -- I think that's fine, Your Honor.

THE COURT: All right. And I guess I'll --

MR. TAYLOR: This is Mr. Taylor. And yes, I agree.

THE COURT: Okay. And Mr. Draper?

MR. DRAPER: This is Douglas Draper. I agree. I agree also, Your Honor.

THE COURT: All right. And I'm going to ask --

MR. POMERANTZ: Your Honor, I --

THE COURT: Go ahead.

MR. POMERANTZ: Your Honor, we -- I think we may need like two hours and ten minutes, because mine was 1:45, Mr. Clemente was 15, and then Mr. Kharasch. But we'll be around that. And I tend to speak fast, so I might even shorten mine.

THE COURT: Okay. You negotiated me up to two hours and ten minutes, Debtors/Objectors, each.

I'm going to ask one more time. The U.S. Trustee lobbed a written objection, but we've not heard anything from the U.S. Trustee. Are you out there wanting to make an oral argument?

MS. LAMBERT: Yes, Your Honor. The United States Trustee is on the line. And we've been listening to the hearing. I can turn my video on. I think you're --

THE COURT: Yes. I can hear you. I can't see you.

MS. LAMBERT: Okay. All right. And so the U.S. Trustee feels that the issues about the releases have been adequately joined and raised by the other parties and that it's an issue of law. The U.S. Trustee does not feel that we can add to that dialogue by, you know, wasting more of the Court's time. I think it's been adequately briefed and it's been adequately argued here today.

THE COURT: Okay.

MS. LAMBERT: And we do have an agreement to include governmental release language in the order. I understand that agreement is still being honored. That's a separate agreement

than the issue of whether the releases are precluded. But we're going to let the other people carry the water on that.

THE COURT: Okay.

MR. POMERANTZ: Yeah. And that is correct. That is correct, Your Honor. They asked for some information -- a provision on government releases. They also asked for a provision regarding joint and several liability for Trustee fees.

As I mentioned previously, the IRS has asked for a provision in the confirmation order, as have the Texas Taxing Authorities.

We have not uploaded a proposed confirmation order, but I will state right now on the record that, before we do so, we will, of course, give Ms. Lambert, Mr. Adams, and the Texas Taxing Authorities the opportunity to review. We expect there won't be any issue because the language has already been agreed to.

THE COURT: All right. Well, how about this. It's 11:23 Central time. Let's break until 12:00 noon Central time, okay, so that gives everyone a little over 30 minutes to have a snack and get their notes together, and we'll start with closing arguments at 12:00 noon. All right? So we're in recess until then.

THE CLERK: All rise.

(A recess ensued from 11:24 a.m. until 12:05 p.m.)

THE COURT: All right. Please be seated. All right. This is Judge Jernigan. We are back on the record in Highland. Let me make sure we have the people we need. Do we have the Pachulski team there? Mr. Pomerantz, Mr. Kharasch?

MR. POMERANTZ: Yes, you do, Your Honor.

THE COURT: All right. For our Objectors, Mr. Taylor, are you there?

MR. TAYLOR: Yes, Your Honor, I am.

THE COURT: All right. I see Mr. Draper there on the video. You're there.

MR. DRAPER: I'm here. Can you hear me?

THE COURT: I can hear you loud and clear, yes.

MR. DRAPER: Great, because I didn't -- I'm not hearing, something so I apologize.

THE COURT: All right. So we have Mr. Rukavina, and I think I see Mr. Hogewood there as well. Is that correct? You're ready to go forward?

MR. RUKAVINA: Yes, Your Honor.

THE COURT: All right.

MR. RUKAVINA: Yes, Your Honor. Good afternoon.

THE COURT: All right. And Ms. Drawhorn, you're there?

MS. DRAWHORN: Yes, Your Honor.

THE COURT: Okay. Committee. Mr. Clemente, are you there?

MR. CLEMENTE: Yes, Your Honor. I'm here, Your Honor.

THE COURT: Okay. Very good. All right. So, let me reiterate. We've given two-hour and 10-minute time limitations for the Debtor, and that'll be both any time you reserve for rebuttal and your closing, initial closing argument. Mr. Clemente, you're going to be in that time frame as well. Okay?

MR. CLEMENTE: Yes, Your Honor.

THE COURT: And so, as supporters of the plan. And then, of course, the Objectors, they have collectively two hours and ten minutes.

A couple of things. I'm going to have my law clerk, Nate, who you can't see but he's to my right, he's going to keep time. I promise I won't be a jerk and cut anyone off midsentence, but please don't push the limit if I say, you know, "Time."

The other thing I will tell you is I'll probably have some questions here or there. And I've told Nate, cut off the timer if we're in a question-answer session. I won't count that as part of the two hours and ten minutes.

All right. So, with that, Mr. Pomerantz, you may begin.

CLOSING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Thank you, Your Honor. As Your Honor is aware, the Debtor has been able to resolve all objections

to confirmation other than the objection by Mr. Dondero or his entities and the United States Trustee.

Your Honor, I have a very lengthy closing argument, given the number of issues that are raised in the objections, and I want to make a complete record, since I understand that there's a good likelihood that (garbled) appeal.

With that in mind, Your Honor, I'm prepared to go through each and every confirmation requirement in Section 1129. However, as an alternative, I might propose that I can go through each of the Section 1129 requirements that are the subject of pending objections or otherwise depend upon evidence that Your Honor has heard.

THE COURT: Okay.

MR. POMERANTZ: And of course, I'll be happy to answer any questions that you have in the process.

THE COURT: Okay.

MR. POMERANTZ: And after my closing argument, I will turn it over to Mr. Kharasch to address the Advisor and Funds' objections.

THE COURT: Okay.

MR. POMERANTZ: Before I walk the Court through the confirmation requirements, I did want to note for the Court, as I did previously, that we filed an updated ballot summary at Docket No. 1887. And as reflected in the summary, Classes 2 and 7 have voted to accept the plan with the respective

numerosity and amounts required. In fact, the votes are a hundred percent.

Class 8, however, has voted to reject the plan. Seventeen creditors in Class 8 voted yes and 24 objectors, which are, I think, all but one the employees with one-dollar claims for voting purposes, voted against.

In dollar amount, Class 8 has accepted the plan by 99.8 percent of the claims. And I will address the issues of the cram-down over that class a little bit later on.

Lastly, during the course of my presentation, I will identify for the Court certain modifications we have made to address the objections that were filed on January 22nd and then also on February 1st. And at the end of my presentation, I will raise a couple of other modifications that I won't get to during my presentation and will explain to the Court why all the modifications do not require resolicitation and are otherwise appropriate under Section 1127.

Your Honor, as Your Honor is aware, Section 1129 requires the Debtors to demonstrate to the court that the plan satisfies a number of statutory requirements. 1129(a)(1) provides that the plan requires -- complies with all statutory provisions of Title 11, and courts interpreted this provision as requiring the debtor to demonstrate it complies with Section 1122 and 1123.

With respect to classification, Your Honor, there has been

one objection that was raised to essentially a classification, and that was raised by Mr. Dondero to Article 3C of the plan on the grounds that it purports to eliminate a class that did not have any claims in it as of the effective date but which may later have a claim in that class.

I think he was primarily concerned about Class 9 subordinated claims. But Mr. Dondero misunderstands the provision. It only eliminates a claim for voting purposes, and if there's later a claim in that class, it will be treated as the plan provides the treatment.

In any event, Class 9, as we know now, will be populated by the HarbourVest claims, as well as the UBS claims and the Patrick Daugherty claims, if the Court approves the settlement approving those claims.

Next, Your Honor, Section 1123(a) contains seven mandatory requirements that a plan must include. Sections 1, 2, and 3 of 1123(a) apply to the classification of claims and where they're impaired and treatment. The plan does that.

There has been an objection to 1123(a)(3) raised by several parties with respect to the classification and treatment of subordinated claims. The concerns stem from the mistaken belief that the Debtor reserved the right to subordinate claims without providing parties with notice and without obtaining a court order.

The Debtor never intended to have unilateral ability to

subordinate claims without affording parties due process rights, and we've added some clarificatory language to so provide.

We made changes to the plan on January 22nd, and then on February 1st, and the plan addresses all those issues in Article 3(j) and it talks about when a claim is going to be subordinated as a non-creditor. We've also redefined the definition of subordinated claims to make clear that a claim is only subordinated upon entry of an order subordinating that claim.

Mr. Dondero also objected on the grounds that the plan did not contain a deadline pursuant to which the Debtor would be required to seek any subordination, and we have revised Article 7(b) of the plan to provide that any request to subordinate a claim would have to be made on or before the claim objection deadline, which is 180 days after the effective date.

Lastly, certain former employees, Mr. Yang and Borud, objection also joined by Mr. Deadman, Travers, and Kauffman, objected to the inclusion of language in the definition of "Subordinated Claims" that a claims arising from a Class A, B, or C limited partnership is deemed automatically subordinated. The concerns were that the language could broadly apply to any potential claims by a former partner, and could be also read to encompass claims outside the statutory scope of 510(b) or

otherwise relating to limited partnership interests.

While the Debtor does reserve the right to seek to subordinate the claims on any basis, we have modified the plan to address that concern and to address the concern that we're not attempting to create any new causes of action for subordination that don't otherwise exist under applicable law, but it just preserves the parties' rights with respect to subordination and deals with that at a later date.

Next, Your Honor, Section 1123(a)(5). I skipped over 1123(a)(4) because there are no objections to that provision.

THE COURT: Okay.

MR. POMERANTZ: Section 1123(a)(5), a plan must provide for adequate means of implementation. And the plan provides a detailed structure and blueprint how the Debtor's operations will continue, how the assets will be monetized, including the establishment of the Claimant Trust, establishment of the Litigation Sub-Trust, the Reorganized Debtor, the Claimant Trust Oversight Board. And the documents precisely describing how this will occur were filed as part of the various plan supplements.

1123(a)(7), Your Honor, requires that the plan only contain provisions that are consistent with the interest of equity holders and creditors with respect to the manner, selection, and -- of any director, officer, or trustee under the plan. And as discussed in the plan, at the disclosure

statement, and as testified to by Mr. Seery, the Committee and the Debtor had arm's-length negotiations regarding the post-effective date corporate governance and believe that the selection of the claimant Trustee, the Litigation Sub-Trustee, and the Claimant Trust Oversight Board are in the best interest of stakeholders.

HCMFA has raised a particular objection, I think, to these issues, but I will address it in the context of the requirement under Section 1129(a)(5).

Your Honor, Section 1129(a)(2) requires that the plan comply with the disclosure and solicitation requirements under the plan. Section 1125 requires that the Debtor only solicit with a court-approved disclosure statement. The Court approved the disclosure statement on November 23rd, and pursuant to the proofs of service on file, the plan and disclosure statement were mailed, along with solicitation materials that the court approved.

Now, there has been an objection raised by Dugaboy, and also alluded to by Mr. Taylor in some of his comments before, that the plan does violate 1129(a)(2) because the Debtor's disclosure statement was deficient.

In support of that argument, Dugaboy points to the reduction in the anticipated distribution to creditors from the November plan analysis to the January plan analysis, and argues that that reduction requires resolicitation. However,

those arguments are not well-taken.

First, none of the people making these objections were solicited for their vote on the plan, or if they had been, they didn't vote or decided to reject the plan. And to the extent that Class 8 creditors, the distribution has gone down -- that's the class that Mr. Taylor and Mr. Draper are concerned about -- you don't hear the Committee, Acis, Redeemer, UBS, HarbourVest, Daugherty, or the Senior Employees making their argument, this argument, and they represent over 99 percent of the claims in that class. And in fact, of the 17 Class 8 creditors that have accepted the plan, 15 are represented by the parties I just mentioned.

So who are the two creditors that they're so concerned about? One is Contrarian, which is a claims trader that actually elected to be treated in Class 7, and one is one of the employees who voted to accept the plan.

Second, Your Honor, the argument conflates the difference between adverse change to the treatment of a claim or interest that would require a resolicitation under Section 1127 and a change to the distribution that would not.

More importantly, Your Honor, the argument is specious. As Mr. Seery testified yesterday, the material differences between the analysis contained on November and late January and the one we filed on February 1st were based on three types of changes: an update regarding the increased value of assets

based upon events that had transpired during this period, which included an increase in asset value, no recoveries, and revenues expected to be generated by the CLO management agreements; an update to the expected costs of the Reorganized Debtor and the Claimant Trust as a result of the continued evaluation of staffing needs, operational expenses, and professional fees; and an update to reflect resolution of the HarbourVest and UBS claims.

In the filing Monday, Your Honor, we updated the plan projection, a liquidation analysis which revised the unsecured claims based upon the UBS settlement that I was able to disclose to Your Honor. And in the filing, the distribution now revised to Class 8 creditors is now 71 percent, compared to the 87 percent that was in the disclosure statement that went out for solicitation.

Your Honor, there can be no serious argument that the creditors in this case were not fully aware of the potential for the UBS and HarbourVest creditors receiving claims. Your Honor's UBS 3018 order granting its claim for voting purposes was entered right around the time that the disclosure statement was approved. And, in fact, a last-minute addition to the disclosure statement disclosed the 3018 amount, although the amount did not make it to the attachment to the disclosure statement. And that reference, Your Honor, to the UBS claim being allowed for voting purposes can be found at

Page 41 of Docket No. 1473.

And the HarbourVest settlement was filed on about December 23, two weeks before the voting deadline, sufficient time for people to take that into consideration.

And as Your Honor surely knows, the hearings in this case have been very well-attended by the major parties, and I believe that if we went back and looked at the records of who was on the WebEx system during the HarbourVest and UBS hearings, you would find that representatives of basically every creditor, every major creditor in this case in Class 8 participated.

Moreover, Your Honor, creditors were not guaranteed any percentage recovery under the plan and disclosure statement, which clearly identified the size of the claims pool as a material risk.

Article 4(a)(7) of the disclosure statement, which is at Docket 1473, is entitled "Claims Estimation" and warns creditors that there can be no assurances that the Debtor's claims estimates will prove correct, and that the actual amount of the allowed claims may vary materially.

And if Dugaboy is arguing it was misled as the holder of a disputed administrative claim and general unsecured claim, that argument is simply preposterous.

Dugaboy cites several cases for the proposition that deficient disclosure may warrant resolicitation, and the

Debtor agrees with the proposition as a general matter. But if one looks at the cases that were filed -- that Dugaboy cited to, it will see that they are clearly inapposite and distinguishable.

In re Michaelson, the Bankruptcy Court for the Eastern District of California, revoked confirmation because the debtor failed to disclose in the disclosure statement a mail fraud indictment of the turnaround specialist who was to lead the reorganization effort and a prior Chapter 7 company he drove into the ground.

In *In re Brotby*, the Ninth Circuit BAP affirmed a decision of the Bankruptcy Court that the individual debtor's decision to modify its financial projections on the eve of confirmation did not require a resolicitation. And there, the financial projections were off by 75 percent.

And in *Renegade Holdings*, the Bankruptcy Court granted a motion by a group of states to revoke confirmation by the debtors, who manufactured and distributed tobacco products, because the debtors failed to disclose in its disclosure statement that the debtor and its principals were under criminal investigation for unlawful trafficking in cigarettes, which was not disclosed to creditors.

Your Honor, none of these cases are remotely analogous to this case, and they certainly do not stand for the proposition that the Debtor was required to resolicit.

Next, Your Honor, the next requirement is 1129(a)(3), which requires that any plan be proposed in good faith. As Mr. Seery testified at length, and the Court has personal knowledge of, having presided over this case for a year, the plan is the result of substantial arm's-length negotiations with the Committee over a period of several months.

Mr. Seery testified yesterday that, soon after the board was appointed, the Committee wanted to immediately pursue down the path of an asset monetization plan. However, as Mr. Seery testified, the board decided that it was inappropriate to rush to judgment and that it should consider all potential restructuring alternatives for the Debtor. And Mr. Seery testified what those alternatives were: a traditional restructuring and continuation of the Debtor's business; a potential sale of the Debtor's assets in one or more transactions; an asset monetization plan like the one before the Court today; and, last but not least, a grand bargain plan that would involve Mr. Dondero sponsoring the plan with a substantial equity infusion.

As Mr. Seery testified, by the early summer of 2020, the Debtor decided that it was appropriate to start moving down the path of an asset monetization plan while it continued to work on the grand bargain plan. Accordingly, Mr. Seery testified that the Debtor commenced good-faith negotiations with the Committee regarding the asset monetization plan, and

that those negotiations took several months, were hard-fought and at arm's-length, and involved substantial analysis of the appropriate post-confirmation corporate structure, governance, operational, regulatory, and tax issues. And on August 12th, Your Honor, the plan was filed with the Court.

And although the Debtor at that time had not reached an agreement with the Committee on some of the most significant issues, Mr. Seery testified that the independent board believed that it was important to file that plan at that time, a proverbial stake in the ground to act as a catalyst for reaching a consensual plan with the Committee or others, which it has done.

As Mr. Seery testified, he continued to work with Mr. Dondero to try to achieve a grand bargain plan, while at the same time proceeding down the path of the filed plan.

He testified that the parties participated in mediation at the end of August and early September to try to reach an agreement on a grand bargain plan, but were unsuccessful. And the Debtor proceeded on the path of the August 12th plan and sought approval of its disclosure statement on August 27th, 2020.

Mr. Seery testified that, at that time, the Debtor still had not reached an agreement with the Committee on certain significant issues involving post-confirmation governance and the scope of releases. And as a result, after a contested

hearing, Your Honor, Your Honor did not approve the disclosure statement on October 27th, but asked us to go back again to try to work out the issues, and we came back on November 23rd.

Mr. Seery testified that the Debtor continued to negotiate with the Committee to resolve the material disputes leading -- which led up to the November 23rd hearing, where we came in with the support of the Committee. But as Mr. Seery has also testified, he has continued to try to reach a consensus on a global plan, notwithstanding the approval of the disclosure statement. And he spent personally several hundred hours since his appointment trying to build consensus.

As part of this process, Mr. Seery testified that Mr. Dondero received access to substantial information regarding the Debtor's assets and liabilities, most recently in connection with a series of informal document requests which were made at the end of December.

And after the Court asked the parties to again reengage in efforts to try to reach a global hearing after the Debtor's preliminary injunction motion, Mr. Seery testified that he and the board participated in calls with Mr. Dondero and his advisors and the Committee to see if common ground could be attained.

Unfortunately, as Mr. Seery testified, the Committee and Mr. Dondero were not able to reach an agreement.

Accordingly, Your Honor, the testimony unequivocally and

overwhelmingly demonstrates that the plan was proposed in good faith.

I expect the Objectors may argue in closing that they have filed a plan under seal that is a better alternative than that being proposed by the plan that the Debtor seeks to confirm. Your Honor, as a threshold matter, yesterday I said any mention of the specifics of the recent plan would be inappropriate. We are not here today to debate the merits of Mr. Dondero's plan, which the Court permitted him to file under seal. He had ample opportunity to file this plan after exclusivity was terminated, seek approval of a disclosure statement, and, if approved, solicit votes in connection with a confirmation hearing, but he failed to do so.

What matters today, Your Honor, is whether the Debtor's plan, the plan that has been accepted by 99.8 percent of the amount of creditors, and opposed only by Mr. Dondero, his related entities, and certain employees, meets the confirmation requirements of Section 1129, which we most certainly argue it does.

And perhaps most importantly, Your Honor, the Court remarked at the last hearing that, without the Committee's support for a competing plan, Mr. Dondero's plan would be dead on arrival. And as you have heard from Mr. Clemente, Mr. Dondero does not yet have the Committee's support.

Next, Your Honor, is Section 1129(a)(5). That requires

that the plan disclose the identity of any director, affiliate, officer, or insider of the debtor, and such appointment be consistent with the best interest of creditors and equity holders. Courts have held that this section requires the disclosure of the post-confirmation governance of the reorganized entity.

HCMFA objects to the plan, arguing that it did not comply with Section 1129(a)(5) because it didn't disclose the people who would control and manage the Reorganized Debtor and who might be a sub-servicer. HCMFA's objection is off-base. Under the plan, Mr. Seery will be the claimant Trustee and Marc Kirschner will be the Litigation Trustee. Mr. Seery testified extensively about his background, and he has appeared before the Court many times and the Court is familiar with him. We have also introduced his *C.V.* into evidence.

As he testified, he will be paid $150,000 per month, subject to further negotiations with the Claimant Trust Oversight Committee regarding the monthly amount and any success fee and severance fee, which negotiation is expected to be completed within the 45 days following the effective date.

Mr. Seery also testified regarding the names of the members of the Claimant Trust Oversight Committee, which information was also contained in the plan supplement and it generally includes the four members of the Committee and David

Pauker, a restructuring professional with decades of restructuring experience.

The members of the Oversight Committee will serve without compensation, except for Mr. Pauker, who Mr. Seery testified will receive $250,000 in the first year and $150,000 for subsequent years.

As set forth in the Claimant Trust agreement, if at any time there is a vacant seat to be filled by another independent member, their compensation will be negotiated by and between the Claimant Trust Oversight Board and them.

Mr. Seery has also testified that he believed the Claimant Trust will have sufficient personnel to manage its business. Specifically, he has testified that he intends to employ approximately ten of the Debtor's employees, who will be sufficient to enable him to continue to operate the Debtor's business, including as an advisor to the managed funds and the CLOs, until the Claimant Trust is able to effectively and efficiently monetize its assets for fair value, whether that takes two years or whether that takes 18 months or whether that takes longer.

Mr. Seery further testified that he believes that the operations can be best conducted by the Debtor's employees. And while he did consider the retention of a sub-servicer, he ultimately decided, in consultation with the Committee, that the monetization would be a lot more effective if done with a

subset of the Debtor's current employees.

The proposed corporate governance is also consistent with the interests of the Debtor and its stakeholders. The Court is very familiar with Mr. Seery and the Debtor, and I believe that Mr. Clemente, when he comments, will say the Committee can think of no better person to continue managing the Claimant Trust than Mr. Seery.

Mr. Kirschner is also well qualified to be the Litigation Trustee. His *C.V.* is part of the evidence that's been admitted and contains additional information regarding his background. And he will receive $40,000 a month for the first three months and $20,000 a month thereafter, plus a to-be-negotiated success fee.

There just simply can be no challenge to Mr. Seery's or Mr. Kirschner's qualifications or abilities to act in a manner contemplated by the plan or that their involvement is not in the best interest of the estate and its creditors.

Your Honor, the next requirement that is objected to is Section 1129(a)(7). That, of course, requires the Debtor to demonstrate that creditors will receive not less under the plan than they would receive if the Debtor was to be liquidated in Chapter 7. And on February 1st, Your Honor, we filed our updated liquidation analysis, which contains the latest-and-greatest evidence to support that.

These documents, the updated documents, in connection with

the prior analysis, was provided to objecting parties in advance of the January 29th deposition, and Your Honor has heard the differences between the January 29th and the February 1st documents being very minimal.

The Court heard extensive evidence and testimony from Mr. Seery regarding the assumptions that went into the preparation of the liquidation analysis and the differences of what creditors are projected to receive under the plan as compared to what they are projected to receive in a Chapter 7.

Such testimony also included a comparison between the liquidation analysis that was filed with the plan in November, the updated liquidation analysis filed on the -- or, provided to parties on January 28th, and the last version, filed on February 1st.

Mr. Seery testified that, on the revenue side, the liquidation analysis was updated to include the HCLOF interest, which was required as part of the settlement with HarbourVest; the increase in value of certain assets, including Trussway; revenue expected to be generated from continued management of the CLOs; and increased recovery on notes as a result of the acceleration of certain related notes.

On the expense side, Mr. Seery testified regarding his best estimate of the likely expenses to be incurred by a Chapter 7 trustee -- by the Claimant Trust, including

personnel costs; professional costs, which increase because of the litigious nature this case has become; and operating expenses.

And lastly, on the claim side, Your Honor, Mr. Seery testified that the claims numbers have been updated to include the settlement from HarbourVest and initially the amount approved to UBS pursuant to the 3018 order and then the reduction at $50 million based upon the settlement announced. And like the prior liquidation analysis, the current analysis demonstrates that creditors will fare substantially better under in Chapter -- under the plan than in Chapter 7. In fact, the projected recovery under the plan is 85 percent for Class 7 creditors and 71.32 percent for Class 8 creditors, as compared to 54.96 percent for all unsecured creditors in a Chapter 7.

Mr. Seery also testified that expenses are expected to be more under Chapter 11 than under Chapter 7, but he also testified that the tens of millions of dollars in greater revenue and asset recoveries under the plan will more than offset the additional expenses.

As a result, the Court has more than sufficient evidentiary basis to conclude that the Debtor has carried its burden to prove that it meets the best interest of creditors best.

But Mr. Dondero's counsel spent a lot of time crossing --

cross-examining Mr. Seery, in a vain attempt to demonstrate to the Court that a Chapter 7 actually would be much better for creditors. And this argument has also been made by Dugaboy and the Advisors and the Funds.

Before I address these arguments on its merits, Your Honor, I just wanted to remind the Court of the Objectors -- these Objectors' interest in this case. Mr. Dondero owns no equity in the Debtor. He owns a general partner. Strand, in turn, owns a quarter-percent -- a quarter of one percent of the total equity in the Debtor. And Mr. Dondero's claim, it's only a claim for indemnification. Dugaboy asserts two claims: a frivolous administrative claim relating to the postpetition management of a Multi-Strat, which, as an administrative claim, if it's valid, would not even be affected by the best interest of creditors test, because it would have to be paid in full. And he also asserts a claim that the Debtor's subsidiary -- against the Debtor's subsidiary for which it tries to pierce the corporate veil.

Just think about it. Dugaboy, Mr. Dondero's entity, is arguing that he should be able to pierce the corporate veil to get at the entity that was his before the bankruptcy.

Dugaboy's only other interest in this case relates to a -- a one -- point eighteen and several-hundredths percent of the equity interest of the Debtor, and that is out of the money.

And as I mentioned previously, Your Honor, Mr. Rukavina's

clients either didn't file any general unsecured claims or filed them and withdrew them. Their only claim is a disputed administrative claim against the Debtor that was filed a week ago and which, at the appropriate time, the Debtor will demonstrate is without merit.

And I understand that, just today, NexPoint Advisors also filed administrative claim.

So I'm not going to argue to Your Honor that these parties do not have standing, although their standing is tenuous, at best, to assert this argument. The Court should keep their relative interests in mind when evaluating the merits and the good faith of this objection.

The principal objection, as I said, is that creditors will do better in a Chapter 7. Essentially, they argue that a Chapter 7 trustee can liquidate the assets just as well as Mr. Seery can and not require the cost structure that is included in the Debtor's plan projections. Yes, they argue that a Chapter 7 will be more efficient.

Mr. Seery's testimony, the only testimony on the topic, however, establishes that this preposterous proposition has no basis in reality. Mr. Seery testified that a Chapter 7 trustee's mandate would be to reduce Debtor's assets as fast as possible, while he will monetize assets as and when appropriate to maximize the value.

But even if you can assume that the Chapter 7 trustee

could get court authority in a Chapter 7 to operate, there are several reasons Mr. Seery testified why a liquidation by a Chapter 7 trustee would be far worse than the plan.

First, Your Honor, no matter how competent the Chapter 7 trustee is -- and Mr. Seery did not say he is more competent than anyone else out there -- the lack of a learning curve that Mr. Seery established through the 13 months in this case puts Mr. Seery at such a major advantage compared to a Chapter 7 trustee.

Second, Mr. Seery questioned whether the Chapter 7 trustee would be able to retain the Debtor's existing professionals, even assuming they were willing to be retained. I'm not sure what's the Court's practice or the practice in the Northern District, but in many districts around the country debtor's counsel and professionals cannot be retained by Chapter 7 trustee, as general counsel, at least.

And I could just imagine, Your Honor, Mr. Dondero's position if the Chapter 7 trustee actually sought to hire Pachulski Stang and DSI.

Third, Your Honor, regardless of whether the Chapter 7 trustee obtained some operating authority, the market perception will be that a Chapter 7 trustee will sell assets for less value than would Mr. Seery as claimant Trustee. Mr. Seery testified to that.

The argument that the Objectors make that a Chapter 7

process, whereby the trustee would seek court approval of assets, is better for value than a process overseen by the Claimant Trust Board lacks any evidentiary basis and also is contradicted by Mr. Seery's testimony.

In fact, Mr. Seery testified that the Chapter 7 process, the public process of it, would very likely result in less recovery than a sale conducted in the Claimant Trust.

And lastly, Mr. Seery testified that it's unlikely that the ten or so valuable employees who Mr. Seery is planning to heavily rely on to assist him with post-confirmation would agree to a work for Chapter 7 trustee. Your Honor is all too familiar with the fights in the *Acis* case and Chapter 7 trustee, and it's just hard to believe that any of the Highland employees would go work for the Chapter 7 trustee.

So why is Mr. Dugaboy -- why is Dugaboy and Mr. Dondero actually making this objection and advocating for a Chapter 7? It's because they would expect to buy the Debtor's assets on the cheap from a Chapter 7 trustee, exactly what they've been trying to do in this case.

Your Honor, moving right now to Section 1129(a)(11), that requires the debtor to demonstrate that the plan is feasible. In other words, it's not likely to be followed by a further liquidation or restructuring. Under the Fifth Circuit law, the debtor need only demonstrate that the plan will have a reasonable probability of success to satisfy the feasibility

requirement, and the Debtor has easily met this standard.

As Mr. Seery testified, the Debtor's plan contemplates continued operations through which time the assets will be monetized for the benefit of creditors. The plan contemplates that Class 7 creditors will be paid off shortly after the effective date. Class 8 creditors are not guaranteed any recovery but will receive pro rata distributions over a period of time. Class 2, Frontier secured claim, will be paid off over time, and the projections demonstrate that it will -- the Debtor will have money to do so.

Mr. Seery testified at length regarding the assumptions that went into the preparation of the projections most recently filed on February 1, and based on that testimony, the Debtor has clearly demonstrated that the plan is feasible.

Your Honor, I think that brings us to Section 1129(b). Of course, again, Your Honor, if Your Honor has any other questions with the sections I'm skipping over. I believe we've adequately covered them in the briefs and I don't think there's any objection.

But as I mentioned before, we have three classes that have voted to reject the plan. Class 8 is the general unsecured claims. They voted to reject the plan. Yes. Even though, based upon the ballot summary, 99 percent of the amount of claims in that class voted to accept the plan, approximately 24 employees voted to reject the plan. And accordingly, the

Debtor cannot satisfy the numerosity requirement of Section 1126(c).

I do want to briefly recount for Your Honor Mr. Seery's testimony regarding the nature of the claims of the 24 employees who voted to reject the plan. And I'm not doing this to argue that the votes from these contingent creditors are not valid or that the Debtor doesn't need to satisfy the cram-down requirements. The Debtor understands it needs to demonstrate to the Court that Section 1129(b) is satisfied for the Court to confirm the plan.

Rather, why I do this, Your Honor, is to provide the Court with context about the nature and extent of the creditors in this class as the Court determines whether the plan is, in fact, fair and equitable and can be crammed down to a dissenting vote.

Mr. Seery testified that these employees originally had claims under the annual bonus plan and the deferred compensation plan. And as he testified, in order for claims under each of those plans to vest -- I think he referred to them as be-in-the-seat plans -- the employee was required to remain employed as of that date.

Mr. Seery testified that the Debtor terminated the annual bonus plan in the middle of January and replaced it with the key employee retention plan that the Court previously approved.

Accordingly, Mr. Seery testified that no employee who voted to reject the plan anymore has a claim on the annual bonus plan. He also testified that, with respect to the deferred compensation plan, people have contingent claims under that plan and that no payments are due until May 20 -- 2021.

As Mr. Seery testified, if the employees who would be entitled to receive payments under the deferred compensation plan do not agree to enter into a separation agreement that was approved by the Court, they will be terminated before May and there will no -- not longer be any deferred compensation due.

Accordingly, while the 24 employees who voted to reject the plan do technically have claims at this time they have voted, Mr. Seery testified the claims will go away soon.

I do want to point out something that's obviously painfully obvious at this point, that while Class 8 voted to reject the plan, the Committee, the statutory fiduciary for all unsecured creditors, supports the plan enthusiastically and I believe it does so unanimously.

The other classes to reject the plan, Your Honor, are Class 11, the A limited partnerships, and none of the holders in Class B and C limited partnerships voted on the plan, so cram-down is required over those classes as well. So Your Honor is able to confirm the plan pursuant to the cram-down

procedures under 1129(b) if the Court determines that the plan is fair and equitable and does not discriminate unfairly against the rejecting classes.

Let's first turn to the fair and equitable requirement. A plan is fair and equitable if it follows the absolute priority rule, meaning that if a class does not receive payment in full, no junior class will receive anything under the plan. With respect to Class 8, no junior class -- junior class to Class 8 will receive payment, and here is the key point, unless Class 8 is paid in full, with appropriate interest. NPA and Dugaboy -- Dugaboy in a brief filed on Monday -- argue that the plan does not satisfy the absolute priority rule because Class 10 and Class Equity Interests have a contingent right to receive property under the plan.

Your Honor, this argument misunderstands the absolute priority rule. Class 10 and Class Creditors will only receive payment after distribution to 8 and 9, the unsecured claims and the subordinated claims, are all paid in full, plus interest.

And, in fact, Dugaboy, in its brief, to its credit, admits that the argument is contrary to the Bankruptcy Court's decision of Judge Gargotta in the Western District case of *In re Introgen Therapeutics*. There, the Court was faced with a similar argument by a group of unsecured creditors who argued that the debtor's plan violated the absolute priority rule

because equity was retaining a contingent interest that would only be payable if general unsecured claims were paid in full.

In rejecting the argument, the Court reasoned, and I quote, "The only way Class 4 will receive anything is if Class 3, in fact, gets paid in full, in satisfaction of 1129(b)(2)(B)(i)," meaning that the absolute priority rule would not be an issue. If Class 3 is not paid in full, Class 4's property interest is not -- is just -- is not just valueless, it just doesn't exist.

Your Honor, this is precisely the situation in this case. Equity interests will only receive a recovery if Class 8 and 9 are paid in full.

But Dugaboy attempts to escape the logical reading of the absolute priority rule by claiming that *Introgen* was wrongly decided and goes against the Supreme Court's decision in *Ellers* (phonetic). Dugaboy argues that because the Supreme Court decided that property given to a junior class without paying a senior class in full is property, even if it's worthless.

But Dugaboy misses the point. Like the debtor in the *Introgen*, the Debtor here is not arguing that the property -- the absolute priority rule is not violated because the contingent trust is worthless. Rather, the argument is that the absolute priority rule is not violated; it's, in order to receive anything on account of the junior -- of the equity,

the senior creditors have to be paid a hundred percent plus interest.

In fact, Your Honor, if the plan just didn't give any recovery to the equity Class 10 and 11, I bet you Dugaboy and Mr. Dondero would be arguing that it violated the absolute priority rule because senior classes, unsecured creditors, could potentially receive more than a hundred percent of their interest. And there's a case in the Southern District of Texas, *In re MCorp*, where the Bankruptcy Court said that for a plan to be confirmed, its stockholders eliminated, creditors must not receive more than payment in full.

Excess proceeds, Your Honor, if any, have to go somewhere. They can't go to creditors, so they have to go to equity. And the absolute priority rule is not violated.

And how is Dugaboy harmed? They say they may want to buy the contingent interests, and the lack of a marketing effort violates the *LaSalle* opinion as well. And who holds the Class B and Class C partnership interests that come before Dugaboy that Dugaboy is concerned may have this opportunity rather than them? Yes, it's Hunter Mountain, Your Honor, an entity, like Dugaboy, that's owned and controlled by Mr. Dondero.

Accordingly, the argument that the plan violates the absolute priority rule is actually a frivolous argument.

Turning now to unfair discrimination, Your Honor, Dugaboy argued in its brief Monday that because the projected

distribution to unsecured creditors has gone down in the recent plan projections, the discrepancy between Class 7 and Class 8 is so large that that amounts to unfair discrimination.

Again, the Court should first ask why is Dugaboy even the right party to be making the objection. Its claim against the Debtor to pierce the corporate veil, as I mentioned, is frivolous. It's subject to objection. It didn't even bother to have the claim temporarily allowed for voting purposes, as did other creditors who thought they had a valid claim. Yet this is another example of Mr. Dondero, through Dugaboy, trying to throw as many roadblocks in front of confirmation as he can.

But this argument, like the other ones, fails as well. Class 8 contains the general unsecured creditor claims, predominately litigation claims that have been pending against the Debtor for years. The Debtor was justified in treating the other unsecured creditors differently.

Class 6 consists of the PTO claims in excess of the cap, which are of different quality and nature than the other claims.

Class 7 consists of the convenience class. And it's appropriate to bribe convenience class creditors with a discount option for smaller claims to be cashed out for administrative convenience.

Mr. Seery testified that when the plan was formulated, the concept was to separately classify liquidated claims in small amounts in Class 7 and unliquidated claims in Class 8. Mr. Seery also testified that there's a valid business justification to treat the -- hold business 7 -- Class 7 claims differently. These creditors had a reasonable expectation of getting paid promptly, as compared to litigation creditors, who would expect to be paid over time.

As the Court is aware, the litigation claims in Class 8 involve litigation that has been pending for several years in the case of Acis, Daugherty, Redeemer, and more than a decade in UBS.

And most importantly, as Mr. Seery testified, the Committee and the Debtor had significant negotiation regarding the classification and treatment provisions of the plan for Class 7.

The Committee does have one constituent who is a Class 7 creditor. However, the other three creditors are all in Class 8 and hold claims in excess of $200 million and supported the separate classification and the different treatment.

So, Your Honor, discrimination, different treatment among Class 7 and 8 is appropriate, and the different treatment is not unfair. In the February 1 projections, the Class 8 creditors are estimated to receive 71.32 percent of their claims, but that's just an estimate. As Mr. Seery testified,

the number can go up based upon the value he can generate from the assets and, importantly, from litigation claims. Class 8 creditors could up end up receiving a hundred percent on account of their claims. Class 7 creditors are fixed at 85 percent.

Giving Class 8 creditors the opportunity to roll the dice and potentially get more or less than the 85 percent offered to Class 7 is not at all unfair.

For these reasons, Your Honor, the Court has the ability and should confirm the plan pursuant to the cram-down provisions of 1129(b).

Your Honor, I'm now going to switch from the statutory requirements to all the issues raised by the release, injunction, and exculpation provisions.

I'd just like to take a brief sip of water.

Dugaboy -- I will first deal with the Debtor release provided in Article 9(f) of the plan, which we claim is appropriate. Dugaboy and the U.S. Trustee have objected to the release contained in Article 9(f). Dugaboy objects because it believes that the Debtor release releases claims that the Claimant Trust or Litigation Trust have that have not yet arisen, and the U.S. Trustee objects because it believes that the release is a third-party release.

These objections have no merit, and they should be overruled.

I would like to ask Ms. Canty to put up a demonstrative which contains the provision Article 9(f) of the plan.

Your Honor, as set forth in this Article 9(f), only the Debtor is granting any release. While that --

THE COURT: And for the record, it's 9(d)? 9(d), right?

MR. POMERANTZ: 9(d)? 9(d), correct, Your Honor.

THE COURT: Yes. Okay.

MR. POMERANTZ: Sorry about that.

THE COURT: Uh-huh.

MR. POMERANTZ: While the release is broad, it does not purport to release the claims of any third party. The Claimant Trust and the Litigation Trust are only included in the release as successors of the Debtor. The release is specifically only for claims that the Debtor or the estate would have been legally entitled to assert in their own right.

Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for the settlement or adjustment of any claims or interests belonging to the debtor or the estate, and that's exactly what the Debtor release provides.

Accordingly, Dugaboy is wrong that the release effects a release of claims that the Claimant Trust or the Litigation Sub-Trust have that won't arise until after the effective date. And the U.S. Trustee is simply wrong; there's no third-party release aspect under the release.

The last point I will address on the release, Your Honor, is who is being released and why and what does the evidence show. The Debtor release extends to release parties which include the independent directors, Strand, for actions after January 9th, Jim Seery as the CEO and CRO, the Committee, members of the Committee, professionals, and employees.

You have heard Mr. Seery's testimony that the Debtor does not believe that any claims against the parties that are proposed to be released actually exist. You have heard Mr. Seery's testimony that he worked closely with the employees and believes that not only have they all been instrumental in getting the Debtor to the -- be on the cusp of plan confirmation, but that also Mr. Seery is not aware of any claims against them.

Moreover, as Mr. Seery testified, the release for the employees is only conditional. He testified that the employees are required to assist in the monetization of assets and the resolution of claims, and if they do not like -- if they do not lose their release, then any Debtor claims are tolled, such that could be pursued by the Litigation Trustee at a future time.

Lastly, I'm sure that the Dondero entities will argue that someone needs to investigate claims against Mr. Seery for mismanagement or for, God forbid, having failed to file the 2015.3 statements. Such claims are part of the continuing

harassment of Mr. Seery that the Dondero entities have embarked on after it was apparent that nobody would support their plan.

There is no evidence of any claims that exist, Your Honor. In fact, the Committee and its professionals have watched the Debtor through this case like a hawk. They have not been afraid to challenge the Debtor's actions in general and Mr. Seery's in particular. FTI has worked on a daily basis with DSI and the company, had access to information. When COVID was happening, they were looking at trades going on on a daily basis.

So if the Committee, whose members hold approximately $200 million of claims against the estate, are okay with the release against the independent directors and Mr. Seery, that should provide the Court with comfort to approve the releases as part of the plan.

In summary, Your Honor, the Debtor release is entirely appropriate and does not affect the release of third-party claims that have not yet arisen.

Next, Your Honor, I want to go to the discharge. There's been objections to the discharge. Dugaboy and NexPoint have objected that the Debtor receiving a discharge under the plan -- argue a debtor is liquidating. The objection is not well taken based upon Mr. Seery's testimony regarding what it is the Claimant Trust and the Reorganized Debtor plan to do after

the effective date, as compared to what the limitations of a discharge are under 1141(d)(3).

Your Honor, Article 9 of the -- 9(b) of the plan provides that as -- except as otherwise expressly provided in the plan or the confirmation order, upon the effective date, the Debtor and its estate will be discharged or released under and to the fullest extent provided under 1141(d)(A) [sic] and other applicable provisions of the Bankruptcy Court. Bankruptcy Code.

Section 1141(d)(3) provides an exception to the discharge, and I'd like to have that section put up for Your Honor at this point. Ms. Canty?

As this -- as the section reflects, and as the Fifth Circuit has ruled in the *TH-New Orleans Limited Partnership* case cited in our materials, in order to deny the debtor a discharge under 1141(d)(3), three things must be true: (1) the plan provides for the liquidation of all or substantially all of the property in the estate; (2) the debtor does not engage in business after consummation of the plan; and (3) the debtor would be denied a discharge under 727(a) of this title if the case was converted to Chapter 7. Here, only C applies.

With respect to A, Your Honor, while the plan does project that it will take approximately two years to monetize the Debtor's assets for fair value, the Debtor is just not liquidating within the meaning of Section A.

As Mr. Seery testified, during the post-confirmation period, post-effective date period, the Debtor will continue to manage its funds and conduct the same type of business it conducted prior to the effective date. It'll manage the CLOs. It'll manage Multi-Strat. It'll manage Restoration Capital. It'll manage the Select Fund, and it'll manage the Korea Fund.

The Bankruptcy Court for the Southern District of New York's 2000 opinion in *Enron*, cited in our materials, is on point. There, the Court found that a debtor liquidating its assets over an indefinite period of time that is likely to take years is not liquidating within the meaning of Section 1141(b)(3)(A), justifying a denial of discharge.

But even if we failed A, based upon Mr. Seery's testimony, we would not fail B. The Debtor will be continuing to do what it has done during the case, as it did before, as I said, managing its business. B says the debtor does not engage in the business after management. So while Mr. Seery testified that it would take approximately two years, it could take more, it could take less, and there is no requirement to liquidate assets over a period of time.

Accordingly, Your Honor, the Debtor is conducting the type of business contemplated by Section B so as not to just deny a discharge.

As the Fifth Circuit said in the *TH-New Orleans* case, the court granted a discharge there because it was likely that the

debtor would be liquidating its assets and conducting business (indecipherable) years following a confirmation date. And this result makes sense, Your Honor, because the Debtor will need the discharge and the tenant injunctions, which I'll get to in a moment, in order to prevent interference with the Debtor's ability to implement the terms of the plan and make distributions to creditors.

I would now like, Your Honor, to turn to the exculpation provisions, which there's been -- there's been a lot of briefing on it, and I know Your Honor is very aware of the exculpation provisions and the *Pacific Lumber* case. And several parties have objected to the exculpation contained in the plan, based primarily on the Fifth Circuit ruling in *Pacific Lumber*.

The exculpation provision, which is not dissimilar to what is found in many plans around the country, including in plans confirmed in bankruptcy courts in the Fifth Circuit, acts to exculpate the exculpated parties for negligent-only acts as it contains the standard carve-outs for gross negligence, intentional conduct, and willful misconduct.

I do want to bring to the Court's attention a deletion we made to the parties protected by the exculpation in the plan and now -- were filed on February 1st. The definition of exculpated parties included, before February 1, not only the Debtor but its direct and indirect majority-owned subsidiaries

and the managed funds. In the plan amendment, we have deleted the Debtor's direct and indirect majority-owned subsidiaries and managed funds from the definition and are not seeking exculpation for those entities.

But before, Your Honor, I address *Pacific Lumber* and why the Debtor believes it does not preclude the Court from approving the exculpation in this case, I do want to focus on something that the Objectors conveniently ignore from their argument.

As I mentioned in my opening argument, Your Honor, the independent directors were appointed pursuant to the Court's order on January 9, 2020. They have resolved many issues between the Debtor and the Committee, and avoided the appointment of a Chapter 11 trustee.

The January 9th order was specifically approved by Mr. Dondero, who was in control of the Debtor at the time, and I believe the transcripts that are admitted into evidence will demonstrate that he was fully behind the approval of the January 9th order.

In addition to appointing the independent directors into what was sure to be a contentiously litigious case, the January 9th order set the standard of care for the independent directors, and specifically exculpated them from negligence.

You have heard Mr. Seery and Mr. Dubel testify that they had input into what the order said and would have not agreed

to be appointed as independent directors if it did not include Paragraph 10, as well as the provisions regarding indemnification and D&O insurance.

I would like to put a demonstrative on the screen, which is actually Paragraph 10 of that order. Your Honor, Paragraph 10, there's two concepts embedded here. First, it requires any parties wishing to sue the independent directors or their agents to first seek such approval from the Bankruptcy Court. Secondly, and importantly for purposes of the independent directors and their agents, who would include the employees, it set the standard of care for them during the Chapter 11 and entitled them to exculpation for negligence. Paragraph 10 says the Court will only permit a suit to go forward if such claim represents a colorable claim for willful misconduct or gross negligence.

And Your Honor, Paragraph 10 does not expire by its terms.

By not including negligence in the definition of what a colorable claim might be, the Court has already exculpated the independent directors and their agents, which include the employees acting at their direction.

And because the independent directors and their agents are exculpated under Paragraph 10, Strand needs to be exculpated as well for actions occurring after January 9th. This is because a suit against Strand for conduct after the independent board was appointed is effectively a suit against

the independent directors, who were the only people in control of Strand at that time.

After the effective date, Mr. Dondero will regain control of Strand, as the independent directors will be discharged. And for parties able to sue Strand essentially for negligence for conduct conducted by the independent directors after January 9th, Strand will then be able to seek indemnification from the Debtor under the Debtor's partnership agreement because the partnership agreement does provide the general partner is entitled to indemnification.

Accordingly, an exculpation for Strand is really the functional equivalent of an exculpation for the independent directors and the Debtor.

The January 9th order was not appealed, and an objection to exculpation at this point as it relates to the independent directors, their agents, and Strand is a collateral attack on this order. So, Your Honor, Your Honor does not even need to get to the thorny issues addressed by *Pacific Lumber*.

However, even in the absence of the January 9th order, exculpation of the independent directors and their employees, as well as the other exculpated parties, is not prohibited by *Pacific Lumber*. In *Pacific Lumber*, the Fifth Circuit reversed a bankruptcy court order confirming a plan because the exculpation provision was too broad and included parties that the Fifth Circuit thought could not be exculpated under

Section 524(e) of the Code.

A close look at the issue before the Court, Your Honor, the reasoning for the Court's ruling and why certain parties like Committee and its members were entitled to exculpation, reflects that this case does not prevent the Court from approving exculpation of this case.

A careful read of the underlying briefs and opinions in *Pacific Lumber* reveals that the concern that the Appellants had in that case was the application of exculpation to non-fiduciary sponsors. There were two competing plans in the case. The first was filed by the indenture trustee. The second was filed by the debtor's parent and lender, and was deemed -- called the Marathon Plan. The Court confirmed the Marathon Plan, and the indenture trustee appealed, and the indenture trustee argued that the plan sponsors could not be exculpated.

After determining that the appeal of the exculpation provisions were not equitably moot, the Fifth Circuit determined that exculpation was not authorized under 524(e) of the Code because that section provides a discharge of the debtor does not affect the liability of any other entity on such debt.

However, and here's the important part, Your Honor: The Fifth Circuit did not say that all exculpations are prohibited under the Code and authorized the exculpation of the Committee

and its members. And why did the Court do that? Because it looked at the Committee's qualified immunity under 1103 and also reasoned that Committee members are essentially disinterested volunteers that should be entitled to exculpation on negligence.

The Court also cited approvingly *Colliers* for the proposition that if Committee members were not exculpated for negligence and subject to suit by people who are unhappy with them, they just would not serve.

Accordingly, the Fifth Circuit based its willingness to exculpate Committee members on the strong public policy that supports exculpation for those parties under those circumstances. And against this backdrop, Your Honor, there are several reasons why the Court should authorize exculpation in this case, notwithstanding *Pacific Lumber*.

First, Your Honor, the independent directors in this case are analogous -- much more analogous to the Committee members that the Fifth Circuit ruled were entitled to than the incumbent officer and directors.

Your Honor has the following facts before the Court, based upon the testimony of Mr. Seery and Mr. Dubel and other evidence in the record. The independent board members were not part of the Highland enterprise before the Court appointed them on January 9th. The Court appointed the independent directors in lieu of a Chapter 11 trustee to address what the

Court perceived as the serious conflicts of interest and fiduciary duty concerns with current management, as identified by the Committee.

The independent directors would not have agreed to accept their role without indemnification, insurance, exculpation, and the gatekeeper function provided by the January 9th order.

And Mr. Dubel testified regarding the significant experience he has as an independent director during his 30-plus years in the restructuring community, including several engagements as an independent director in Chapter 11 cases. And he testified that independent directors have become commonplace in complex restructurings over the last several years and have been appointed in many cases, including high-profile cases. We've cited to just a few of those cases in our brief, but we could go on and on.

Mr. Dubel testified that the independent directors are a critical tool in proper corporate governance and restoring creditor confidence in management in modern-day restructurings, and he testified that, based upon his experience, independent directors expect to be indemnified by the company, expect to obtain directors and officers insurance, and expect to be exculpated from claims of negligence when they agree to be appointed.

He further testified that if independent directors cannot be assured that they will be exculpated for simple negligence,

he believes they will be unwilling to serve in contentious cases like the one we have here, which will have a material adverse effect on the Chapter 11 restructuring process as we know it.

Based upon the foregoing testimony, Your Honor, which is uncontroverted, the Court should have no problem finding that the independent directors are much more analogous to the Committee members in *Pacific Lumber* who the Fifth Circuit said could be exculpated.

The facts, these facts also distinguish this case from the *Dropbox v. Thru* case which Your Honor decided and which was reversed on this issue by the District Court. In neither *Pacific Lumber* or *Thru* was there an argument that the policy reasons that supported exculpation of Committee members also supported the exculpation of the parties sought to be exculpated.

Moreover, Your Honor, the independent directors in this case were pointed as essentially as substitute for a Chapter 11 trustee. There was a Chapter 11 trustee motion filed a few days before, I believe, and the Court, in approving this, said that you -- better than a Chapter 11 trustee. And Chapter 11 Trustees are entitled to qualified immunity. So, while, yes, the independent directors aren't truly Chapter 11 trustees, they are analogous.

Second, Your Honor, while there is language in *Pacific*

Lumber that says that the directors and officers of the debtor are not entitled to exculpation, the issue before the Court really on appeal was the plan sponsors and whether they were. So I would argue that any discussion of the exculpation not being available for directors and officers in the Fifth Circuit opinion in *Palco* is actually dicta.

Third, Your Honor, as I discussed before, the *Pacific Lumber* decision was based solely on 524(e) of the Bankruptcy Code, which only says that the discharge of a claim against the debtor does not affect the discharge of a third party. However, the Debtor is not relying on 524(e) as the basis of their exculpation. As we outline in our brief, Your Honor, we believe that the exculpation is appropriate under Section 105 and 1123(b)(6) as a means -- part of an implementation of the plan.

Importantly, Your Honor, as other courts hostile to third-party releases have determined, exculpation only sets a standard of care for parties and is not an effort to relieve fiduciaries of liability.

Other courts that have aligned with the Fifth Circuit and rejected third-party releases, like the Ninth Circuit, have recently determined exculpation has nothing to do with 524(e). In *In re Blixseth*, a Ninth Circuit case decided at the end of 2020 cited in our materials, they examined several of their circuit cases that had strongly prohibited non-consensual

third-party releases under 524(e). But again, the Court concluded that 524(e) only prohibits third parties from being released from liability of a prepetition claim for which the debtor receives a discharge. The Court reasoned that the exculpation clause, however, protects parties from negligence claims relating to matters that occurred during the Chapter 11 case and has nothing to do with 524(e).

The Ninth Circuit, which along with the Fifth Circuit has been notorious for prohibiting third-party releases, issued its ruling against this backdrop and said that exculpations are appropriate.

Your Honor, the Objectors made a point yesterday of pointing out that Strand, as the Debtor's general partner, is liable for the debts under applicable law. To the extent they intend to argue that the exculpation is seeking to discharge any such prepetition liability, they would be wrong. The exculpation only applies to postpetition matters. And to the extent they argue that the exculpation seeks to discharge Strand's potential postpetition liability, for the reasons I discussed, a claim against Strand will essentially be a claim against the Debtor because the Debtor will be obligated to indemnify them.

Accordingly, Your Honor, we submit that if this matter goes up to appeal to the Fifth Circuit, which it may very well do, that the Fifth Circuit may very well come out the same way

as the Ninth Circuit and start relaxing the standard or otherwise provide that the independent directors are much more like Committee members.

Lastly, Your Honor, if the Court does confirm the plan, which we certainly hope it will do, it will have made a finding that the plan has been proposed in good faith, and in doing so, the Court essentially finds that the independent directors and their agents have acted appropriately and consistent with their fiduciary duties, and it makes -- exculpation for negligence naturally flows from that finding.

Your Honor, I would now like to go to the injunction provisions, and my argument is that the injunction provisions as amended are appropriate.

THE COURT: Can I stop you?

MR. POMERANTZ: We received several of -- yes.

THE COURT: I want to just recap a couple of things I think I heard you say. You're not asking this Court, you say, to go contrary to *Pacific Lumber* per se. You have thrown out there the possibility that *Pacific Lumber* mistakenly relied on 524(e) in rejecting exculpations of plan sponsors. You're saying, eh, as a technical matter, I think they were wrong in focusing on that statute because that statute seems to deal with prepetition liability. Okay? Its actual wording, 524(e) states, discharge of a debt of a debtor does not affect the liability of any other entity on such debts.

And reading between the lines, I think you're saying -- well, maybe this isn't what you're saying, but here's what I inferred -- "debt" is defined in 101(12) to mean liability on a claim, and then "claim" is defined in 101(5) of the Bankruptcy Code as meaning right to payment. It doesn't say as of the petition date, but I think if you look at, then, Section 502 of the Bankruptcy Code that addresses claims and interests, clearly, it seems to be referring to the prepetition time period, you know, claims and interest as of the petition date. And then -- that's 502. And then 503 speaks of, for the most part, postpetition administrative expenses.

So that was my rambling way of saying I'm understanding you to say, eh, as a technical matter, we think the Fifth Circuit was wrong to focus on 524(e) because when you're talking about exculpation you're talking about postpetition liability, not prepetition liability. And 524(e) is talking more about prepetition liability.

But I think what I also hear you saying is, at bottom, *Pacific Lumber* was sort of a policy-driven holding where, you know, we're worried about no one would ever sign up for being on an unsecured creditors' committee if they could be exposed to lawsuits. They're fiduciaries, we think, for policy reasons. Exculpation is appropriate for this one group. And you're saying, well, they didn't have an independent board

that they were considering. They were just considering non-fiduciary plan sponsors. And so the rationale presented by *Pacific Lumber* applies equally here, and just they didn't make a holding in this factual context.

Have I recapped what you're saying?

MR. POMERANTZ: Your Honor, that's generally -- generally correct, with a couple of nuances. So, yes, first, I think, on a policy basis, Your Honor -- again, putting aside the January 9th order, because we don't see --

THE COURT: Right. Right.

MR. POMERANTZ: -- Your Honor even needs to get to this issue.

THE COURT: I understand.

MR. POMERANTZ: But if Your Honor does get to this issue, we think, as a first point, Your Honor could be totally consistent with *Pacific Lumber* because there's policy reasons and there was not a categorical rejection of exculpation. Okay. So if there was a categorical rejection, then it wouldn't have been okay for committee members. Okay.

Second argument, yes, we don't think -- we think it's part of dicta. It's not part of the holding. We understand that other courts may have not agreed, maybe your *Thru* case, which Your Honor was appealed on.

But the third issue, our argument is all they looked at was 524(e). They said 523 -- 4(e) does not authorize it.

They did not say 524(e) prohibits it.

We think there's other provisions in the Code. And then when you basically add in the analysis that Your Honor provided, which we agree with, and what 524 was -- to do, 524(e) just says that discharge doesn't affect. It doesn't say that under another provision of the Code or for another reason you are authorized to give an exculpation. I think it's a nuance and it's a difference there.

And my point of bringing up the *Blixseth* case -- which, of course, is Ninth Circuit and it's not binding on Your Honor, it's not binding on the Fifth Circuit -- is to say, when that was presented to them, they saw the distinction that 524(e) has nothing to do with an exculpation. And while, yes, the Fifth Circuit hasn't ruled on that, and if the Fifth -- if that argument is made to the Fifth Circuit, we don't know how they would rule, I think that, based upon their analysis -- which, again, Your Honor, is no more than a page and a half of their opinion, right, of a long, lengthy opinion on the confirmation issues. So I think, Your Honor, with the Fifth Circuit, there is a good chance that based upon the developing case law of exculpation, based upon the sister circuit in *Blixseth* making that distinction, that there is a very good chance that the Fifth Circuit would change.

But look, I recognize that argument requires Your Honor to say, okay, this is outside and -- and what *Pacific Lumber* did

or didn't do. But I think, Your Honor, there's several potential reasons, there's several potential arguments that you can get to the same place.

THE COURT: Okay. Thank you.

MR. POMERANTZ: Okay. If I may just get another glass of -- sip of water before my time starts?

THE COURT: Okay.

MR. POMERANTZ: Okay, Your Honor. We're now turning to the injunction provision. The Debtor received several objections to the injunction provisions in -- I think I have it right now -- Article 9(f) to the plan. And we've modified Article 9(f) to address certain of those concerns, and we believe that, as modified, that the injunction provision implements and enforces the plan's discharge, release, and exculpation provisions to prevent parties from pursuing claims in interest that are addressed by the plan and otherwise interfering with consummation and implementation of the plan.

I'd like to put up the first paragraph of the injunction on the screen now.

Okay, Your Honor. The first paragraph, all it does is prohibits the enjoined parties from taking action to interfere with consummation or implementation of the plan. I suspect a sentence like that is probably in hundreds of plans in the Fifth Circuit and elsewhere.

Initially, to address a concern that it applied to too

many parties, the Debtor added a definition in the revised plan that defines "enjoined parties," which I'd like to now put that definition up on the screen.

The changes -- it's a little hard to read there, but you have it in the -- oh, there you go. The changes made clear that only parties who have a relationship to this case, either holding a claim or interest, having appeared in the case, be a -- or be a party in interest, Jim Dondero, or related entity, or related person of the foregoing are covered. The claim objectors argue that the word "implementation and consummation" is vague, or vague and unclear. Your Honor, these terms are both defined in the Bankruptcy Code and under the case law, and they're, as I said, common features of many plans.

Section 1123(a)(5) of the Code provides that a plan shall provide for its implementation, and identifies a list of items that the plan can include. Article 4 of our plan is defined as "Means of Implementation of This Plan," and describes the various corporate steps required to implement the provisions of the plan, including canceling equity interests, creation of new general partners and a limited part of the Reorganized Debtor, the restatement of the limited partnership agreement, and the establishment of the various trusts.

Paragraph 1 rightly and appropriately enjoins efforts to interfere with these steps.

Nor is the term "consummation of the plan" vague. "Consummation" also is a commonly-used term and has been defined by the Fifth Circuit and the Code. 1102 -- 1101(2) defines "Substantial Consummation" to be the transfer of assets to be transferred under the plan, the assumption by the debtor of the management of all the property dealt with by the plan, and the commencement of distributions under the plan.

Section 1142 gives the Court authority to direct a party to perform any act necessary for consummation of a plan. And as the Fifth Circuit, in *United States Brass Corp.*, which is said in our material, states, said the Bankruptcy Court had post-confirmation jurisdiction to enforce the unperformed terms of a plan with respect to a matter that could affect the parties' post-confirmation rights because the plan had not been fully consummated.

And Your Honor just wrote on this issue last year in the *Senior* -- the *Texas* -- the *TXMS Real Estate v. Senior Care* case, and you cited to *U.S. Brass* to find that, in that case, post-confirmation jurisdiction existed to resolve a dispute relating to an assumed contract because the matter related to interpretation, implementation, and execution of the plan.

Accordingly, Your Honor, neither implementation or consummation are vague, and the first paragraph of the injunction is necessary and appropriate to enforce the Debtor's discharge.

As I said before, I will leave it to Mr. Kharasch to address specifically the concerns that the Advisor and the Funds have with the injunction.

The second and third paragraphs of the injunction, Your Honor, certain parties have objected to them on the ground that they constitute an improper release of the independent directors as well as the release of claims against the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust, entities that will not have come into existence until after the effective date.

We believe we have addressed these concerns by modifications to the second and third paragraphs of the injunction, which I would now like to put the second and third paragraphs on the screen.

(Pause.)

MR. POMERANTZ: As that is happening, Your Honor, I will -- there we go.

We believe that the changes that were made to these paragraphs should address the Objectors' concerns.

First, as with the first paragraph, we have created a defined term of "Enjoined Parties" who are subject to the injunction which is narrower than all persons, I believe, or all entities that was included in the prior plan. So we've narrowed that.

"Enjoined Parties" are generally defined, as I mentioned

before, as entities involved in this case or related to Jim Dondero, or have appeared in this case.

Second, we have removed independent directors from these paragraphs to address the concern that the injunction was a disguised third-party release.

Third, we have removed the Reorganized Debtor and the Claimant Trust from the second paragraph and moved them to the third paragraph. We did this to make clear that the Reorganized Debtor and Claimant Trust were only getting the benefit of the injunction as the successors to the Debtor. As the Reorganized Debtor and the Claimant Trust receives the property from the Debtor free and clear of all claims and interests and equity holders under 1141(c), they are entitled to the benefit of the injunction.

Fourth, we have addressed the concern that the injunction improperly affected set-off rights. We added language to make clear that the injunction would only affect the parties' set-off of an obligation owed to the Debtor to the extent that that was permissible under 553 and 1141 of the Bankruptcy Code.

In other words, we are punting the issue for another day, and there's nothing in the plan that gives the Debtor any more set-off rights than it otherwise has under the Bankruptcy Code.

Lastly, Your Honor, certain Objectors have argued that the

injunction somehow prevents them from enforcing the rights they have under the plan or the confirmation order. We don't really understand this concern, as the language leading into the second paragraph of the injunction says, except as expressly provided in the plan, the confirmation order, or a separate order of the Bankruptcy Court.

With these modifications, Your Honor, the provisions do nothing more than implement 1123(b)(6) and 1141 by preventing parties from taking actions to interfere with the Debtor's plan.

The Court has also heard testimony from Mr. Seery regarding the importance of the injunction to implementation of the plan. He testified that he intends to monetize assets in a way that will maximize value. And to effectively do that, he has testified that the Claimant Trust needs to be able to pursue its objectives without interference and continued harassment from Mr. Dondero and his related entities.

In fact, Mr. Seery testified that if the Claimant Trust were subject to interference by Mr. Dondero, it would take him more time to monetize assets, they would be monetized for less money, and creditors would be harmed.

If Your Honor doesn't have any questions for me on the injunction provisions, I'd like to turn to the last part of the injunction, which is really the gatekeeper provision.

THE COURT: All right. You may.

MR. POMERANTZ: Your Honor, the last paragraph in Article 9(f) is really not an injunction but is rather a gatekeeper provision. And as originally drafted, it'd do two things: first, it'd require that before any entity, which is defined very broadly, could file an action against a protected party relating to certain specified matters, the entity would have to seek a determination from this Court that the claim represented are colorable claim of bad faith, criminal conduct, willful misconduct, fraud, or gross negligence. The specified matters to which the gatekeeper provision would apply included the Chapter 11 case, negotiations regarding the plan, the administration of the plan, the property to be distributed under the plan, the wind-down of the Debtor's business, the administration of the Claimant Trust, or transactions related to the foregoing.

Subject to certain exceptions for Dondero-related parties, protected parties were defined to include the Debtor, its successors and assigns, indirect and direct, majority-owned subsidiaries and managed funds, employees, Strand, Reorganized Debtor, the independent directors, the Committee and its members, the Claimant Trust, the Claimant Trustee, the Litigation Trust, the Litigation Sub-Trustee, the members of the Oversight Committee, retained professionals, the CEO and CRO, and persons related to the foregoing. Essentially,

parties related to the pre-effective-date administration of the estate or the post-confirmation implementation of the plan.

Second, the gatekeeper provision as originally presented gave the Bankruptcy Court exclusive jurisdiction to adjudicate any cause of action that it determined would pass through the gate. The gatekeeper provision, Your Honor, is not a release in any way. Rather, it permits enjoined parties who believe they have a claim against the protected parties to pursue such a claim, provided they first make a showing that the claim is colorable to the Bankruptcy Court.

Several parties, Your Honor, objected to the Bankruptcy Court having exclusive jurisdiction to adjudicate the claims that pass through the gate. The Debtor believes that the Bankruptcy Court would ultimately have jurisdiction of any of those claims that pass through the gate. However, the Debtor did, upon reflection, appreciate the concern that if the Court agreed to that now, it would essentially be determining its jurisdiction before a claim was filed.

Accordingly, in the January 22nd plan, Your Honor, we amended the provision to provide that the Bankruptcy Court will only have jurisdiction over such claims to the extent it was legally permissible to do so, essentially deferring the issue to a later time.

And as Your Honor, I believe, in one of cases called the

Icing on the Cake, the retention and jurisdiction provisions in the plan only are to the extent under applicable law and are quite broad and include the things that we would have the Court -- have jurisdiction for the Court, otherwise determined.

The Court made some other changes to the gatekeeper provision, and I would like to place the amended gatekeeper provision on the screen right now. In addition to the change I mentioned, the Debtor made the following changes: the provision is limited now to apply only to enjoined parties, rather than any entity. Than any entity. Much narrower. The provision added the administration of the Litigation Sub-Trust to the matters to which the provision would apply. The provision makes clear now that any claim, including negligence, is a claim that could be sought and pursued through the gatekeeper function. And the provision made some other syntax changes.

We believe, Your Honor, with these changes, we believe that the gatekeeper provision is within the Court's jurisdiction and it's appropriate to include under the plan.

But certain parties have argued that the Court does not have the authority, the jurisdictional authority to perform the gatekeeper function, separate and apart from whether it has jurisdiction to adjudicate the claims that pass through the gate.

Your Honor, we submit that these arguments represent a fundamental misunderstanding of Bankruptcy Court jurisdiction and the Court's authority to make sure the Debtor is free of interference in carrying out the plan which I'll get to in a couple moments.

As a preliminary matter, Your Honor, it is important for the Court to remember that Paragraph 10 of the January 9 order already contains a gatekeeper provision as it relates to the independent directors and their agents. And as I mentioned on a couple of occasions, that order is not going away, it doesn't expire by its terms, and it cannot be collaterally attacked in this forum.

The Debtor does acknowledge, though, that the gatekeeper provision in the plan is broader in terms of the people it protects and it applies to post-confirmation matters.

Before I address the Court's authority to approve the gatekeeper provision, I want to summarize the evidence that it has heard from Mr. Seery and Mr. Tauber regarding why the gatekeeper is so important a provision to the success of the plan.

Although the Court is all too familiar with the history of litigation initiated by and filed against Mr. Dondero and his related affiliates, Mr. Seery spent some time on the stand testifying about the litigation so the Court would have a complete record for this hearing. He testified that prior to

the petition date, the Debtor faced years of litigation from Mr. Terry and Acis that led to the *Acis* bankruptcy case, which Your Honor has said many times it's still in your mind. Years of litigation with the Redeemer Committee which precipitated the filing of a bankruptcy case and resulted in an award very critical of the Debtor's conduct. Years of litigation with UBS. Years of litigation with Patrick Daugherty. And we placed all the dockets for all these matters before the Court.

Also, during the bankruptcy and after the Committee essentially rejected the Debtor's pot plan proposal and indicated -- and the Debtor indicated it would be terminating the shared service agreements with Mr. Dondero and his related entities, the Debtor was the subject of harassment from Mr. Dondero and related entities which resulted in the temporary restraining order against him, a preliminary injunction against him, a contempt motion, which Your Honor is scheduled to hear Friday, a motion by the Debtor's controlled -- by the Dondero-controlled investors and funds in CLO managed -- managed by the Debtor, which the Court referred to that motion as being frivolous and a waste of the Court's time. Multiple plan objections, most of which are focused on allowing the Debtors to continue their litigation crusade against the Debtor and its successors post-confirmation. An objection to the Debtor approval of the Acis order and a subsequent appeal. An objection to the HarbourVest settlement and subsequent

appeal. A complaint and injunction against the Advisors and the Funds to prevent them from violating Paragraph 9 of the January 9th order. And a temporary restraining order against those parties, which was by consent.

Mr. Dondero's counsel tends to argue that he is the victim here and that the litigation is being commenced against him and -- instead of by him. That response does not even deserve a response, Your Honor. It is disingenuous.

Mr. Tauber testified that he was part of the team at Aon that sourced coverage for the independent directors after their appointment in January 2020 and that he has over 20 years of underwriting experience. He testified that at Aon he builds bespoke insurance programs which are not cookie-cutter programs for his clients, with an emphasis on D&O and E&O. And he was asked by the independent board to obtain D&O and E&O insurance after the board's appointment on January 9th.

Based upon the process Aon conducted in reaching out to insurance carriers, Mr. Tauber testified that Aon was only able to obtain D&O insurance based upon the inclusion of Paragraph 10 of the January 9 order, the gatekeeper provision. I know Mr. Taylor said that that was spoon-fed to the insurers, but Mr. Tauber's testimony is they knew about Mr. Dondero and they knew about his litigation tactics, so it is not a good inference to be made from the testimony that they would not have required something. They probably would have

just said no.

Aon has now been -- Mr. Tauber testified that Aon has now been asked to obtain D&O coverage for the Claimant Trustee, the Litigation Trustee, the Oversight Committee, the members, the Claimant Trust, and the Litigation Sub-Trust. He testified that he and Aon have approached the insurance carriers that they believe might be interested in underwriting coverage.

And no, he hasn't approached every D&O and E&O carrier out there, and there may be, just like an investment banker doesn't have to approach everyone. They are experts in the field, and he testified they approached the people they thought would likely be willing or interested and potentially be willing to extend coverage. And as a result of Aon's efforts, Mr. Tauber has determined that there's a continued resistance to provide any coverage that does not contain an exclusion for actions relating to Mr. Dondero or his related entities. And he further believes that all carriers that will -- that have discussed a willingness to provide coverage will only do so if there is a gatekeeper provision, and only one carrier will agree to provide coverage without a Dondero exclusion.

Mr. Tauber testified that he believes that any ultimate policy will provide that if at any time the gatekeeper provision is not in place, either the carrier will not cover

any actions related to Mr. Dondero or his affiliates or that the coverage will be vacated or voided.

Based upon the foregoing record, Your Honor, which is uncontroverted, there's ample justification on a factual basis for approval of the gatekeeper provision.

I will now turn to the Court's authority to approve the gatekeeper provision.

There are three alternative bases upon which the Court can approve the gatekeeper provision. First, several provisions of the Bankruptcy Code give broad authority to approve a provision like the gatekeeper provision.

Second, the Court can analogize to the Barton Doctrine the facts and circumstances in this case and authorize the Court to act as a gatekeeper to prevent frivolous litigation from being filed against court-appointed officers and directors and those that will lead the post-confirmation monetization of the estate's assets.

And third, Your Honor, the Court can find that Mr. Dondero and his entities are vexatious litigants, and use the gatekeeper provision as a sanction to prevent the filing of baseless litigation designed merely to harass those in charge of the estate post-confirmation.

So, Bankruptcy Court authority. Your Honor, there are several provisions in the Bankruptcy Code which we rely on to support the Court's authority. First, Section 1123(a)(5)

permits the plan to approve adequate means of implementation, and contains a long, non-exclusive list. Mr. Seery's testimony is uncontroverted that a gatekeeper provision is necessary for the adequate implementation of the plan.

Second, Your Honor, 1123(b)(6) authorizes a plan to include any appropriate provision in a plan not inconsistent with any other provision in this Code. There are not any provisions and none have been cited by the Objectors that would prohibit a gatekeeper provision. Section 1141 effectively holds that the terms of a plan bind the debtor and its creditors and vest property in a reorganized debtor, free and clear of the interests of third parties.

If nothing else, Your Honor, the spirit of 1141 allows the Court to prevent, in appropriate cases, vexatious litigation by unhappy creditors and parties in interest from torpedoing the plan.

1142(b), Your Honor, provides that the confirmation -- that, after confirmation, the Court may direct any parties to perform any act necessary for the consummation of the plan, and requiring the party to seek court-approval before filing an action is certainly an act.

And lastly, Your Honor, Section 105 allows the Court to enter orders necessary to order other things, enforce orders of the Court like the confirmation order, and prevent an abuse of process which would certainly occur if baseless litigation

were filed against the parties in charge of the Reorganized Debtor and the trust vehicles entrusted with carrying out the plan.

Your Honor, gatekeepers are not a novel concept and have been approved by courts in appropriate circumstances. In the *Madoff* cases, the Court has been the gatekeeper post-confirmation to determine whether investor claims are derivative or direct claims.

In *General Motors*, the Court has been the gatekeeper post-confirmation to determine whether product liability claims are proper claims against the reorganized debtor.

Closer to home, Judge Lynn, Mr. Dondero's counsel, approved a gatekeeper provision, arguably even more far-reaching than the provision here, in the *Pilgrim's Pride* case. In that case, Judge Lynn held that *Pacific Lumber* prevented him -- prevented the Court from approving the exculpation provision in the plan. However, he did hold that it was appropriate for the Court to ensure that debtor representatives are not improperly pursued for their good-faith actions by requiring that any actions against the debtor or its representatives, and further, on the performance of their obligations as debtor-in-possession, be heard exclusively before the Bankruptcy Court.

And *Pilgrim's Pride* is not the only case in this district to include a gatekeeper provision, as Judge Houser approved

one in the *CHC Group* in 2016, which is cited in our materials.

The theme in all these cases, Your Honor, is that there are circumstances where it is necessary and appropriate for the Bankruptcy Court to act as a gatekeeper as a means of reducing litigation that could interfere with a confirmed plan and that a Court has the authority to approve such provisions.

The Objectors argue that the Bankruptcy Court does not have jurisdiction to approve that provision. The Debtor understands the argument as it related to the prior provision, which gave the Court exclusive jurisdiction over any claim it found colorable, and we've amended the plan to address that issue. The jurisdiction to deal with those claims could be left to a later day.

But to the extent the Objectors still pursue the jurisdiction argument in light of the current provision, they're really conflating two very different things: the ability to determine whether a claim is colorable and the ability to adjudicate that claim if the Court determines it's colorable.

None of the authorities cited by the Objectors hold that the Court is without jurisdiction to approve a gatekeeper provision like the one here. So, rather, what they do is they try to -- they argue, based upon the *Craig's Stores* case, which is narrower than other circuits of post-confirmation jurisdiction in the Bankruptcy Court, and argue that the

gatekeeper provision doesn't fall within that. But that -- such reliance is misplaced, Your Honor.

Craig held that the Bankruptcy Court did not have jurisdiction to adjudicate a post-confirmation dispute over a private-label credit card agreement between the debtor and the bank. In declining to find jurisdiction, the Fifth Circuit remarked that there was no antagonism or claim pending between the parties as of the reorganization and no facts or law deriving from the reorganization or the plan was necessary to the claim asserted by the debtor.

However, in so ruling, Your Honor, the Fifth Circuit did reason that post-confirmation jurisdiction in the Bankruptcy Court continues to exist for matters pertaining to implementation and execution of the plan. Requiring parties to seek Bankruptcy Court determination the claim is colorable before embarking on litigation that will impact indemnification rights and affect distributions to creditors is not an expansion of jurisdiction and fits well within the *Craig* reasoning.

Unlike the credit card agreement dispute in *Craig*, Mr. Dondero and his entities have demonstrated tremendous antagonism towards the Debtor. And while the Debtor's plan may be confirmed, further litigation has been threatened by Mr. Dondero. It's in the pleadings. That's one of the reasons Mr. Dondero says his plan is better. It'll avoid

tremendous amount of litigation.

After *Craig*, the Fifth Circuit again examined the bankruptcy court's post-confirmation jurisdiction in the *Stoneridge* case in 2005. In that case, the Fifth Circuit ruled that a bankruptcy court has post-confirmation jurisdiction to resolve a dispute between two nondebtors that could trigger indemnification claims against a liquidating trust formed as a result of a confirmed plan.

And lastly, as I mentioned Your Honor's decision before, the *TXMS Real Estate* case, I think just a couple of months ago, it stands for the proposition that post-confirmation jurisdiction exists for matters bearing on the implementation, interpretation, and execution of a plan. In that case, Your Honor ruled that Your Honor had jurisdiction to resolve a post-confirmation dispute between a liquidating trust formed under a plan and a landlord, the result of which could significantly and adversely affect the value of the liquidating trust and monies available for unsecured creditors.

And you have heard Mr. Seery testify that litigation will have an adverse effect on the ability to make distributions to creditors.

So, Your Honor, under these authorities, the Court undoubtedly would have jurisdiction to act as the gatekeeper for the litigation.

There's also an independent basis for the gatekeeper provision, Your Honor, the Barton Doctrine, which the Court is very familiar from your opinion in the *In re Ondova* case in 2017 and which provides that before a suit may be brought against a trustee, leave of Court is required. In *Ondova*, the Court reviewed the history of the doctrine in connection with litigation brought by a highly-litigious debtor against a trustee and his professionals. This Court noted that there are several important policies followed by the doctrine, including a concern for the overall integrity of the bankruptcy process and the threat of trustees being distracted from or intimidated from doing their jobs. And Your Honor's language still: For example, losers in the bankruptcy process might turn to other courts to try to become winners there by alleging the trustee did a negligent job.

Your Honor, this is precisely what the Debtor is trying to prevent here, Mr. Dondero and his entities from putting the bad experience before Your Honor in this case behind it and going to try to find better luck in a more hospitable court.

Your Honor, the Barton Doctrine originally only applied to receivers, and over the course of time has been extended to apply to various court-appointed fiduciaries, as we have cited in our materials: trustees, debtors-in-possession, officers and directors, employees, and attorneys representing the debtor.

And I expect the Objectors to argue that there is a statutory exception to the Barton Doctrine under 28 U.S.C. 959 and it does not apply to acts or transactions in carrying out business conducted with a property. The exception, Your Honor, is very narrow and was meant to apply for things like slip-and-fall cases. In fact, the Eleventh Circuit in the *Carter v. Rodgers* case, 220 F.3d 1249 in 2000, held that Section 11 -- 28 U.S.C. 959(a) does not apply to suits against trustees for administering or liquidating the bankruptcy estate.

The Objectors also argue that the gatekeeper provision violates *Stern v. Marshal*. However, as the Court acknowledged in *Ondova*, the Fifth Circuit in *Villegas v. Schmidt* has recognized that the Barton Doctrine remains viable post-*Stern v. Marshal*. The Fifth Circuit reasoned that while Barton Doctrine is jurisdictional in that a court does not have jurisdiction of an action if preapproval has not been obtained, it does not implicate the extent of a bankruptcy court's jurisdiction to adjudicate the underlying claim, precisely the distinction we're making here. The bankruptcy court would be the gatekeeper for deciding whether the claim passes through the gate, and then after will decide if it has jurisdiction to rule on the underlying claim.

And this is important especially in a case like this, Your Honor, where Your Honor has had extensive experience with the

parties and is in the best position to determine whether the claims are valid or attempted to be used as harassment.

The Objectors will complain about the open-ended nature of the gatekeeper provision, whether it will or won't apply after the case is closed or a final decree is issued, and the unfair burden of their rights.

Your Honor has a previous reported opinion where basically jurisdiction does extend after a case is closed or a final decree is entered, so that issue is a red herring.

As Your Honor is well aware, it's a decade-long -- a decade of litigation against the Dondero-controlled entities that caused the Highland bankruptcy. And the Court is very well aware of the litigation that occurred in *Acis*, very well aware of the litigation that's occurred here that I mentioned a few minutes ago. Your Honor, it is not over, you'll be presiding over the contempt hearing.

And if the Court needs yet another ground to approve the gatekeeper provision, the Debtor submits that the procedure is an appropriate sanction for Dondero's vexatious litigation activities. We cited the *In re Carroll* case in the Fifth Circuit of 2017 that held that a bankruptcy court has the authority to enjoin a litigant from filing any pleading in any action without the prior authority from the bankruptcy court.

And in affirming the decision of the bankruptcy court, the Fifth Circuit commented on the reasons the bankruptcy court

gave for its ruling. After recounting the bad faith of appellants, the bankruptcy court determined that the Carrolls' true motives were to harass the trustee and thereby delay the proper administration of the estate, in the hope that they would be able to retain their assets or make pursuit of the assets so unappealing that the trustee would be compelled to settle on terms favorable to appellants.

Sounds familiar, Your Honor. The same can certainly be said about what Mr. Dondero is doing in this case.

And to make a showing that a party is vexatious litigant, the Court must find that the party has a history of vexatious and harassing litigation, whether the party has a good faith -- the litigation or has filed it as a means to harass, the burden to the Court and other parties, and the adequacy of alternative sanctions.

And as Your Honor is well aware from all the litigation, Your Honor is well, well able to make the finding required for the vexatious litigation finding.

But here, we don't ask for the drastic sanction of enjoining from any further filings. Rather, we just ask for a less-severe sanction, requiring Mr. Dondero and his entities to first make a showing that he has a colorable claim.

The Fifth Circuit in *Baum v. Blue Moon*, 2007, did exactly that. In *Baum*, the district court barred a vexatious litigant from initiating litigation without first obtaining the

approval of the district court. Ultimately, the matter reached the Fifth Circuit after the district court had modified the pre-filing injunction to limit it to a certain case, and then broadened it again based upon continued bad faith conduct.

On appeal, the Fifth Circuit, citing several prior cases, noted that a district court has the authority to impose a pre-filing injunction to defer vexatious, abusive, and harassing litigation.

And for those reasons, Your Honor, the Debtor asks the Court to overrule any objections to the gatekeeper provision.

Your Honor, I was just going to then go to the plan modification provisions, but I wanted to stop and see if you had any questions at this point.

THE COURT: I do not. Let's give him a time estimate, Nate. About how --

THE CLERK: Twenty.

MR. POMERANTZ: I have another five or six minutes, I think, based upon --

THE COURT: Okay.

MR. POMERANTZ: And then I'll be ready to turn it over to --

THE COURT: Okay.

MR. POMERANTZ: -- to Mr. Kharasch.

THE COURT: All right. Yes. You've got -- you've

done an hour and 33 minutes. So you have about, I guess, 37 minutes left. Okay. Go ahead.

MR. POMERANTZ: Thank you, Your Honor.

I would like to address the modifications of the plan that were contained in our January 22nd plan and the additional changes filed on February 1, several of which I have referred.

As a preliminary matter, Your Honor, under 1127(b), the Debtor can modify a plan at any time prior to confirmation if -- and not require resolicitation if there's no adverse change in the treatment of claim or interest of any equity holder.

With that background, I won't go through the changes we made that I've already discussed, but I will point out a couple, Your Honor, that I would like to point out now. We have modified the plan with respect to conditions of the effective date in Article 8. First, a condition to the effective date will now be entry of a final order confirming a plan, as opposed just to entry of order. And final order is defined as the exhaustion of all appeals.

In addition, the ability to obtain directors and officers insurance coverage on terms acceptable to the Debtor, the Committee, the Claimant Trustee, the Claimant Trustee Oversight Board, and the Litigation Trustee is now a condition to the effective date.

The Court heard testimony today and has experienced firsthand the litigiousness of Mr. Dondero and his related

entities. And the Court heard testimony from Mr. Tauber and Aon that the D&O insurance will not be available post-effective date without assurances that the gatekeeper provision will be in effect for the duration of the policy and any run-off period.

Mr. Tauber further testified that he expected the final terms from the insurance carrier to provide that if the confirmation order was reversed on appeal and the gatekeeper was removed, it would void -- it would either void the directors and officers coverage or it'd result in a Dondero exclusion.

Mr. Dondero and his entities are no strangers to the appellate process, as Your Honor knows. They appealed several of your orders, and continue the tack in this case, having appealed the Acis and the HarbourVest orders and the preliminary injunction. It would not surprise the Debtor if Mr. Dondero and his entities appealed your confirmation order, if Your Honor decides to confirm the plan.

The Debtor is confident that it will prevail on any appeal in the confirmation order, as we believe the Debtor has made a compelling case for confirmation.

The Debtor also believes a compelling case exists that if the plan went effective without a stay pending appeal, that the appeal would be equitably moot, but we understand we are facing headwinds from the courts, bankruptcy court have

addressed that issue before.

However, given the effect a reversal would have on the availability of insurance coverage, the Claimant Trustee, the Claimant Oversight Committee, and the Litigation Trustee are just not willing to take that risk.

We are hopeful that Mr. Dondero and his entities will recognize that any appeal is futile and step aside and let the plan proceed and become effective.

If Mr. Dondero and his related entities do appeal the confirmation order, preventing it from becoming final and preventing the effective date from the occurring, the Debtor intends to work closely with the Committee to ratchet down costs substantially and proceed to operate and monetize assets as appropriate until an order becomes final.

None of these modifications adversely affect the treatment of claims or interests under the plan, Your Honor, and for those reasons, Your Honor, we request that the Court approve those modifications.

And with that, I would like to turn the podium over to Mr. Kharasch to briefly address the remaining CLO objections.

THE COURT: All right. Mr. Kharasch?

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. KHARASCH: Good afternoon, Your Honor. I'll be as brief as possible. I know we're under a deadline.

As you've heard yesterday, you've heard before in other

proceedings, Your Honor, the CLO Objecting Parties, the so-called investors, do have rights under the CLO management agreements and indentures, including contractual rights to terminate the management agreements under certain circumstances.

What they complain about today, Your Honor, is that the injunction language in the plan, including the language preventing actions to interfere with the implementation and consummation of the plan, is so broad and ambiguous that their rights are or may be improperly impacted, especially any rights to remove the manager for acts of malfeasance.

But the Debtor is primarily relying, Your Honor, not so much on the plan injunctions but on the clear provisions of the January 9 order, to which Mr. Dondero consented and which provides that Mr. Dondero shall not cause any of his related entities to terminate any agreements with the Debtor.

Yes, that is a broad provision, but it is very clear, and it does not even allow the CLO Objecting Parties to come to court under a gatekeeper-type provision. But that is what Mr. Dondero consented to on behalf of himself and his related entities.

Important to note, Your Honor, we are not here today to litigate who is and who is not a related entity. That will be left for another day. However, Your Honor, we have considered these issues, including last night and this morning, and we

are going to propose -- well, we will modify our plan through a provision in the confirmation order to provide the following: Notwithstanding anything in the plan or the January 9 order, the CLO Objecting Parties will not be precluded from exercising their contractual or statutory rights in the CLOs based on negligence, malfeasance, or any wrongdoing, but before exercising such rights shall come to this Court to determine whether those rights are colorable and to also determine whether they are a related entity. If the Court has jurisdiction, the Court can determine the underlying colorable rights or claims.

This does not impact the separate settlement we have with CLO Holdco, Your Honor.

We think that such modification addresses some of the concerns raised yesterday by the objecting parties by providing more clarity as to what the plan is doing and not doing with respect to the plan and the January 9 order, and we think it is also a fair resolution of some legitimate concerns.

So, with that, Your Honor, we think that, with that clarification that we did not have to make but are willing to make, that this should fully satisfy the CLO Objecting Parties with regard to their objections to the injunction and the gatekeeper.

Thank you, Your Honor.

THE COURT: All right. Mr. Clemente?

CLOSING ARGUMENT ON BEHALF OF THE CREDITORS' COMMITTEE

MR. CLEMENTE: Yes, Your Honor. And I actually am going to be brief. Mr. Pomerantz's discussion, obviously, was very, very thorough, so I'm able to cut out a lot of stuff.

Thank you, Your Honor. Matt Clemente, Sidley Austin, on behalf of the Committee.

The plan, Your Honor, meets the confirmation standards and should be confirmed. Mr. Pomerantz covered a lot of ground, and I will endeavor not to repeat that, but there are a few points that I think the Committee wishes to emphasize.

Your Honor, since I first appeared in front of you, I have maintained consistently that no plan can or should be confirmed without the consent of the Committee. Your Honor, in her wisdom, understood this immediately, as it was obvious -- it was the obvious conclusion, given the makeup of the creditor body, the asset pool, and the impetus for the filing of the case.

Unfortunately, not everyone came to this conclusion so easily, and it took much hard-fought negotiations as well as a defeated disclosure statement, among other things, and tireless dedication and commitment by each individual Committee member to drive for a value-maximizing plan that is in the best interests of its constituencies and for us to get to where we are today.

And where we are today, Your Honor, is at confirmation for a plan that the Committee unanimously supports, which was the inevitable outcome for this case from the very beginning.

I've also said, Your Honor, that context is critical in this case. It has been from the beginning, and it remains so now. Mr. Draper, interestingly, began his comments yesterday by saying that even a serial killer is entitled to *Miranda* rights. While I will admit that at times the rhetoric in this case has been heated, I have never certainly likened Mr. Dondero to a serial killer. But the record shows, and Mr. Dondero's own words and actions show, that he is, in fact, a serial litigator who has no hesitation at all to take any position in an attempt to leverage an outcome that suits his self-interest. And he has no hesitation at all to use his many tentacles in a similar fashion.

That is a very important context in which the Court should view the remaining objections of the Dondero tentacles and weigh confirmation of the Debtor's plan.

Against this context of a serial litigator, Your Honor, we have a plan supported by each member of the Official Committee of Unsecured Creditors, accepted by two classes of claims, Class 2 and Class 7, and holders of almost one hundred percent in amount of non-insider claims in Class 8.

The parties that have voted against the plan are either employees who are not receiving distributions under the plan

or are insiders or parties related to Mr. Dondero.

The overwhelming number and amount of creditors who are receiving distributions under this plan, therefore, have accepted the plan. The true creditors and economic parties in interest have spoken, they have spoken loudly, and they have spoken in favor of confirming the plan.

Your Honor, I'm not going to address the technical requirements, as Mr. Pomerantz did that. So I'm going to skip over my remarks in that regard, except I do want to emphasize the remarks regarding the gatekeeper, exculpation, and injunction provisions as they're of critical importance to the plan.

The testimony has shown and the proceedings of this case has shown, again, Mr. Dondero is a serial litigator with a stated goal of causing destruction and delay through litigation.

The testimony has further shown that none of the independent board members would have signed onto the role without the gatekeeper and injunction provisions and the indemnity from the Debtor.

Therefore, it follows that such provisions are necessary to entice parties to serve in the Claimant Trustee and other roles under the plan, which, as I remarked in my opening comments, are integral to providing the structure that the creditors believe is necessary to unlocking the value and

unlocking themselves from the Dondero web.

Regarding the exculpation and injunction provisions specifically, Your Honor, the Court will recall that the Committee raised objections to them in connection with the first disclosure statement hearing. In response, the Debtor narrowed the provisions, and the Committee believes they comply with the Fifth Circuit precedent, as Mr. Pomerantz ably walked Your Honor through.

And to be clear, Your Honor, not only does the Committee believe the exculpation and injunction provisions comply with Fifth Circuit law, the Committee does not believe the estate is harmed by such provisions, as the Committee does not believe there are any cognizable claims that could or should be raised that would otherwise be affected by the exculpation or injunction, and, frankly, with respect to the release that Mr. Pomerantz walked Your Honor through with respect to the directors and the officers.

Regarding the gatekeeper, Your Honor, Your Honor presciently approved it in her January 9th order, and the developments since then only serve as further justification for including it in the plan and confirmation order. Mr. Dondero is a serial and vexatious litigator, and the instruments put in place under the plan to maximize value for the creditors and to oversee that value-maximizing process must be protected, and the gatekeeper function serves that

protection while also, importantly, as Mr. Pomerantz pointed out, providing Mr. Dondero with a forum to advance any legitimate claims he and his tentacles may have.

In short, Your Honor, the gatekeeper provision is necessary to the implementation to the plan, is fair under the circumstances of the case, and is therefore within this Court's authority, and it is appropriate to approve.

Your Honor, in sum, it has been a long road to get here today, but we are finally here. And we are here, Your Honor, I believe in large part as a result of the tireless efforts of the individual members of my Committee, and for that I thank them.

The Committee fully supports and unanimously supports confirmation of the plan. As demonstrated by the evidence, the plan meets all the requirements of the Bankruptcy Code. The Committee believes the plan is in the best interests of its constituencies. And therefore the Committee, along with two classes of creditors and the overwhelming amount of creditors in terms of dollars, urge you to confirm the plan.

That's all I have, Your Honor, but I'm happy to answer any questions you may have for me.

THE COURT: Okay. Not at this time.

Nate, how much time --

(Clerk advises.)

THE COURT: Twenty-five minutes remaining? All

right. Just so you know, you've got a collective Debtor's counsel/Committee's counsel 25 minutes remaining for any rebuttal, if you choose to make it.

Let's take a five-minute break, and then we'll hear the Objectors' closing arguments. Okay.

THE CLERK: All rise.

(A recess ensued from 2:00 p.m. until 2:06 p.m.)

THE COURT: All right. Please be seated. We're going back on the record in Highland. We're ready to hear the Objectors' closing arguments. Who wants to go first?

MR. DRAPER: Your Honor, this -- this is Douglas Draper. I get the joy of going first.

THE COURT: Okay.

CLOSING ARGUMENT ON BEHALF OF THE GET GOOD AND DUGABOY TRUSTS

MR. DRAPER: We've heard a great deal of testimony about the Debtor's belief that the circumstances in this case warrant an exception to existing Fifth Circuit case law, the Bankruptcy Code, and Court's post-confirmation jurisdiction.

I would not be standing here today objecting to the plan if the Debtor didn't attempt to extend, move past and beyond the Barton Doctrine, move beyond 1141, move beyond *Pacific Lumber*. In fact, I think I heard an argument that *Pacific Lumber* is not applicable and this Court should disregard Fifth Circuit case law.

Let's start with the exculpation provision. And the focus

of this case has been, and what we've heard over the last few days, is about the independent directors. I understand there was an order entered earlier, the order stands, and the order is applicable in this case. It cuts off, however, when we have a Reorganized Debtor, because these independent directors are no longer independent directors. It cuts off when we have a new general partner.

And so the protections that were afforded by that order do not need to be afforded to the new officers and new directors of the new general partner. And in fact, the protections that they're entitled to are completely different than the protections that were entitled -- that are covered by the order that the Court has looked at.

Let's first focus on, however, the exculpation provision. And I wanted to ask the Court to look at the exculpated parties. Have to be very careful and very interest -- and focus solely on the independent directors. But if you look at the parties covered by exculpation provision, it includes the professionals retained by the Debtor. My reading of *Pacific Lumber* is that neither the Creditors' Committee counsel nor the Debtor can be covered by an exculpation provision. This in and of itself makes the plan non-confirmable. This exculpation provision is unwarranted and unnecessary.

Two, --

THE COURT: Well, let's drill down on that.

MR. DRAPER: -- we have --

THE COURT: Let's drill down on that. Mr. Pomerantz says that this wasn't what they considered one way or another by *Pacific Lumber*. Debtor, debtor professionals. Okay? Do you disagree with that?

MR. DRAPER: I disagree with that. *Pacific Lumber* said you could only have releases and exculpations for the Creditors' Committee members. And the rationale behind that was that those people volunteered to be part and parcel of the bankruptcy process, that those parties did not get paid. Here, we have two professionals who both volunteered and are being paid, and are not entitled to an exculpation under *Pacific Lumber*. They're not entitled to a --

THE COURT: Okay. So you say *Pacific* --

MR. DRAPER: -- release. Now, ultimately, they --

THE COURT: -- *Pacific Lumber* categorically rejected all exculpations except to Creditors' Committee and its members. That's your --

MR. DRAPER: I agree. That's --

THE COURT: -- interpretation of *Pacific Lumber*?

MR. DRAPER: Yes.

THE COURT: Okay. All right. So you just absolutely disagree, one by one, with every one of the arguments, that it was really -- the only thing before the Fifth Circuit was plan sponsors, okay? A plan proponent that I think was like a

competitor previously of the debtor, and I think a large creditor or secured creditor. I think those were the two plan proponents.

So you disagree -- I'm going to, obviously, go back and line-by-line pour through *Pacific Lumber*, but you disagree with Mr. Pomerantz's notion that, look, it was really a page and a half or two of a multipage opinion where the Fifth Circuit said, no, I don't think 524(e) is authority to give exculpation from postpetition liability for negligence as to these two plan sponsors. And I guess it was also -- I don't know. They say, Pachulski's briefing says it was really only looking at these two plan sponsors and the Committee and its members on appeal, you know, going through the briefing, and in such, you can see that these were all that was presented and addressed by the Fifth Circuit. You disagree with that?

MR. DRAPER: Look, I know the facts of *Pacific Lumber* and they -- I know what the posture of the case was. However, the literal language by the opinion in it, it transcends just a dispute in the case. And I think the U.S. Trustee's position that this exculpation provision is correct as a matter of law support -- is further evidence of the fact that the U.S. Trustee, as watchdog of this process, and *Pacific Lumber* say this cannot be done, period, end of story.

THE COURT: Okay. So you, at bottom, just totally disagree with Mr. Pomerantz? You say *Pacific Lumber* is

actually a very broad holding, and I guess, if such, there's a conflict among the Circuits, right?

MR. DRAPER: Well, that's okay.

THE COURT: So, --

MR. DRAPER: I mean, quite frankly, *Pacific Lumber* is binding on you.

THE COURT: Understood.

MR. DRAPER: There may be a conflict in the Circuits, and ultimately the Supreme Court may make a decision and decide who's right and who's wrong.

But for purposes of today and for purposes of this exculpation provision and for purposes of this confirmation, *Pacific Lumber* is the applicable law.

THE COURT: Okay. Well, again, this is a hugely important issue, although in many ways I don't understand why it is, because we're just talking about postpetition acts and negligence, okay? You know, many might say it's much ado about nothing, but it's front and center of your objection. So I guess I'm just thinking through, if the Fifth Circuit was presented these exact facts and was presented with the argument, you know, the *Blixseth* case says 524(e) has nothing to do with exculpation because exculpation is a postpetition concept, and it's just talking about standard liability -- these people aren't going to be liable for negligence; they can be liable for anything and everything else -- if presented

with that *Blixseth* case, you know, there are several arguments that Mr. Pomerantz has made why, if you accept that 524(e) might not apply here, let's look at the reasoning, the little bit of reasoning we had of *Pacific Lumber*, that it was really a policy rationale, right? These independent fiduciaries, strangers to the company and case, they'd never want to do this if they knew they were vulnerable for getting sued for negligence. Mr. Pomerantz's argument is that these independent board members are exactly analogous to a Committee, more than prepetition officers and directors. What do you have to say about that policy argument?

MR. DRAPER: Well, I think there's a huge distinction between the members of a Creditors' Committee who are volunteers and are not paid versus a paid independent director. And more importantly, I think there's a huge difference between a member of a Creditors' Committee who's not paid and counsel for a Debtor and counsel for a Creditors' Committee.

THE COURT: Okay.

MR. DRAPER: Look, you have -- you've --

THE COURT: So, at bottom, it was all about compensation to the Fifth Circuit?

MR. DRAPER: Well, no. The Fifth Circuit policy decision was we want to protect a party who wants to serve and do their civic duty to serve on a Creditors' Committee for no

compensation. I agree with that. I think it's a laudable policy decision. I think it makes sense.

However, the Fifth Circuit in its language basically said, nobody else gets it. It didn't say, look, you know, if there are circumstances that are different, we may look at it differently. The language is absolute in the opinion. And that's what I think is binding and I think that's what the case stands for.

And look, just so the Court is very clear, when Pachulski files its fee application and the Court grants the fee application, any claim against them is res judicata. So, in fact, they do have -- they do have protection. They do have the ability to get out from under. The Court -- they're just not -- they just can't get out from under through an exculpation provision. And the same goes for Mr. Clemente and his firm.

THE COURT: Which, --

MR. DRAPER: And the same goes for DSI.

THE COURT: Which, by the way, that's one reason I think sometimes this is much ado about nothing. It goes both ways. The Debtor professionals, the Committee professionals, estate professionals, they're going to get cleared on the day any fee app is approved, right? I mean, there's Fifth Circuit law that says --

MR. DRAPER: I -- I --

THE COURT: -- says that's res judicata as to any future claims.

But I guess I'm really trying to understand, you know, at bottom, I feel like the Fifth Circuit was making a holding based on policy more than any directly applicable Code provision.

I mean, it's been said, for example, that Committee members, they're entitled to exculpation because of, what, 1103, some people argue, 1103, which subsection, (c)? That's been quoted as giving, quote, qualified immunity to Committees. But it doesn't really say that, right? It's just something you infer.

MR. DRAPER: No. Look, what I think, if you really want to put the two concepts together, I think what the Fifth Circuit, when they told lawyers and professionals that you can't get an exculpation, was very mindful of the fact that you can get released once your fee app is approved. So, as a policy, they didn't need to do it in a exculpation provision. There was another methodology in which it could be done.

THE COURT: Uh-huh.

MR. DRAPER: And so that's -- you have to look at it as holistic and not just focus on the exculpation provision. Because, in fact, they recognize and they -- I'm sure they knew their existing case law on res judicata, and that's why they read it out.

So, honestly, there's no reason for Pachulski to be in here. There's no reason for Mr. Clemente to be in here. There's no reason for the professionals employed by the Debtor to be in here. They have an exit not by virtue of the plan.

THE COURT: But so then it boils down to the independent directors and Strand post January 9th?

MR. DRAPER: It boils down somewhat to them, but quite frankly, there are two parts to this. One is you have an order that's in place. I am not asking the Court to overturn the order. And quite frankly, this provision could have been written to the effect that the order that was in place on -- that's been presented to the Court is applicable and applied.

However, let's parse that down. Let's look at Mr. Seery. The order that's in place solely protects the independent directors acting in their capacities as independent directors. If somebody's acting as -- and if you want to liken it to a trustee, their protection is afforded by the Barton Doctrine, and that's how the protection arises.

What's going on here is they're extending the provisions, first of all, of the Court's order, and number two, of the Barton Doctrine, which are -- which cannot be -- which should not be extended. The law limits what protections you have and what protections you don't have. And we, as lawyers -- look, I'll give you the best example. Think of all the times you

had somebody write in the concept of superpriority in a cash collateral order. And how many times have you had a lawyer rewrite the concept of the issue as to diminution in value? The Code says diminution in value, and quite frankly, a cash collateral order should just say if, to the extent there's diminution in value, just apply the Code section. It's written there. Smart people put it in, and Congress approved it. And once you start getting beyond that, those things should be limited.

And what we have are lawyers trying to extend out by definitions things that the Code limits by its reach. That goes for post-confirmation jurisdiction. That goes for the injunction. That goes for the so-called gatekeeper provision.

And so, again, I would not be here if, in fact, they had said, we have an injunction to the full extent allowed by the Bankruptcy Code and *Pacific Lumber*. We have an exculpation provision that's allowed by virtue of the Court's order. We have the full extent and full reach of the Barton Doctrine. Those are legitimate. Once you start expanding upon that, you're reaching into matters that are not authorized and not allowed.

And then you get into 105 territory, which is always very dangerous. And that's really what's going on here. And that's the tenor of my argument and what I'm trying to say. The Code gives protections. It is not for us to extend the

protections. It's not for us to enlarge them, even under a, gee, the other party's litigious.

And so that's -- let's take *Craig's Store*. Attempted to limit its reach. *Craig's Store* says once you have a confirmed plan, any dispute between the parties, for -- let's take an executory contract. If there's a breach of the executory contract, that's a matter to be handled aft... by another court. It's not a matter to be handled by this Court. This Court lets the parties out.

And in this case, it's even worse, because you basically have a new general partner coming in, you have an assumption of various executory contracts, and you have a -- Strand is no longer present.

If you adopted Mr. Seery's argument, anybody who appeals a decision, questions what he does or how he does it, is a vexatious litigator. That's not the case. And the fact that we are appealing a decision is a right that we have. It shouldn't be limited, and it shouldn't be held against us. Courts can rule against us. That's fine.

And so that's really what the focus is here and that's why I gave the opening that I had. We are willing to be bound by applicable law. And quite frankly, the concept that the exigencies of a case allow a court to change what applicable law is is problematic. I gave the criminal example as a reason. And the reason was that, in certain instances, the

application of law may allow a criminal to go free. It's a problem with our system and how we work, but that's what the law does, and it is absolute in its application.

Let me address the so-called gatekeeper provision. The gatekeeper provision, in a certain sense, is recognized in the Barton Doctrine. It's jurisdictional, and it says, to the extent you're going to litigate with somebody who served during the bankruptcy, who was a trustee, then you have to come to the bankruptcy court and pass through a gate. It doesn't say you have to pass through a gate for a reorganized debtor who does something after a plan is confirmed and going forward. And so that's -- there's a distinction.

And if you look at Judge Summerhays' decision, which I will be happy to send to the Court, in *WRT* involving -- it's kind of (indecipherable) and Mr. Pauker, where, in that case, the trustee, the litigation trustee, spent more litigating than it had in recoveries, and Baker Hughes filed suit. Judge Summerhays said, look, the Barton Doctrine only applies to a certain extent. It is limited once you get into post-confirmation matters and related-to jurisdiction.

And so, again, the Barton Doctrine is what it stands for. We agree with it, we recognize it, and it should be applied. The Barton Doctrine, however, should not be extended, should not go past its reach, and should not go past the grant of jurisdiction for this Court.

And so you have in here, though they have -- they have tried to hide it in a limited fashion, this gatekeeper provision. The gatekeeper provision, as currently written, covers post-confirmation claims that somebody has to come before this Court to the extent there's a breach of a contract. That's not proper, and it's not covered by your post-confirmation jurisdiction. To the extent there's an interpretation of an existing contract and an interpretation of the order, you do have authority, and I don't question that.

THE COURT: But address Mr. Pomerantz's statement that there's a difference between saying you have to go to the bankruptcy court and make an argument, we have a colorable claim that we would like to pursue, and having that jurisdictional step required. There's a difference between that and the bankruptcy court adjudicating the claim.

MR. DRAPER: Well, there are two parts to that. Number one is there's an injunction in place from an action taken post-confirmation against property of the estate. We all agree at that, correct? And we believe that the injunction applies to post-confirmation action against property of the pre-confirmation estate. We all agree to that.

However, if in fact there's a breach of a contract postpetition that the parties have a dispute about, that

contract is now no longer under your purview once the contract has been assumed. And so they shouldn't have to make a colorable claim to you that a breach of the contract has occurred. That should be the determining factor for another court.

That's, in essence, what *Craig's Store* says. Your jurisdiction and the jurisdiction of a bankruptcy court is limited. It's limited by *Stern vs. Marshall*. It's limited by your ability to render findings of fact and conclusions of law versus render a final decision. That decision has been made not by us, it's been made by Congress and it's been made by the United States Constitution.

THE COURT: All right. And I think we all agree with you regarding the holding of *Craig's Stores* and some of the other post-confirmation bankruptcy subject matter jurisdiction holdings. But Mr. Pomerantz is arguing that this gatekeeping function is warranted by, among other things, you know, there was a district court holding, *Baum v. Blue Moon*, or a Fifth Circuit case, that upheld a district court having the ability to impose pre-filing injunctions in the context of a vexatious litigator. So, you know, that's a strong analogy he makes to what's sought here. What is your response to that?

MR. DRAPER: My response to that is a district court can do that. A district court has jurisdiction to make that decision. And quite frankly, a district court can sanction a

vexatious litigator under Rule 11.

So, in fact -- again, you have to bifurcate your power versus the power that a district court has. And that gatekeeper provision is allowed by a district court because they had authority over the case. You may not have authority over being the gatekeeper for a post-confirmation matter that you had no jurisdiction over to start with.

THE COURT: Okay.

MR. DRAPER: That, that's the distinction between here. That's -- what's going on here is they are -- they are mashing together a whole load of concepts under the vexatious litigator and the anti-Dondero function that fundamentally abrogate the distinction between what your jurisdiction is pre-confirmation versus your jurisdiction post-confirmation. And that --

THE COURT: Do you think --

MR. DRAPER: -- is sacrosanct.

THE COURT: Do you think Judge Lynn got it wrong in *Pilgrim's Pride*? Do you think Judge Houser got it wrong in *CHC*? Or do you think this situation is different?

MR. DRAPER: There are two parts to that. I have told Judge Lynn, since I have been working with him, that I think *Pilgrim's Pride* is wrongfully decided. However, having said that, *Pilgrim's Pride* and those cases dealt with claims against the -- the channeling injunction affected actions

during the bankruptcy. It did not serve as a post-jurisdictional grant of jurisdiction to the bankruptcy court. It did not pose as an ability -- as a limitation on a post-confirmation litigator or a post-effective date litigator to address a wrong done to them by an independent director of a general partner.

In a sense, Judge Lynn's determination, and Judge Houser, is consistent somewhat with the Barton Doctrine. Now, do I agree that they're right? No. But I understand the decision and I understand the context in which it was rendered and I don't have a huge problem with it.

So, again, let's parse what we're trying to do here. Number one, we are -- we have to bifurcate post-confirmation jurisdiction or post-effective date jurisdiction and what you can do as a post-effective date arbiter versus what you could do pre-effective date and pre-effective date claims. And again, that's the problem with what's written here. It is designed one hundred percent to expand your post-effective date jurisdiction through both the gatekeeper provision and the jurisdictional grant that's here from your pre-effective date capability, your pre-effective date jurisdiction, and your pre-effective date ability to either curb a claim or not to curb a claim. And that, that's the issue.

And again, let's start talking about the independent directors. I recognize, again, that there's an order there.

But if Mr. Seery -- let's take Mr. Seery -- is acting as a director of Strand but is also an accountant for the Debtor and makes a mistake, he would be sued in his capacity as the accountant for the Debtor, not as an independent director of Strand. That distinction needs to be made.

What we are doing here under this plan, and what's been argued by Mr. Pomerantz, is too broad a brush. It needs to be cut back. The Court needs to take a very hard look at what's being presented here.

And again, the Court's order is very clear. And this is binding. I recognize that. But the protection they got was serving as an independent director. The protection they didn't get was -- let's take Mr. Seery, if Mr. Seery was serving as an accountant and blew a tax return. Those are distinctions that warrant analysis and warrant looking at here. And again, it is too broad a brush that's touted here, and that is why this plan on its face is not confirmable with respect to both the post-confirmation jurisdiction, the gatekeeper provision, the exculpation provisions.

And so let me address a few other things, just to address them. Number one, the argument has been made with respect to the creditors and the resolicitation issue and that creditors could have come in looking, seen, followed the case, and basically calculated and made the same calculation that the Debtor made when they filed this and put forth the new plan

analysis versus liquidation analysis. And then they've also made the argument, well, nobody came and complained. Well, two parts to that.

Number one, as you know, a disclosure statement needs to be on its face and should not require a creditor to go back in and monitor the record -- and quite frankly, in this record, there are thousands of pages -- and do the calculation himself. This was incumbent upon the Debtor to possibly resolicit when these material changes took place.

Number two, the recalculation has not been subject to the entire creditor body seeing it. And anybody who wanted to call them would have had to have seen the document they filed on February 1st and made a telephone call basically contemporaneous with seeing it.

Those are two things. The argument that they didn't call me is just nonsensical. There's nobody -- you, you are sitting here -- and I've had a number of battles over the years with Judge (indecipherable), who was -- who -- and her view was, I'm here to protect the little guy who's not -- didn't hire counsel, who's not represented by Mr. Clemente and his huge clients who have voted in favor of the plan. It's the little person, *i.e.*, the employees who would vote against a plan that they so -- so desperately tried to get out from under.

THE COURT: Well, --

MR. DRAPER: It's really a function --

THE COURT: -- Mr. Pomerantz argues it's not as though there was a materially adverse change in treatment; it was the disbursement estimate. And doesn't every Chapter 11 plan -- most Chapter 11 plans, not every -- they make an estimate. I mean, and it's, frankly, it's very often a big range of recovery, right, a big range of recovery, because we don't know what the allowed claims are going to compute to at the end of the day. There's obviously liquidation of assets. We don't know. Isn't this sort of like every -- not, again, not every other plan, but most other plans -- where there's a big range of possible estimated distributions? I mean, this wasn't a change in treatment, right?

MR. DRAPER: Well, let me address that. There are two parts to that. Most plans I see that contain some sort of analysis have a range. This one doesn't have a range. What they've done is they've buried in a footnote or assumption that these numbers may change. So had they said, look, your recovery can go from 60 cents to 85 cents, God bless, they probably would have been right.

Number two, which is more problematic to me, to be honest with you, is the fact that, number one, the operating expenses have increased over a hundred percent. And number two, the Debtor has made a determination post-disclosure statement and pre-hearing that they're going to change their model of

business.

The original disclosure statement said we're not going to get into the managing CLO part of the business and we're going to let these contracts go. However, at some point along the way, they made a change. I don't know to this day, because I was never furnished the backup to the expense side. I understand what they said why they didn't give me the asset side, but the expense side, they should have given me, and I did ask for.

But, you know, what we have now is a more fundamental problem with the execution of the plan and the expectation that creditors -- what they're going to get, because, in fact, the expense items have doubled.

I think creditors were entitled to know that, rather than it having been sprung upon everybody, when I got it the day before a deposition. And so those are things that I think warranted a change in solicitation. Now, the result may have been the same. I don't know. More people may have voted against the plan. More people may have opted in from Class 8 to Class 7, I mean, based upon that information. That information was not provided to them.

And so I look at two -- three things. One is a range could have been given, and they probably would have been a whole lot better off. Two, you have a material change in expenses. And three, you have a material change in business

model. Three things that occurred between November and this confirmation hearing. Three things that were not known by the creditor body and not told to them.

THE COURT: Mr. Draper, I --

MR. DRAPER: Now, it may have been told --

THE COURT: I don't want to belabor this any more than I think we need to, but I've got a Creditors' Committee with very sophisticated professionals, very sophisticated members. They're fiduciaries to this constituency. You know, you mentioned the little guy. I'm not quite sure who is the little guy in this case. I think it's a case of all big guys. But, I mean, they're fine with what's happened here. Meanwhile, you -- I mean, clarify your standing here for Dugaboy and Get Good. I mean, --

MR. DRAPER: I have --

THE COURT: -- I know you have standing. Mr. Pomerantz did not say you don't have standing. But in pointing out the economic interests here, I think he said your clients only have asserted a postpetition administrative expense. Is that correct?

MR. DRAPER: No. I have a post -- I have an -- I have a claim that's been objected to. I don't think my economic --

THE COURT: A claim of what amount?

MR. DRAPER: I think it's $10 million. But Mr.

Pomerantz is right, it requires a looking through the -- through the entity that I had a loan relationship with.

I recognize all of those things. I don't think that's relevant to whether my argument is correct or incorrect. I have standing to do it. I don't think whether my claim is 50 cents or $50 million should change the Court's view of whether the claim is good or bad.

THE COURT: Well, I do want to understand, though. Okay. So you have not asserted an administrative expense, correct?

MR. DRAPER: No. There's been an administrative expense that's been asserted, --

THE COURT: For what?

MR. DRAPER: -- but that --

THE COURT: For what?

MR. DRAPER: I don't have the number in front of me, Your Honor. I don't -- I don't have those numbers --

THE COURT: Okay. Well, then, --

MR. DRAPER: -- in front of me. I have asserted --

THE COURT: -- what is the concept? What is the basis for it?

MR. DRAPER: It deals with -- Mr. Pomerantz is absolutely right as to how he's articulated it.

THE COURT: I can't remember what he said.

MR. DRAPER: It deals with -- it deals with a

transaction that's unrelated to the Debtor that deals with Multi-Strat. I agree with that.

THE COURT: Okay. So I remember him saying piercing the corporate veil. Your trusts -- both of them, one of them, I don't know -- engaged in a transaction with Multi-Strat that you say --

MR. DRAPER: No, that --

THE COURT: -- gave -- okay. Well, you say Multi-Strat is liable and the Debtor is also liable?

MR. DRAPER: No. Let me make two things. The administrative claim deals with a Multi-Strat transaction that took place during the bankruptcy. My unsecured claim deals with a transaction that took place prior to the bankruptcy, where we lent money to another entity that then funneled money out into the Debtor. We're -- our contention is that the Debtor is liable for that loan.

THE COURT: All right. So both the administrative expense as well as the prepetition claim require veil-piercing to establish liability of the Debtor?

MR. DRAPER: Or single business enterprise. I don't necessarily have to veil-pierce.

THE COURT: Okay. I'm not even sure that single business enterprise is completely available anymore in Texas, by the Texas legislature doing different things, assuming Texas law applies. I don't know, maybe Delaware does. But I

-- sorry. Just let me let that sink in a little bit. You're -- okay. Okay. Let me let it --

MR. DRAPER: Your Honor, I --

THE COURT: -- sink in a little bit.

MR. DRAPER: Okay.

THE COURT: These trusts -- of which Mr. Dondero is the beneficiary ultimately, right?

MR. DRAPER: Yes. Well, and to --

THE COURT: So, your --

MR. DRAPER: Again, I have not gone up --

THE COURT: The beneficiary of your client --

MR. DRAPER: Mr. Dondero is --

THE COURT: The beneficiary of your client is ultimately hoping to succeed on the administrative expense and the claim on the basis that you should disregard the separateness of Highland and these other entities?

MR. DRAPER: Well, let's take the --

THE COURT: When he's resisted that --

MR. DRAPER: -- unsecured claim. The --

THE COURT: -- in multiple pieces of litigation? Right? I'm sorry. I'm just trying to let this sink in. Okay. If you could elaborate. I'm sorry. I'm talking too much. You answer me.

MR. DRAPER: Okay. What we are saying is that, in essence, the party we lent the money to was a conduit for the

Debtor.

THE COURT: Okay. And who was that entity that either --

MR. DRAPER: Highland Select.

THE COURT: -- Dugaboy or Get Good lent money to?

MR. DRAPER: The Get Good claim is completely different. The Get Good claim is written as a tax claim. Honestly, I haven't taken a hard look at it. I will, once we get through this, and it may be withdrawn. The Dugaboy claim is a claim that arises through a conduit loan.

THE COURT: Okay. But to which entity?

MR. DRAPER: Highland Select.

THE COURT: Okay. All right. Well, continue with your argument. I'll get my flow chart out and --

MR. DRAPER: Well, let me -- again, I think I've made the points that I needed to make. I think I've done it in a sense that you -- what I think the Court needs to do is take a very hard look at the jurisdictional extension that's being granted here. I think the exculpation provision, in and of itself, just by the mere inclusion of Pachulski and the Debtor's professionals and the Committee professionals, is just unconfirmable. It has to be stricken.

And I think the injunction and the juris... the gatekeeper provision are not allowed by applicable law. If this plan merely said, we will enforce the Barton Doctrine, we will

abide -- and this order the Court has entered stands, the injunction that's provided and the rights that we have under 1141 stand, nobody would be objecting. That's why the U.S. Trustee has objected, because of the expansive nature of what the -- what's been done in this plan.

And with that, I'll turn it over to Mr. Taylor or Davor.

THE COURT: All right. Who's next?

MR. RUKAVINA: Your Honor, Davor Rukavina. Can you hear me?

THE COURT: I can.

CLOSING ARGUMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

MR. RUKAVINA: Your Honor, thank you. I'll try not to repeat the arguments from Mr. Draper, but I do want to point out a couple bigger-picture issues, I think.

One, the issue today is not Mr. Dondero, what he has been alleged to have done, what he is alleged to do in the future. The Debtor has gone out of its way to create the impression that we're all tentacles, we're vexatious litigants, we're frivolous litigants. The issue today is whether this plan is confirmable under 1129(a) and 1129(b). And I think that that has to be the focus.

Nor is the issue, I think, today any motivation behind my objection or Mr. Draper's or anything else.

And I do take issue that my motivation or my client's motivation has some ulterior motive for a competing plan or

burning down the house or anything like that. It's very, very simple. My clients do not want $140 million of their money and their investors' money, to whom they owe fiduciary duties, to be managed by a liquidating debtor under new management without proper staffing and with an obvious conflict of interest in the form of Mr. Seery wearing two hats.

I respect very much that Mr. Seery wants to monetize estate assets for the benefit of the estate creditors. That's his job. That's incompatible with his job under the Advisers Act and, as he said, to maximize value to my clients and over a billion dollars of investments in these CLOs.

That should not be, Your Honor, a controversial proposition. I should not be described as a tentacle or vexatious because my clients don't want their money managed by someone that they, in effect, did not contract with. I may be -- I may lose that argument. The CLOs have obviously consented to the assumption. But my argument should not be controversial. It should not be painted with a broad brush of somehow being done in bad faith by Mr. Dondero.

And in fact, Mr. Seery has admitted that the Debtor and he are fiduciaries to us. The fact that today they call us things like tentacles and serial litigants and vexatious litigants -- we all know what a vexatious litigant is. We've all dealt with those. The fact that our fiduciary would call us that just reconfirms that it should have no business

managing our or other people's money.

And then for what? Mr. Seery has basically said that the Debtor will make some $8.5 million in revenue from these contracts, net out $4 million of expenses. That's net profit of $4.5 million. But then they have to pay $3.5 million for D&O insurance and $525,000 in cure claims. But it's the Debtor's business decision, not ours.

Your Honor, the second issue is the cram-down of Class 8. There are two problems here: the disparate treatment between Class 7 and Class 8, which also raises classification, and then the absolute priority rule. Class 7 is a convenience class claim -- is a convenience claim, Your Honor, with a $1 million threshold. Objectively, that is not for administrative convenience, as the Code allows. And the only evidence as to how that million dollars was arrived at was, oh, it was a negotiation of the Committee.

There is no evidence justifying administrative convenience. Therefore, there is no evidence justifying separate classification. And on cram-down, the treatment has to be fair and equitable, which *per se* it is not if there is unfair discrimination. And there is unfair discrimination, because Class 8 will be paid less.

On the absolute priority rule, Your Honor, I think that it's very simple. I think that the Code is very clear that equity cannot retain anything -- I'm sorry, equity cannot

retain any property or be given any property. Property is the key word in 1129(b), not value. It doesn't matter that this property may not have any value, although Mr. Seery said that it might. What matters is whether these unvested contingent interests in the trust are property. And Your Honor, they are property. They have to be property. They are trust interests.

So the absolute priority rule is violated on its face. There is no evidence that unsecured creditors in Class 8 will receive hundred-cent dollars. The only evidence is that they'll receive 71 cents. Mr. Seery said there's a potential upside from litigation. He never quantified that upside. And there is zero evidence that Class 8 creditors are likely to be paid hundred-cent dollars. So, again, you have the absolute priority rule issue.

And this construct where, okay, well, equity won't be in the money unless everyone higher above is paid in full, that is just a way to try to get around the dictate of the absolute priority rule. If that logic flies, then the next time I have a hotel client or a Chapter 11 debtor-in-possession client where my equity wants to retain ownership, I'll just create something like, well, here's a trust, creditors own the trust, I won't distribute any money to equity, and equity can just stay in control.

The point again is that this is property and it's being

received on account of prepetition equity.

And there's also the control issue. The absolute priority rule, the Supreme Court is clear that control of the post-confirmation equity is also subject to the absolute priority rule. Here you have the same prepetition management postpetition controlling the Debtor and the assets.

Your Honor, the Rule 2015.3 issue, someone's going to say that it's trivial. Someone's going to accuse me of pulling out nothing to make something. Your Honor, it's not trivial. That's part of the problem in this case, that this Debtor owns other entities that own assets, and there's been precious little window given into that during the case, during this confirmation hearing, and in the disclosure statement.

Rule 2015.3 is mandatory. It's a shall. I respect very much Mr. Seery's explanation that there was a lot going on with the COVID and with everything and that it just fell through the cracks. That's an honest explanation. But the Rule has not been complied with. And 1107(a) requires that the debtor-in-possession comply with a trustee's duties under 704(a)(8). Those duties include filing reports required by the Rules.

So we have an 1129(a)(3) problem, Your Honor, because this plan proponent has not complied with Chapter 11 and Title 11. I'll leave it at that, because I suspect, again, someone will accuse me of being trivial on that. It is not trivial. It is

a very important rule.

On the releases and exculpations, Your Honor, I'm not going to try -- I'm not going to hopefully repeat Mr. Draper. But there's a couple of huge things here with this exculpation that takes it outside of any possible universe of *Pacific Lumber*.

First, you have a nondebtor entity that is being exculpated. I understand the proposition that, during a bankruptcy case, the professionals of a bankruptcy case might be afforded some protection. I understand that proposition. But here you have Strand and its board that's a nondebtor.

The other thing you have that takes this outside of any plausible case law is that the Debtor is exculpated from business decisions, including post-confirmation. I understand that professionals in a case make decisions, and professionals, at the end of the case, especially if the Court is making findings about a plan's good faith, that professionals making decisions on how to administer an estate ought to have some protection.

That does not hold true for whether a debtor and its professionals should have protection for how they manage their business. GM cannot be exculpated for having manufactured a defective product and sold it during its bankruptcy case.

Here, I asked Mr. Seery whether this language in these provisions, talking about whether the administration of the

estate and the implementation of the plan includes the Debtor's management of those contracts and funds. He said yes. He said yes. So if you look at the exculpation provision, it is not limited in time. It affects, Your Honor, I'm quoting, it affects the implementation of the plan. That's going forward.

So you are exculpating the Debtor and its professionals from business decisions, including post-confirmation, from negligence. Well, isn't negligence the number one protection that people that have invested a billion dollars with the Debtor have? It's cold comfort to hear, well, you can come after us for gross negligence or theft. I get that. What about negligence? Isn't that what professionals do? Isn't that why professionals have insurance, liability insurance? It's called professional negligence for malpractice.

So this exculpation, let there be no mistake -- I heard Your Honor's view and discussion -- this is a different universe, both in space and in time.

And we don't have to worry about *Pacific Lumber* too much because we have the *Dropbox* opinion in *Thru, Inc.* We have that opinion. Whether it's sound law or not, I don't wear the robe. But the exculpation provision in that case was virtually identical. And Your Honor, that's a 2018 U.S. Dist. LEXIS 179769. In that opinion, Judge Fish -- I don't think anyone could say that Judge Fish was not a very experienced

district court judge -- Judge Fish found that the exculpation violated Fifth Circuit precedent. That exculpation covered the debtor's attorneys, the debtor, the very people that Mr. Pomerantz is now saying, well, maybe the Fifth Circuit would allow an exculpation for.

THE COURT: Well, I think he is relying heavily on the analogy of independent directors to Creditors' Committee members, saying that's a different animal, if you will, than prepetition officers and directors. And he thinks, given the little bit of policy analysis put out there by the Fifth Circuit, they might agree that that's analogous and worthy of an exculpation.

MR. RUKAVINA: And they might. And they might. And again, I usually do debtor cases. You know that. I'd love to be exculpated.

THE COURT: But --

MR. RUKAVINA: And I think, again, I do -- I do --

THE COURT: -- I really want people to give me their best argument of why, you know, that's just flat wrong. And Mr. Draper just said it's, you know, there's a categorical --

MR. RUKAVINA: Yeah.

THE COURT: -- rejection of exculpations except for Committee members and Committee in *Pacific Lumber*. And I'm scratching my head on that one. And partly the reason I am, while 524(e) was thrown out there, the fact is there's nothing

explicitly in the Bankruptcy Code, right, that explicitly permits exculpation to a Committee or Committee members. There's just sort of this notion, you know, allegedly embodied in 1103(c), or maybe there are cases you want to cite to me, that they're fiduciaries, they're voluntary fiduciaries, they ought to have qualified immunity.

And again, I see it as more of a policy rationale the Fifth Circuit gave than pointing to a certain statute. So if it's really a policy rationale, then I think the analogy given here to a newly-appointed independent board is pretty darn good.

So tell me why I'm all wrong, why Mr. Pomerantz is all wrong.

MR. RUKAVINA: I am not going to tell you that you're all wrong. I'm not going to tell Mr. Pomerantz that he's all wrong. Although I am, I guess, a Dondero tentacle, I am not a Mr. Draper tentacle, and I happen to disagree with him. That's my right. I respect the man very much. I thought he did a very honorable and ethical job explaining his position to Your Honor. I believe that the Fifth Circuit would approve exculpations for postpetition pre-confirmation matters taken by estate fiduciaries. I do believe that they would. And I do believe that that should be the case.

But again, I'm telling you that this one is different. It's -- Mr. Pomerantz is misdirecting you. The estate

professionals manage the estate. The Debtor manages its business. It goes out into the world and it manages business. And as Your Honor knows, under that 1969 Supreme Court case, of course I blanked, and under 28 U.S. 959, a debtor must comply, when it's out there, with all applicable law.

So if the Debtor -- and I'm making this up, okay? I am making this up. I'm not alleging anything. But if the Debtor, through actionable neglect, lost $500 million of its clients' or its investor clients' money, I'm telling you that under no theory can that be exculpated, and I'm telling you that that's what this provision does.

The estate and the Debtor can release their claims. It happens all the time. Whatever -- whatever claims the estate may have against professionals, those can be released. It's a 9019. I'm not complaining about that. Although I do think that it's premature in this case, because we don't know whether there's any liability for the $100 million that Mr. Seery told you Mr. Dondero lost. But in no event can business -- business --

THE COURT: I don't understand what you just said.

MR. RUKAVINA: Your Honor, I --

THE COURT: Mr. Dondero is not released --

MR. RUKAVINA: -- went through Mr. Seery's --

THE COURT: -- by the estate.

MR. RUKAVINA: I understand. I understand. But we

all have to also understand that a board of directors and officers can be liable, breaches of fiduciary duty by not properly managing an employee. So I'm not suggesting -- I mean, I know that there's been an examiner motion filed. I'm not suggesting that we have a mini-trial. I'm not suggesting there's actionable conduct. What I'm telling you is that the evidence shows that there's a large postpetition loss. And it's premature to prevent third parties that might have claims from bringing those.

And then I think -- I'm not sure that Your Honor understood my point. Let me try to make it again. This exculpation is not limited in time. This exculpation is expressly not limited in time and applies to the administration of the plan post-confirmation. I don't think under any theory would the Fifth Circuit or any court at the appellate level allow an exculpation for purely post-reorganization post-bankruptcy matters. I have nothing more to tell Your Honor on exculpation.

THE COURT: Well, again, I -- perhaps I go down some roads I really don't need to go down here, but I'm not sure I read it the way you did. I thought we were just talking about pre -- postpetition, pre-confirmation. Or pre-effective date.

MR. RUKAVINA: Your Honor, Page --

THE COURT: The --

MR. RUKAVINA: Page 48 of the plan, Section C,

Exculpation. Romanette (iv). The implementation of the plan. And I -- and that's -- that's part of why I asked Mr. Seery that yesterday. Does the implementation of the plan, in his understanding, include the Reorganized Debtor's management and wind-down of the Funds, and he said yes.

THE COURT: Okay.

MR. RUKAVINA: So that's right there in black and white.

It also includes the administration of the Chapter 11 case. If that is defined broadly, as Mr. Seery wants it to be, to define business decisions, then that also exceeds any permissible exculpation.

So, again, I'm telling Your Honor, with due respect to you and to Mr. Pomerantz, that the focus of Your Honor's questioning is wrong. The focus of Your Honor's questioning should be on exculpation from what? From business -- *i.e.*, GM manufacturing and selling the car -- or from management of the bankruptcy case? Management of the bankruptcy case? Okay. Postpetition pre-confirmation managing business, never okay.

Your Honor, on the channeling -- and let me add, I think it's very clear, there is no Barton Doctrine here. This is not a Chapter 11 trustee. The Barton Doctrine does not extend to debtors-in-possession. And I can cite you to a recent case, *In re Zaman*, 2020 Bankr. LEXIS 2361, that confirms that the Barton Doctrine does not apply to a debtor-

in-possession.

I want to --

THE COURT: Remind me of that --

MR. RUKAVINA: -- discuss, Your Honor, the --

THE COURT: Remind me of the facts of that case. I feel like I read it, but -- or saw it in the advance sheets, maybe.

MR. RUKAVINA: I honestly do not recall. I read it a few days ago, and since then, I hope Your Honor can appreciate, I've been up very late trying to negotiate something good in this case.

THE COURT: I'd like to know --

MR. RUKAVINA: So, I mean, I have the case in front of me.

THE COURT: I'd like to know about a holding that says Barton Doctrine can't be applied in a Chapter 11 post-confirmation context, if that's --

MR. RUKAVINA: Well, I have it --

THE COURT: -- indeed the holding.

MR. RUKAVINA: I have it right in front of me here, Your Honor, and I can certainly -- all I know is that this case held that -- it rejected the notion that the Barton Doctrine applies to a debtor-in-possession.

THE COURT: Okay.

MR. RUKAVINA: And maybe --

THE COURT: That --

MR. RUKAVINA: There it is, right there.

THE COURT: What judge?

MR. RUKAVINA: Your Honor, it is the Southern District of Florida, and it is the Honorable -- Your Honor, it is the Honorable Mindy Mora.

THE COURT: Okay.

MR. RUKAVINA: M-O-R-A.

THE COURT: Okay.

MR. RUKAVINA: I have not had the pleasure of being in front of that judge.

Your Honor, let me discuss the channeling injunction. This is the big one for me. This is the big one. And I think we have to begin -- and it's the big one, as I'll get to, because Your Honor knows that the CLO management agreements give my clients certain rights, and this injunction would prevent those rights from being exercised post-confirmation. It's not dissimilar from the PI hearing that we're in the middle of in an adversary.

But I begin my analysis, again, with 28 U.S.C. 959. Your Honor, that -- the first sentence of that statute makes it very clear that when it comes to carrying on a business, a debtor-in-possession may be sued without leave of the court appointing them.

So the first thing that this channel -- gatekeeper,

channeling, I don't mean to miscall it -- the first thing that this gatekeeping injunction does is it stands directly opposite to 28 U.S.C. 959.

28 U.S.C. 959 also says that jury rights must be preserved. As I'll argue in a moment, this injunction also affects those rights.

In addition to 959, we have the fundamental issue of post-confirmation jurisdiction. As Mr. Draper said, here, this channeling injunction applies to post-confirmation matters. Similar to my answer to you on exculpation, I can see there being a place for a channeling injunction during the pendency of a case or for claims that might have arisen during the pendency of a case. I cannot see that, and I don't know of any court that, at least at a circuit level, that would agree that this can apply post-confirmation.

It is, again, the equivalent of GM manufacturing a car post-confirmation and having to go to bankruptcy court because someone's wanting to sue it for product negligence or liability. It's unthinkable. The reason why a debtor exits bankruptcy is to go back out into the community. It's no longer under the protection of the bankruptcy court. That's what the media calls Chapter 11, it calls it the protection of the court. There's no such protection post-reorganization. So, --

THE COURT: Is that really analogous, Mr. Rukavina?

Let's get real. Is this really analogous --

MR. RUKAVINA: It is.

THE COURT: -- to GM --

MR. RUKAVINA: It is.

THE COURT: -- manufacturing thousands of cars?

MR. RUKAVINA: It absolutely is analogous. Because this Debtor is going to assume these contracts and it is going to go out there and it is going to make daily decisions affecting a billion dollars of other people's money. Each of those decisions hopefully will be done correctly and make everyone a lot of money, but each of those decisions is the potential for claims and causes of action.

So it is analogous, Your Honor. They want my clients and others to come to you for purely post-confirmation matters. The Court will not have that jurisdiction. There will be no bankruptcy estate, nor can the Court's limited jurisdiction to ensure the implementation of the plan go to and affect a post-confirmation business decision.

That's the distinction. The Debtor's post-confirmation business is not the implementation of a plan. As Mr. Draper said, there's a new entity. There's a new general partner. There's a new structure. Go out there and do business, Debtor. That's what they're telling you. They're telling you this is not a liquidation because they're going to be in business. Okay. Well, the consequence of that is that

there's no post-confirmation jurisdiction.

Now, Mr. Pomerantz says, and I think you asked Mr. Draper, well, the jurisdiction to adjudicate whether something is colorable is different from the jurisdiction to adjudicate the underlying matter. Your Honor, I don't understand that argument, and I don't see a distinction. If the Court has no jurisdiction to decide the underlying matter, then how can the Court have any jurisdiction to pass on any aspect of that underlying matter?

And whether something is colorable is a fundamental issue in every matter. That's the thing that courts look at in a 12(b)(6), in a Rule 11 issue, in a 1927 issue. So they're going to come -- or someone is going to have to come to Your Honor and present evidence and law that something is colorable. Let's say that we've said there's a breach of contract. Aren't we going to have to show you, here's the contract, here's the language, here's the facts giving rise to the breach, here's the elements? And Your Honor is going to have to pass on that. And if Your Honor decides that something is not colorable, then there ain't no step two.

And if Your Honor decides that something is colorable, then isn't that going to be binding on the future proceeding? And if it's going to be binding on the future proceeding, then of course you're exercising jurisdiction to adjudicate an aspect of that lawsuit.

I don't think that that -- I don't know I can be clearer than that, Your Honor, unless the Debtor has some other understanding of what a colorable claim or cause of action is that I'm misunderstanding.

And Your Honor, I would ask, when Your Honor is in chambers, to look at one of these CLO management agreements. I'm sure Your Honor has already. I just pulled one out of the Debtor's exhibits, Exhibit J as in Jason. And Section 14, 14 talks about termination for cause. Most of these contracts are for cause. So, Your Honor, cause includes willfully breaching the agreement or violating the law, cause includes fraud, cause includes a criminal matter, such as indictment.

So let's imagine, Your Honor, that I come to you a year from now and I say, I would like to terminate this agreement because I don't want the Debtor managing my $140 million because of one of these causes. What am I going to argue to Your Honor? I'm going to argue to Your Honor that those causes exist. And Your Honor is going to have to pass on that.

And if Your Honor says they don't exist, again, I'm done. I just got an effective final ruling from a federal judge that my claim is without merit. I'm done. Your Honor has decided the matter effectively, legally, and finally.

That's why, when Mr. Pomerantz says that the jurisdiction to adjudicate the colorableness of a claim is different from

adjudicating that claim, it's not correct. They're part of the same thing, Your Honor.

We strenuously object to that injunction, we think it's unprecedented, and we strenuously object to that injunction because we are not Mr. Dondero.

I understand the January 9th order. I'll let Mr. Dondero's counsel talk about why that was never intended to be a perpetual order. I'll let Mr. Dondero's counsel argue as to why the extension of that order *ad infinitum* in the plan is illegal.

But even if Mr. Dondero is enjoined in perpetuity from causing the related parties to terminate these agreements, Your Honor, the related parties themselves are not subject to that injunction. That's why you have the preliminary injunction proceeding impending in front of you on ridiculous allegations of tortious interference.

So whether the Court enjoins Mr. Dondero or not in perpetuity is a separate matter. The question is, as you've heard, at least my retail clients, they have boards. Those boards are the final decision-makers. Mr. Dondero is not on those boards.

In other words, it is wrong to conclude *a priori* that anything that my clients do has to be at the direction of Mr. Dondero. There is no evidence of that. The evidence is to the contrary.

Yes, a couple of my clients, the Advisors are controlled by Mr. Dondero. Mr. Norris testified to that. You'll not find Mr. Norris anywhere testifying in that transcript that Your Honor allowed into evidence that the funds, my retail fund clients are controlled by Mr. Dondero. You won't find that evidence. There was no evidence yesterday or today that Mr. Dondero controls those retail funds. The only evidence is that they have independent boards.

So I ask the Court to see that it's a little bit of a sleight of hand by the Debtor. If I am to be enjoined or if I am to have to come to Your Honor in the future as a vexatious litigant or a tentacle or a frivolous litigant, whatever else I've been called today, then let it be because of something that I've done or failed to do, something that my client has done to warrant such a serious remedy, not something that Mr. Dondero is alleged to have done.

And what have my clients done, Your Honor? What have we done to be called vexatious litigants and serial litigants? We've done nothing in this case, pretty much, until December 16th, when we filed a motion that was a poor motion, unfortunately, the Court found it to be frivolous, and the Court read us the riot act.

We refused, on December 22nd, we, my clients' employees, to execute two trades that Mr. Dondero wanted us to execute. We had no obligation to execute them. We knew nothing about

them. And Mr. Seery -- I'm sorry. Not Mr. Dondero, that Mr. Seery wanted to execute. And Mr. Seery closed those transactions that same day. And then a professional lawyer at K&L Gates, a seasoned bankruptcy lawyer, sent three letters to a seasoned professional lawyer at Pachulski, and the letters were basically ignored.

Okay. Those are the things that we've done. Other than that, we've defended ourselves against a TRO, we've defended ourselves against a preliminary injunction, we will continue to defend ourselves against a preliminary injunction, and we defend ourselves against this plan because it takes away our rights. Is that vexatious litigation? Is that, other than the frivolous motion, is that frivolous litigation?

And we heard you loud and clear when you read us the riot act on December 16th. And I will challenge any of these colleagues here today to point me to something that we have filed since then that is in any way, shape, or form arguably meritless.

So where is the evidence that my retail funds are tentacles or vexatious litigants or anything else? There is no evidence, Your Honor, and the Debtor is doing its best to give you smoke and mirrors to just make that mental jump from Mr. Dondero to my clients, effectively an alter ego, without a trial on alter ego.

Once these contracts are assumed, the Debtor must live

with their consequences. It's as simple as that. Your Honor has so held. Your Honor has so held forcefully in the *Texas Ballpark* case. And the Court, I submit respectfully, cannot excise by an injunction a provision of a contract.

Also, this injunction will -- is a permanent injunction. We know from *Zale* and other cases the Fifth Circuit does permit certain limited plan injunctions that are temporary in hundred-cent plans. This is a permanent one. It doesn't even pretend to be a temporary one.

It's also a permanent one because the Debtor knows and I think the Debtor is banking on me being unable to get relief in the Fifth Circuit before Mr. Seery is finished liquidating these CLOs.

So what we are talking about today is effectively excising valuable and important negotiated provisions of these contracts, provisions that, although my clients are not counterparties to these contracts, you've heard from at least three of them we do control the requisite vote, the voting percentages, to cause a termination, to remove the Debtor, or to seek to enforce the Debtor's obligations under those contracts.

And again, Your Honor, it's very simple. Where those contracts require cause, there either is cause or is not cause. If there is not cause, the Debtor has its remedies. If there is cause, I'll have my remedies. But it's not for

this Court post-confirmation to be making that determination. That's not my decision. That's Congress's decision.

So, Your Honor, for those reasons, we object, and we continue to object, and we'd ask that the Court not confirm this plan because it is patently unconfirmable. Or if the Court does confirm the plan, that it excise those provisions of the releases, exculpations, and injunction that I just mentioned as being not in line with the Fifth Circuit or Supreme Court precedent.

Thank you.

THE COURT: All right. Can I -- I meant to ask Mr. Draper this. Can we all agree that we do not have third-party releases *per se* in this plan? Can we all agree on that?

MR. DRAPER: I don't know. I have to look at that. I think what you have are exculpations and channeling injunctions for third parties who have not paid for those channeling injunctions or those exculpations.

THE COURT: All right.

MR. RUKAVINA: Your Honor, was that question -- was that question solely to Mr. Draper?

THE COURT: Well, no, it was to all of you. I thought we could all agree that we don't have third party releases *per se*. Okay. There was --

MR. RUKAVINA: Your Honor, we --

THE COURT: -- a little bit of glossing over that in

some of the briefing, I can't remember whose. But we have Debtor releases, we have --

MR. RUKAVINA: Yes.

THE COURT: -- exculpations that deal with postpetition negligence only, we have injunctions, which I guess the Debtor would say merely serve to implement the plan provisions and are commonplace, but Mr. Draper would say maybe are tantamount to third-party releases. Is that --

MR. RUKAVINA: Your Honor, I don't think --

THE COURT: -- where we are?

MR. RUKAVINA: -- there's any question -- I don't think there's any question that the exculpation is a third-party release, and that that's also what Judge Fish held in the *Dropbox* case. It says that none of the exculpated parties shall have any liability on any claim. So, --

THE COURT: All right.

MR. RUKAVINA: -- that necessarily --

THE COURT: I get what you're saying, but I just think, in common bankruptcy lingo, most people regard a third-party release as when third parties are releasing -- third parties meaning, for example, creditors, interest holders -- are releasing officers and directors and other third parties for anything and everything.

Exculpation, I get it, it's worded in a passive voice, but it is third parties releasing third parties, but for a narrow

thing, postpetition conduct that is negligent. Okay. So I think -- while there's technically something like a third-party release there, it's not in bankruptcy lingo what we call a third-party release. It's an exculpation means no liability of the exculpated parties for postpetition conduct that's negligent. So I -- anyway, I think we all agree that, I mean, can we all agree there aren't any *per se* third-party releases as that term is typically used in bankruptcy parlance?

MR. RUKAVINA: I apologize, Your Honor, and I'm not trying to try your patience, but I cannot agree to that. Whatever claims my client, a nondebtor, has against Strand, a nondebtor, are gone. Whether it's a release or exculpations, they're gone. So I apologize, I cannot agree to that, Your Honor.

MR. DRAPER: Your Honor, this is Douglas Draper. I can't agree, either. I think it's definitional. And quite frankly, I think I'm looking at the functional effect of what's here, and they appear to be third-party releases.

THE COURT: Okay. All right. Who is making the argument for Mr. Dondero?

MR. TAYLOR: Your Honor, Clay Taylor appearing on behalf of Mr. Dondero.

THE COURT: Okay.

CLOSING ARGUMENT ON BEHALF OF JAMES D. DONDERO

MR. TAYLOR: Your Honor, first of all, as this Court

is well aware, this Court sits, as a bankruptcy court, as a court of equity. It has many different tools available to it. One of those, of course, is denying confirmation of this plan because of the laws that we have discussed today and that we believe the evidence has shown, and I won't go into those. Of course, of course, Your Honor could confirm that plan. Yet another tool available to this Court is it can take it under advisement.

To the extent that this Court decides to confirm this plan and decides to confirm it today, it certainly takes a lot of options off the table for all parties. There are ongoing discussions, I'm not going to go into any of the particulars of those discussions, but a ruling on confirmation today would effectively end that, because, absent, then, an order vacating confirmation, there's a lot of eggs that can't become unscrambled after a confirmation order is entered.

So we would respectively ask that, to the extent that the Court is even considering confirmation, we don't believe it to be appropriate, but at least take it under advisement for 30 days, or at least, in the very alternative, that it announce some date which it is going to give a ruling, so that we kind of know when that is going to come down, to see if any positive ongoing discussions can result in more of a global resolution that all parties can agree upon.

Addressing more the merits of the case, Your Honor, Mr.

Dondero does indeed object to the nondebtor releases, the exculpations, the injunction. I believe those have been covered rather extensively in the prior argument, so I wasn't going to go into those here because they've been addressed. Of course, I will endeavor to answer any questions that Your Honor may have on those.

I will say I think Your Honor asked for everybody's best shot as to why this is different for a Committee member versus the independent trustees here. I will say my best shot is, first of all, *Pacific Lumber* says what it says. I believe Mr. Pomerantz has indicated their position that that language is dicta and therefore not binding upon this Court. I respectfully disagree with that. But to the extent, more directly answering Your Honor's question, to me, the difference is clear. Chapter 7 trustees are a creature of statute. So are Chapter 11 trustees. And -- as are members of a Committee that are seated pursuant to the Bankruptcy Code. Those are all creatures of statute. And the independent board of trustees, while there are certainly -- there are some analogies that can be made, undoubtedly, but they are not a creature of statute. There is no provision for them under the Bankruptcy Code. And therefore I don't believe that they should and can receive the same protections under *Pacific Lumber*.

And so hopefully that -- that is my best shot at

answering, directly answering the question that Your Honor posed.

THE COURT: Okay.

MR. DRAPER: Mr. Dondero also has issue with the overbroad continuing jurisdiction of this Court. I believe Mr. Rukavina has stated that rather succinctly, too. Merely ruling upon whatever claim is colorable or not certainly has definite impacts. If this Court has jurisdiction to do that when it otherwise wouldn't have jurisdiction, it enacts an expansion, a potentially impermissible expansion of this Court's jurisdiction. And for that reason, the plan should -- confirmation should be denied.

Getting into the particulars of 1129, Your Honor, there is problems under 1129(a)(2). Those are the solicitation problems. Let's just kind of look at what the evidence showed. On November 28th, there was a disclosure statement, it was published to all creditors, and it said, under this plan, you're going to get 87 cents. It wasn't a range. Now, there was some assumptions that went in there, but they said, under a liquidation of all these assets, you're going to get 62 cents.

The Debtors came back approximately two months later, on January 28th, and said, oh, wait, we missed the boat here, and actually, under the plan, you're going to get 61 cents. And under a liquidation, though, you'd only get 48.

Well, the problem is, already, two months later, they've already told you they missed the boat on what the liquidation analysis was just two months ago. And two months ago, they told you under a liquidation you'd get 62 cents, and now we're telling you you're going to get less. That's at least some very good evidence that the best interests of the creditors isn't being met, and potentially a liquidation is much better.

They then came back, potentially maybe realizing that problem, also because some new information came in with the employees, and also with UBS, which adjusted the overall general unsecured claims pool, and said, well, under the plan you're going to get 71 cents, and under a liquidation you're going to get 55 cents.

In between those iterations from November to February, they found $67 million more in assets. So Mr. Seery testified he believed some of that's as to market increases in values, and some (garbling) investment, market -- securities. And some were just in these private equity investments.

There are indeed some rollups behind all of these numbers. I do understand why they wouldn't want to make some of these numbers public, because they might not be able to get -- create the upside for any particular asset class that they're seeking to monetize.

However, we and others, including Mr. Draper, asked for those rollups to be provided, and we certainly could have

taken those under seal or a confidentiality agreement, could have also put those before this Court under seal and the Debtor could have put those rollups before this Court under seal. It elected not to do so.

So, rather, what you have is the naked assumptions of this is what we think we can monetize the assets, or we're not going to tell you what it is, but trust me, Creditors, and cool, we found $67 million worth of value in the past two months, so therefore we're going to beat the liquidation analysis that we previously told you just two months ago.

They also acknowledge that, in those two months, that there was going to be about $26 million in increased costs from their November analysis to their February analysis. And they included that in their projections.

Finally, they acknowledged, in those two months, that we had previously estimated -- and they even have it in their assumptions in November liquidation and plan analysis -- that UBS, HarbourVest, and I believe it was Acis, were all going to be valued at zero dollars, and that's what the claims were going to be. Well, they kind of missed the boat on those, and they missed it by a lot. They -- it increased all the claims in the pool from $195 million to $273 million, or sorry, I don't -- look at that again, but it was an increase of $95 million. I'm sorry, 190 -- the claims pool increased from $194 million to -- I'm sorry, Your Honor, I have too many

papers in front of me -- on November, the claims pool was 176 and it increased by February 1st to 273. Therefore, approximately $95, almost $100 million worth of claims that they weren't anticipating that actually came in.

That tells you about the quality of the assumptions that went into the analysis to begin with. They missed it by 50 percent on what the overall claims pool was going to be. That's significant. It's material.

There is a lot of other assumptions that could go into this document, and one of those assumptions are how much are we going to be able to monetize these assets for? One other assumption is, well, how much is it going to cost during the two-year life of this wind-down? Another assumption is going to be, are we actually going to be able to wind down in two years? Because if we're not, well, guess what, all those costs are going to go up. Another assumption is, well, how much are those fee claims going to be over the two-year period? Again, if it goes over two years, they're going to be significantly higher. Moreover, you might have just missed what the burn rate is.

So I think it's rather telling that the assumptions made of -- all the way back of over two -- of only two months ago were off by $100 million, and therefore it skewed all of the plan-versus-liquidation analysis all over the board.

That's the only evidence that the Debtor has put forth as

to why it's in the best interest of the creditors. And quite frankly, we don't believe they have met their burden. And it is their burden to prove to Your Honor that the plan is better than what a Chapter 7 trustee will -- can do.

What the evidence does show, as far as what the plan would do as compared to a hypothetical Chapter 7 trustee, is that we know for sure that the Claimant Trust base fee, just over the two years, is going to be $3.6 million.

(Interruption.)

MR. TAYLOR: I'm sorry.

THE COURT: Someone needs to put their device on mute. I don't know who that was.

MR. TAYLOR: Oh, I'm sorry. I thought you said something, Your Honor.

THE COURT: No.

MR. TAYLOR: So what we do know is the Claimant Trustee base fee is going to be $3.6 million. What we don't know and what was not put into evidence because they are still negotiating it is there's going to be a bonus fee on top of that that's going to be paid to Mr. Seery. Is that $2 million? Is that $4 million? Is that $10 million? Well, we don't know. We can't perform that analysis as compared to what a hypothetical Chapter 7 trustee could be. Nor can Your Honor, based upon the evidence presented.

And quite frankly, I don't see how one could ever conclude

-- and there are some other unknowns that we're about to go over, including the Litigation Trust base fee and there are collection fees, contingency fees. Those are also to be negotiated. To be negotiated and unknown. You can't perform the analysis. The Debtor couldn't perform the analysis because those are to be negotiated, so you can't tell whether a Chapter -- hypothetical Chapter 7 trustee might come out better because he's not going to incur all these costs. We know that they're going to incur D&O costs.

THE COURT: Let me interject right now.

MR. TAYLOR: Sure.

THE COURT: Again, I'm going to go back to understanding who your client is arguing for. Okay? Again, as we've said before, Mr. Pomerantz did not technically say no standing, but he thought it was important to point out the economic interests that our Objectors either have or don't have. Okay?

So I'm looking through my notes to see exactly what the Dondero economic interest is. I have something written in my notes, but I'm going to let you tell me. Tell me what his economic interests are with regard to this Debtor, this reorganization.

MR. TAYLOR: Your Honor, I believe he has been placed into Class 9, Subordinated Claims. So to the extent that there is recovery available to Class 9, he can recover on

those claims.

THE COURT: But what proof of claim --

MR. TAYLOR: We also have --

THE COURT: What proof of claim does he have pending at this juncture?

MR. TAYLOR: Your Honor, I would have to go back and look. I don't have the proofs of claim register in front of me. And I'm sorry, if I tried to speculate, I would be doing a disservice to my client and this Court by trying to speculate. I did not prepare those proofs of claim. People in my firm did. But I would be merely speculating if I tried to give you an answer off the spot. And I apologize. I'm happy to submit a post-confirmation hearing letter --

THE COURT: No, no, no.

MR. TAYLOR: -- as to that.

THE COURT: I'm not going to allow one more piece of paper in connection with confirmation. I thought you would be able to answer that.

MR. TAYLOR: I'm sorry. I just don't want to lie to Your Honor.

THE COURT: What about his -- what would be an indirect equity interest?

MR. TAYLOR: Well, again, there are a lot of people that know this org chart a lot better than me. This is me going on hearsay myself. But I understand he also owns a lot

of indirect interests in subsidiaries, some of which are majority, some of which are minority, and some of which he owns maybe directly, some of which through other entities. So the way in which these assets could be monetized at the sub-debtor level could certainly impact his economic rights and could impact him greatly. For instance, if the --

THE COURT: I really wanted an exact answer.

MR. TAYLOR: Mr. Seery --

THE COURT: I really wanted an exact answer, not just he has an indirect interest in, you know, some of the 2,000 -- I'm not going to say tentacles, but --

I'm going to interrupt briefly, because I really want to nail down the answer as best I can. Mr. Pomerantz, can you just remind me of what your answer was or statement was regarding Mr. Dondero, individually, his economic stake in all this?

MR. POMERANTZ: He has an indemnification claim that's been objected to, --

THE COURT: That's the one and only --

MR. POMERANTZ: -- although it's not before --

THE COURT: That's the one and only pending proof of claim, right?

MR. POMERANTZ: That's my understanding. And while it's not before the Court, we could all imagine whether Mr. Dondero's going to be entitled to indemnification.

He has an interest in Strand, which is the general partner.

THE COURT: Right.

MR. POMERANTZ: And Strand owns a quarter-percent -- a quarter of one percent of the equity. I believe that is all of Mr. Dondero's economic interest in the Debtor.

THE COURT: Okay. So, again, I'm just trying to, you know, understand who he's looking out for, for lack of a better way of saying it, Mr. Taylor, in making these arguments.

MR. TAYLOR: So, there is also, and this is -- I'm not involved in what are these going to be filed collection suits, or some of which have been filed, some of which have not been filed, none of which I believe the answer date has been -- has passed or come to be yet.

But he is also a defendant in collection suits on these notes, as you are undoubtedly aware.

THE COURT: Okay. He's a defendant in adversary proceedings. Okay? That makes him a party in interest to -- well, I keep -- that makes him have standing to make an 1129(a)(7) argument? That's why I'm going down this trail. Because you've spent the last five minutes talking about, you know, creditors could do better in a Chapter 7 liquidation. I'm not sure he has standing to make that argument, so I'm wanting you to address that squarely.

MR. TAYLOR: Your Honor, I believe he has economic interests up and down the capital structure. And I cannot describe to you, without wildly speculating and potentially lying to this Court, which I'm not going to do, without some time to have looked at that, because I was -- I was not involved in the proofs of claim and I am not his accountant. So I could not do that without wildly speculating, so I just -- I would like to more directly answer your question, Your Honor. I am not trying to avoid the question. But I can't honestly answer your question with true facts as we sit here right now.

THE COURT: All right. But do you agree or disagree with me that only parties -- the only parties that really can make an 1129(a)(7) argument are holders of claims or interests in impaired classes?

MR. TAYLOR: Your Honor, I believe that Mr. Dondero has standing to do so by virtue of claims for indemnification --

THE COURT: Okay.

MR. TAYLOR: -- if these -- if these -- if this Debtor (indecipherable) able to meet its obligations to indemnify him. And some of those are significant claims that are being brought against him that could total millions, if not tens of millions of dollars, just in defense costs alone, that I do believe give some standing.

THE COURT: Okay. So, assuming you're right, you think the evidence does not show this is better than a Chapter 7 liquidation where we would have a stranger trustee come in and just, yeah, I guess, cold-turkey liquidate it all.

MR. TAYLOR: Your Honor, I do believe that the evidence shows that the Debtor hasn't met its burden as to this. A Chapter 7 trustee doesn't necessarily have to liquidate immediately. It can run these -- these assets. I mean, Mr. Seery is going to do it with ten people. At one time, just two months ago, he said he was going to do it with three people. A Chapter 7 trustee could certainly have a limited runway, or even an extended runway, if it so asked for it, to liquate these Debtors.

Moreover, there would be at least the requirements that the Chapter 7 trustee would request the sale, tell creditors about it. And, as many courts have said, the competitive bidding process is the best way to make sure that you ensure the highest and best offer that you can get.

Mr. Seery has not committed to providing notice of sales to creditors and other parties in interest, potentially bringing them in as bidders. They -- he could name a stalking horse, but he has not indicated any desire to do so. A Chapter 7 trustee would endeavor to do so.

So I do believe that there are some advantages. And you've heard no testimony that they've performed any analysis

or conducted any interviews with any Chapter 7 trustees as to whether or not this was possible or not. They just made the naked assumption that they would do work based upon what they said was their experience. And Mr. Seery's deposition, when it was taken and noticed as a 30(b)(6) deposition, and I believe it has been entered into evidence here, he said the last time he dealt with a Chapter 7 trustee was 11 or 13 years ago, and it was the *Lehman* case, and that was the -- a SIPC trustee. So --

THE COURT: Well, --

MR. TAYLOR: -- that's the last time he had any experience with it.

THE COURT: -- again, I don't mean to belabor this point, just like I didn't mean to belabor a few others. But, you know, there is a mechanism, yes, in Chapter 7, Section 704, for a trustee to seek court authority to operate a business. But it's not a statute that contemplates long-term operation. Okay? It's just, oh, we've got a little bit of -- you know, we have some assets here that really require a short-term operation here.

If it's long-term, then you convert to Chapter 11. Okay? It's just a temporary tool, Section 704. Right? Would you agree with me?

MR. TAYLOR: That's typically how it has been used.

THE COURT: Okay.

MR. TAYLOR: But that's not to say that it's limited in time by the statute itself. It doesn't say that it can't go for one year or two years. That can be a short wind-down period.

THE COURT: But hasn't your client's argument been this past several weeks that Mr. Seery is moving too fast, he's wanting to sell things and he needs to hold them longer? I mean, these two argument seem inconsistent to me.

MR. TAYLOR: So, just because a Chapter 7 trustee has been appointed doesn't mean that he has to sell them any faster than Mr. Seery.

I think what the -- the problem with the process that has been going on with Mr. Seery, my client's problem with it, is not necessarily the timing but the process that Mr. Seery is going through with these sales. Provide notice, allow more bidders to come in, make sure that he's getting the highest and best price. And if that happens to be Mr. Dondero who offers the highest and best price, great. And if Mr. Dondero gets outbid by somebody, well, that's all the more better for the estate.

THE COURT: Okay. Continue your argument.

MR. TAYLOR: I believe we covered a lot of it, Your Honor, and the plan analysis is all based upon their assumptions that there's $257 million worth of value. Again, there's no rollup provided as to how that asset allocation is

broken out, but they consist of a couple of items.

First, there's the notes; and second, there's the assets. The notes are either long-term or demand notes. Those long-term notes, Mr. Seery will tell you some have been validly accelerated and therefore are now due and payable. I think there's arguments to the contrary. But those long-term notes probably have some both time value of money and collection costs. And then, of course, you have to discount them by collectability issues, too.

I don't believe any analysis went into it, or at least the Court was not provided any data or analysis as to what discounts were applied to those notes. And, therefore, I don't think that this Court can make any determination that the best interests of the creditors have been met.

As far as the assets that are to be monetized, again, there's two sub-buckets of those assets. There's securities that are to be sold. Some of those are semi-public securities that have markets. Those are somewhat more readily ascertained. The others are holdings in private equity companies, and sometimes holdings in companies that own other companies.

There's no evidence of the value -- empirical evidence of the value of those companies, nor of the assumptions that went into as to when they should be sold, how much they'd be sold for.

Again, I do realize the sensitive nature of such information, but that could have been placed under seal. And without that information, I don't believe that the Court can conduct the due diligence it's necessary to say the best interest of the creditors have been met.

To sum up, Your Honor -- oh, I'm sorry. One other point that I did want to talk about before I summed up is, you know, Mr. Pomerantz and I were listening to a different record or I was totally confused as to the testimony that was put forth regarding the directors and officers. I believe the testimony in the record is extremely clear that the Debtor made no effort to go out and find out if it could obtain directors and officers insurance without a gatekeeping injunction or a channeling injunction, whatever you want to call it. I believe that his testimony was extremely clear. He didn't shop it. He doesn't know. And that's what the record is before this Court.

To the extent that the Debtor wants to rely upon we can't get Debtor -- or, directors and officers insurance because without this gatekeeping function we just can't get it, I believe the record just wholly does not support that. The testimony was at least extremely clear, as how I heard it. Your Honor will have to review the record herself, but I don't believe that there was much argument about it.

I'm sure -- as I stated in the beginning, Your Honor, this

is a court of equity. It could deny confirmation, as I believe Your Honor should, based upon the flaws in the plan.

If Your Honor finds that the plan as written is impermissible because of any of the exculpation or the gatekeeping functions that they're asking, the testimony is equally clear that the independent directors would not serve in -- as officers of the Reorganized Debtor. Any plan that is put forth by the Debtor has to tell the people who are going to be officers going forward. And with that naked testimony before the Court, that it's simply not feasible, and I don't think it is one of the possible -- where the Court can come back and say, well, I can't confirm this plan as written, but if you change it and rewrite it to get rid of the certain offensive parts of the exculpation or the gatekeeping functions, then we can confirm this plan. And I think the evidence before this Court is it's not feasible because none of the directors will serve in that capacity, and therefore this plan should be dead on arrival if Your Honor agrees the proposed provisions do not meet *Pacific Lumber*.

We would ask the Court to deny confirmation, but in the alternative, to at least take this under advisement. Give us a time frame -- we'd ask for 30 days -- but give us a time frame of when the Court is going to rule, to allow the positive conversations to move forward.

To that end, Your Honor, there is, indeed, a hearing on

the extension of a temporary injunction and contempt that is scheduled for Friday. I understand that the parties, at least the joint parties, will not -- will agree to, I'm sorry, will agree to the extension of the temporary injunction until such time as the Court can rule on confirmation. I do see that there could be a lot of harm done at the Friday hearing. We would ask that the Court additionally continue that hearing on that motion and on the injunction, and contempt, until such time as confirmation has been ruled upon. It will be both efficient and allow discussions to continue regarding potential global resolution.

And so that is the end of my argument, Your Honor.

THE COURT: All right. Thank you. All right. Mr. Pomerantz, do you have any rebuttal?

REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Yes, I do, Your Honor. I want to address a couple of comments that Mr. Taylor made towards the end. First of all -- and, actually, the beginning.

We think Your Honor should rule on confirmation. Ruling on confirmation and having an entered confirmation order are two separate things. We understand that a new offer was made. Whether that's acceptable to the Committee -- I actually think it will enhance the ability of the parties to see if they could reach a deal if there's (audio gap) that Your Honor is going to confirm the plan.

Again, doesn't mean a confirmation order has to be entered, but I think, based upon my personal experience in negotiating with Mr. Dondero, that your clear communication to the parties that, unless something happens, you will enter a confirmation order, I think will change things. Okay? Without getting into settlement discussions, things have changed over the last several days, and we wish you would have -- wish things would have happened sooner. But we totally disagree that Your Honor should hold your ruling for 30 days or any other period of time.

Part of the reason I think they are making that argument is because they have an examiner motion and they recognize that, upon confirmation, the examiner motion is moot. So I think there's strategic reasons as well.

We don't think there should be a continuance of the TRO hearing and of the contempt hearing. As Your Honor recalls, the contempt motion was specifically set for this time to give Mr. Dondero enough time to prepare. Your Honor was sensitive to his due process concerns. We set the TRO, the preliminary injunction hearing against the Advisors and the Funds, we set that, again, knowing that it would be after confirmation.

So we do not agree that either should be continued. Again, we think the more direct, unequivocal answers Your Honor can give to the parties, the better off we'll be.

I guess -- Mr. Taylor and I do agree that the record was

clear. I guess we just disagree on the clarity of it. I heard Mr. Tauber testify that when he went out to people, to insurance carriers, after he and Aon were engaged, they all talked about a Dondero exclusion. Okay? They weren't convinced into a gatekeeper provision because it was provided as part of the normal materials you would provide in a bankruptcy court and trying to get D&O liability in the context of a bankruptcy case. Mr. Tauber's testimony was pretty clear, that carriers wanted to have a Dondero exclusion. And, in fact, the only reason we were able to get any coverage was because of the gatekeeper.

So, yes, the record was clear. We just disagree.

I'd like to go back to Mr. Draper's comments going -- and a couple of things, obviously, overlap. I guess one of the things here, it's great that everyone is coming in here as different interests and different parties or whatnot. But as I mentioned, Your Honor, at the outset, and I've repeated a few times, these are all -- the only people we have not been able to resolve issues with are the Dondero parties and the related parties. And I recall the tentacles. Mr. Davor questioned that. Mr. Clemente, his comments. But the fact of the matter is, Your Honor, Your Honor has heard testimony. Your Honor has had hearings. Mr. Rukavina represents the Advisors and the Funds. Your Honor has never seen the independent board member testify in this case to demonstrate

how these entities are really different. So while Mr. Rukavina does -- you know, tries his best, and I think he has limited stuff to work with, but I give him credit for doing the best he can, these are all Dondero-related entities and Your Honor has seen that.

So, Your Honor, going to the resolicitation argument, it actually has taken up a lot more time than the argument is worth, for one very simple reason. As I said in my argument, and as Mr. Taylor and Mr. Draper totally ignored, there were 17 creditors who voted yes, 17 creditors who were apparently misled, that Mr. Draper is looking out for the little guy and Mr. Taylor is fumbling over his reason for why that's important to Dondero. And of those 17 creditors that voted yes, Your Honor, they were either the employees related to HarbourVest, UBS, Redeemer, or Acis, except for two. And you know the other two? One was Contrarian, a claim buyer, who, yeah, elected to be in Class 7, and the other was an employee with a dollar claim.

So the whole argument that there should be a resolicitation is preposterous, Your Honor. But to go to some of the specifics in what they argued, we didn't require creditors to monitor recovery. The footnote -- as I indicated, the UBS 3018 was in the disclosure statement that went out. It didn't make it to the projections. It was clearly -- and they characterize it, I think Mr. Draper

characterized it as buried in the document. There is a section that every disclosure statement is required to have called Risk Factors. This disclosure statement had that. And in the disclosure statement, it talked about the amount of claims being a risk factor.

Mr. Draper also said that the Debtor totally changed its business model from the first to the second analysis. That is incorrect. The Debtor was always going to manage funds. Yes, did they add the CLOs? But before, they were going to manage Multi-Strat, they were going to manage Restoration Capital, they were going to oversee Korea, they were going to be doing the management of the funds. So there wasn't a big change in the business model, Your Honor.

Mr. Taylor, on the solicitation issue, says we found $67 million in assets. You know, that's a disingenuous statement. I think over $20 million was found because his client and related entities didn't make a payment on notes and they got accelerated. So while before we would have had to wait over time if they were paid, it's not surprising that Mr. Dondero and his related entities just failed to basically pay the notes.

So that was, I think, over $20 million. And then there was the HCLOF asset. That was acquired in the HarbourVest settlement. And then there was basically an increase in some value to some assets.

So there wasn't anything mysterious here. There wasn't anything that the Debtor was trying to hide. There weren't any found assets. It was based upon different circumstances.

Mr. Taylor complains about the lack of rollup of assets, the lack of evidence on the best interests of creditors test. Your Honor, you've had extensive testimony from Mr. Seery about what would happen in a Chapter 7 and what would happen in a Chapter 11. And you know why we didn't provide the information to Mr. Taylor and his client on what the rollup of the assets would be, and do you know why he wants them? He wants to know what the assets are so he can try to bid.

And there also was the allegation that the failure to allow them to bid means we're going to get less in a Chapter 11 than a 7. Two comments to that, Your Honor. Number one, if that was the case, a debtor would never be able to satisfy the best interests of creditors test. If the existence of a public process *de facto* meant you would get more value than outside, you would never be able to satisfy that. And, quite honestly, that's just not the law, Your Honor.

You have an Oversight Committee with over $200 million of creditors who are going to watch Mr. Seery like a hawk, like they have watched him during the case. And the concern that somehow, because these assets are not put into full view to sell, that they will get less value, it's just not -- it's not supported by the evidence at all, Your Honor. And Mr. Seery

will make the determination. If it makes sense to notice up and provide Mr. Dondero with notice, he will. If he doesn't, he won't.

Your Honor, going -- oh, and then the last comment on the -- that I'll make on the resolicitation and the liquidation analysis is Mr. Taylor chides us and we've been criticized for not disclosing more about the HarbourVest and the UBS settlements and that we were off substantially. Your Honor, you've heard testimony that we were in pending litigation with HarbourVest and UBS at the time. What kind of litigant would we be if we came in and said, you know, Your Honor, you know, Creditors, we think the UBS claim is going to be allowed at $60 million and we think the HarbourVest claim is going to be allowed at $30 million? Would that really have benefited creditors and this estate, to basically, after we took the position, hard negotiations and hard pleadings that we prepared, and in some cases filed, that we didn't have any liability? It would have made no sense, and it would have been a dereliction of our duty to actually come out and say what the claims -- the claims were, or what we thought they could be settled for.

Your Honor, going back to Mr. Draper's comments. He started with the exculpation. First he made a comment that I don't think he intended what he said, but he said that the exculpation order, the January 9th order, cuts off when the

independent directors go away. I think what he meant to say is that since the three people are not going to be independent directors anymore, that basically any actions going forward by any of those three are not covered. But let's be clear. The January 9th order is in effect, and if at some point in the future somebody has a claim against those three gentleman, or their agents, for what they did as independent directors or their agents, that order will apply.

Your Honor, we next had a discussion, or Mr. Draper and you had a discussion on professionals. I'm aware of the Fifth Circuit law that says res judicata, fee applications. I think that only applies to claims that the Debtor and estate would have. It doesn't really apply to an exculpation. But there's Texas state law that I identified in our brief and we cited to that limits third parties' ability to go after professionals.

But the bottom line is the Fifth Circuit, in *Pacific Lumber*, didn't deal with professionals. Your Honor was correct in pushing both Mr. Taylor and Mr. Rukavina. What really that was was a policy case. And professionals have nothing to do with 524(e). So the *Palco* and the *Pacific Lumber* reference and explanation of 524(e) doesn't have anything to do with professionals. And we would submit, Your Honor, that an exculpation, especially in a case like this, is important for professionals.

I understand Your Honor's comments that maybe it's much

ado about nothing, but I'm not really sure it's much ado about nothing when we have Mr. Dondero and his affiliates who, notwithstanding their efforts to just claim that all they are doing is trying to get a fair shake, Your Honor knows better. Your Honor knows better from the years you've been litigating with them, and we know better and the Debtor knows better from what the independent directors have been dealing with.

THE COURT: Let me ask you this, though. I came into the hearing with the impression we were just talking about postpetition pre-confirmation, or pre-effective date maybe I should say, was the expanse of time covered by exculpation. And Mr. Rukavina said no, no, no, go back, look at, I don't know, Subsection 4 of something. It is a post-confirmation concept. What is your response to that?

MR. POMERANTZ: I believe it's implementation. And, again, --

THE COURT: Implementation? Yes.

MR. POMERANTZ: -- I think Mr. Rukavina -- right. I think Mr. Rukavina and Mr. Taylor and Mr. Draper have done a great job trying to muddy the issues. They talk about our sleight of hand and how we're trying to do things that are way beyond the bankruptcy court's jurisdiction. We are not. I think they are trying -- what they have done throughout the case is throw up enough mud. And here's, here's the answer to that question, Your Honor. Implementation. Okay? We know

what implementation means. The plan says implementation is cancelation of the equity interests, creation of new general partners, restatement of the limited partners, establishment of the Claimant Trust and Litigation Sub-Trust. That's the implementation.

We are not trying to get exculpation for post-confirmation activity. Actually, my partner, Mr. Kharasch, in specifically addressing Mr. Rukavina's concern, said, look, if you have a problem with cause, if you have a problem, want to exercise your rights, we're only asking you to come back to the Court. We are not stopping you.

So the whole argument that the exculpation is really broad and is not really -- does not really cover just the plan, the approved plan, I think is a red herring. Implementation is implementation in the context of the plan.

And also Mr. Rukavina tries to argue that, well, it's administration, it's not really you acting any operation of business. I just don't think there's any support in the case law. Your Honor has overseen this case, overseen this Debtor's activities, overseen the independent directors' activities, overseen Strand's activities, overseen the employees' activities. And those activities have been (indecipherable) administration of the case. And his attempt to create a different category for, well, it's not administration, it's operation and so it doesn't apply, I just

think is wrong.

Your Honor made a couple of comments about what was *Pacific Lumber* doing. It was a policy decision. If there was a bright-line rule, then nobody would be entitled to exculpation. The very fact that the Fifth Circuit said that Committee members are different made -- makes it clear it was -- it was policy.

And Mr. Taylor's comments that, well, their creation of statute, Chapter 11 trustees and Committee members, that's not what basically the case said. If you look at the citation to touters in the case, it was we want people to volunteer and who are needed for the process. Committee members are needed for the process. We don't want to discourage them from coming in. And the only testimony you have on the independent directors is from Mr. Dubel, and he testified the importance of independent directors to modern-day Chapter 11 practice, the importance of exculpation, indemnification, and D&O insurance. And his testimony: uncontroverted. The Objectors could have brought in someone to say something different, but the only testimony before Your Honor is, if Your Honor does not approve exculpations in cases like this, you will not get independent directors and it will have an adverse effect on the Chapter 11 process.

So, while I appreciate all the Objectors trying to say bright line, trying to say *Pacific Lumber*, that is the gut

reaction, right? That's -- it's easy to say. But Your Honor will know better, from reading the cases, that's not what *Pacific Lumber* says. And for the several reasons I gave, it's the reason why *Pacific Lumber* does not govern the decision in this case.

Your Honor, Mr. Draper then started to talk about *Craig*. And everyone cites *Craig* as this, you know, limiting jurisdiction. Now, we acknowledge that *Craig* and the Fifth Circuit has a more limited post-confirmation jurisdiction approach than the other Circuits, but it's not nonexistent. And just because the Debtor is going out post-confirmation and acting does not mean that the conduct that they are engaging in is not -- and disputes that arise, doesn't come within the Court's jurisdiction. If that was the case, and I think Your Honor recognized this, in your case it was the *TXMS* case, while it's limited, more limited after confirmation, and I think you even, in the case -- or, in one case of yours, said that even after the case is closed there could be jurisdiction. So their just trying to argue *Craig* is just -- is just too much.

Going out of the gatekeeper, Mr. Draper tried to say we are *Barton*, and that's it, and *Barton* has its limitations, et cetera. First of all, with respect to *Barton*, it is not limited and doesn't include debtors-in-possession. We have cited cases in our materials where it has been applied to

debtors-in-possession.

So, you know, look, maybe this is a provision -- this is a proposition like many in bankruptcy, you could find a bankruptcy court to agree with a proposition, but there's cases all over the place on that. There's cases applying to post-confirmation. The trend has been to expand *Barton*. But the beauty of it is, Your Honor, you don't have to rely on *Barton*. *Barton* was one of our arguments. We gave *Barton* as, you know, somewhat of an analogy but somehow applying because in the -- because the independent directors were like the trustees.

But we recognize it may be going farther than *Barton* has previously gone. But the case law is clear, it is being extended. But we -- I gave you several provisions of the Bankruptcy Code that authorized you to enter a gatekeeper order. None of the Objectors objected on any of those grounds. They didn't say the statutes that I cited. And it wasn't only 105, I know bankruptcy practitioners love to cite 105, but there were three or four others that I mentioned, and they're in our brief. There's no case that they cited that said that there is no authority on the gatekeeper.

But what was the argument that was raised? And I think Mr. Rukavina raised it, saying, you know, look, I don't understand the argument of no jurisdiction, of jurisdiction for a gatekeeper but no jurisdiction for underlying cause of

action. Well, Mr. Rukavina should read and Your Honor should read, when you're considering the plan, the case, the *Villegas* case in the Fifth Circuit as it dealt with *Stern*. That was particularly a case. Does *Barton* -- is *Barton* impacted from *Stern*? By *Stern*? And *Stern*, we know, limits the bankruptcy court's jurisdiction. But, no, the Fifth Circuit said, in that case, no. Even though the bankruptcy court's jurisdiction is limited to hear the claim, there is nothing inconsistent with that and allowing the bankruptcy court to act as a gatekeeper.

So Mr. Rukavina's argument that, well, he'll present to you that there's cause and you'll find there's no cause and then he will be without a remedy by someone that had jurisdiction, that really sounds good but it just doesn't withstand analytic scrutiny. There is a distinction. They are glossing over the distinction. They don't like the distinction.

And why is that distinction -- and why is it important in this case? Again, we're not talking about garden-variety people who are just involved with a debtor and will get caught up in a bankruptcy. We narrowly tailored the gatekeeper to enjoined parties. Enjoined parties are the people before Your Honor, some of the people that have made the Debtor's life miserable over the last few months.

We have every interest and desire, as does the Committee,

to go out post-confirmation and monetize these assets. But we see the clouds on the horizon. We see all the pleadings that have been filed by the Objectors saying how, if there's no deal, there will be an unending amount of costs and appeals. It's, you know, the point, not too subtle. It wasn't lost on us.

Your Honor, going to Mr. Rukavina's arguments on Class 8 cram down, again, it's really a hard argument to understand, but first I want to make a point. He sort of mentioned -- and I'm not sure if he intends to preserve this on appeal, but it was not objected to and I'll ask for a ruling on it, Your Honor -- he said that there was inappropriate separate classification. That was not raised in any of the objections. We don't think it was properly before the Court. We understand there's a component of that in unfair discrimination in connection with a cram down, but there is no objection, there was no filed objection, to the separate classification of the deficiency claims and the Class 8 unsecured claims.

And if you look at the voting, you realize it wasn't done for gerrymandering, because if you put both claims together, both classes together, you would have had one class that voted yes.

So I don't believe the separate classification under the 1129 standards is appropriate for Your Honor to consider,

other than in connection with the cram down.

Now, Mr. Rukavina complains that the only way the convenience class was decided was by way of negotiation. Your Honor, how else do provisions like that get decided? And who was the negotiation between? It was between the Committee. And one of the benefits of a Committee process, and I represent a lot of Committees, you put people in a Committee that have diverse interests and they can come up with an appropriate result. And here you have that. You had one creditor who was a convenience creditor. You have three other creditors who would lose liquidity if convenience payments are made.

Do you think that UBS, Acis and Redeemer, do you think they had a desire just to pay people off? No. It was part of a collaborative process. So to say that there was no basis and no testimony on the appropriateness to have -- and how the convenience class was put together just would be wrong.

And with respect to the absolute priority rule, Your Honor, again, there's a missing link here, okay? These are contingent interests. They are property. No doubt they are property. But if I did not allow those creditors or those equity to have a contingent interest, the argument would have been made that the plan violates the absolute priority rule. And I said that in my argument. And why would it have violated the absolute priority rule? Because there's a

potential that creditors could get over a hundred cents on the dollar, plus interest. So it's a game of gotcha, right?

And why do they really care? Mr. Dugaboy said in his -- Mr. Draper said in his brief that Dugaboy cares because they may have wanted to buy the interest. Well, I'm sure they can go to Hunter Mountain, you know, Mr. Dondero's left hand can go to his right hand, and I'm sure he'd be happy to sell the contingent interests.

And with respect to the argument that Mr. Rukavina made about control, equity be in control, yeah, control is a right. No doubt. You've got -- if you're giving control to the post-confirmation Debtor, that could be a right and implicate the absolute priority rule. But what is the control here? Equity is not given any rights. Your Honor heard how the post-confirmation entity is structured. It's going to be Mr. Seery, overseen by an Oversight Board. So I really don't understand the concept of control. There just is no violation of the absolute priority rule.

Your Honor, Mr. Rukavina then took us to task for 2000 -- or, for not filing the 2015.3 statement. And if you take his argument to the logical conclusion -- well, we didn't file it, we didn't comply with that Rule, so we're not in compliance with the Bankruptcy Code, so we can never basically get our plan confirmed, right, because it's a violation and we didn't file and seek an extension.

That's just a preposterous argument, Your Honor. Mr. Seery poignantly told the Court, in the rush of things that were going on, it wasn't filed. Did Mr. Rukavina, before yesterday, having Mr. Dubel on the stand, did he ever ask where is our 2015.3 report? He probably didn't ask it because the answer -- when I told him the reason why it wasn't filed before January 9 was because I don't think Mr. Dondero wanted it filed, and I think that's why, as Mr. Seery testified, we were having a challenging time getting that information from the in-house -- in-house.

But, yes, should it have been filed? Yes. But if that is all they could point to through the course of the case that Mr. Seery or Mr. -- or the rest of the board did wrong, you know, I think that just demonstrates they did a fine job.

THE COURT: All right.

MR. POMERANTZ: Your Honor?

THE COURT: You've got four minutes left.

MR. POMERANTZ: Oh. Okay. Your Honor, going to Mr. Rukavina and the Strand argument that it's a nondebtor entity, as I explained in my argument, the Strand -- Strand needs to get exculpation or else that's a backdoor way to the Debtor. Forget about the independent directors, it's a backdoor way to the Debtor. Because Mr. Dondero will be in control. If Strand is sued for post-January 9th activities, he will assert an administrative claim. And one thing from *Pacific Lumber* is

clear, the Debtor is entitled to an exculpation as part of the injunction and the -- and the discharge.

Your Honor, Mr. Kharasch adequately addressed Mr. Rukavina's comments with the gatekeeper and the gatekeeper problem. We are not seeking to stop his clients, however related they may be, from exercising their rights. We are seeking a process that will not embroil the Debtor in litigation going forward. There is no problem with Your Honor acting as the gatekeeper to do so. And to the extent that they are bound by the January 9th order is not really an issue for today. That'll be an issue at the temporary -- the temporary -- at the preliminary injunction hearing.

I -- just one minute, Your Honor.

(Pause.)

MR. POMERANTZ: Your Honor, I think I covered a lot. If there's anything that any of the Objectors have mentioned that I failed to respond to, I'd be happy to answer questions Your Honor has.

THE COURT: All right. I guess there's, what, about two minutes left, if Mr. Clemente had anything.

Mr. Clemente, have you drifted off? I doubt it. But anything else from you, Mr. Clemente?

MR. TAYLOR: Your Honor, I show him talking -- this is Clay Taylor -- but no one's hearing him.

THE COURT: Okay. Mr. Clemente, we are not hearing

you, or I'm not seeing you. Make sure you're not on mute.

THE CLERK: He's not on mute, Judge.

THE COURT: He's not on mute? So we must have a bandwidth issue or something else.

All right. Mr. Clemente, still not hearing or seeing you. We'll give him another 30 seconds.

THE CLERK: He's coming up.

THE COURT: He's coming up? Ah, I see his name now.

MR. CLEMENTE: Your Honor, can you hear me?

THE COURT: I can hear you now.

MR. CLEMENTE: Okay, Your Honor. I don't know what happened. I just switched another camera, so you may not be able to see me, but can you hear me? I'll be very quick.

THE COURT: Okay. I can hear you.

MR. CLEMENTE: Can you hear me?

THE COURT: Yes.

MR. CLEMENTE: Okay. Thank you, Your Honor.

CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

MR. CLEMENTE: Two things I want to say. First, just on Class 8, I think what's important, as my comments emphasized earlier, the structure of Class 8. We must remember what it is. It's really designed so that Class 8 holders receive their pro rata share of what's left after prior claims are paid. That's really what Class 8 creditors voted on. That's what the disclosure provided. They did not

vote on receiving a specific dollar or a specific recovery percentage.

And regarding the projections and estimates, Your Honor, we're talking about large litigation claims that were asserted and then settled. And given the nature of these assets, the values fluctuate. It's perfectly expected, Your Honor, and indeed disclosed, that there could be wide swings in the amount of claims. That does not lead to the conclusion that the plan needs to be resolicited.

And then, finally, Your Honor, again, Mr. Pomerantz adequately addressed all the points, as he did with his earlier presentation, so I'm not going to touch on them, but I did want to respond to one thing that Mr. Taylor said. And I, of course, agree with Mr. Pomerantz. The Committee believes there's no reason for you to delay a ruling and would in fact urge you to rule as soon as Your Honor is ready to rule. Confirmation of the plan, to the extent that there are conversations occurring, is not going to prevent those conversations from taking place, and they can continue after the plan is confirmed. There's simply nothing inherent in Your Honor confirming the plan that would prevent those conversations from occurring or would ultimately prevent parties from pivoting to a deal on the off-chance that one should be reached.

So I just wanted to emphasize, Your Honor, again, Your

Honor is going to rule when Your Honor rules, but the Committee would urge you to rule, and certainly the idea that there may or may not be discussions with Mr. Dondero should not at all in any way lead you to the conclusion that you shouldn't rule or that those conversations cannot continue after plan confirmation.

Thank you, Your Honor. Unless you have questions for me. And my apologies with the technology.

THE COURT: No problem. All right. Here's what I'm going to do. We can see you now, Mr. Clemente.

MR. CLEMENTE: Oh. I'm sorry, Your Honor. I switched to another camera again because it wasn't working. So, I apologize.

THE COURT: All right. I am going to call you back Monday. What day of the week will that be? Is that -- I mean, Monday, what date, I should say. That'll be the 8th, right? I am going to call you back Monday, this coming Monday, February 8th, at 9:30 Central time, and I am going to give you my ruling. It will be a detailed oral bench ruling. And I'm not going to leave you hanging on the edge of your seat over the next few days. I will tell you I'm inclined to confirm this plan. I think it meets all of the requirements of 1129 and 1123 and 1122.

The thing that I am going to spend some time thinking about between now and Monday morning is, no surprise, the

propriety of the exculpations, the propriety of the plan injunctions, the propriety of the gatekeeper provisions. I certainly am duty-bound to go back and reread *Pacific Lumber*, to go back and read *Thru, Inc.*, and to really think hard about what is happening here.

So, I'm pretty much down, I think, to just those three issues here. I'll talk to my law clerk. He may remind me of something else that I'm not articulating right now. But I think I'm just down to those issues. Okay? So it's not going to be a mystery very long. We will come back Monday, 9:30. My courtroom deputy will post on the docket the WebEx connection instructions as usual, and we'll go from there. Now, --

MR. POMERANTZ: Your Honor? Your Honor, this is Jeff Pomerantz. I have a question, and it's going to sound odd coming from someone on the West Coast, but I was wondering if you could do it earlier. And the only reason I say that is, the night before, I have to call in to see if I'm on jury duty on Monday, and it would be helpful to me -- I assume your reading the ruling would be within a half hour, 45 minutes. That if you started at 9:00, if that was possible, I could then get in a car, and if I'm actually called to jury duty, I can get there. Of course, I don't know if I will be called, but I'd hate to miss it.

THE COURT: Okay. Well, I don't want to make you

miss jury duty. Okay. We will do 9:00 o'clock.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: Hopefully no one will be, you know, hung over from watching the Super Bowl. Personally, I don't like Tom Brady, so I may be boycotting the Super Bowl. But maybe I'll watch it. Maybe I'll -- I'll watch it. So we'll do it 9:00 o'clock. So 9:00 o'clock next Monday.

Now, let's talk about next the currently-set hearing this Friday, February 5th, on the injunction and contempt of court motion as to Mr. Dondero and the other entities. I want to continue that, and here is what I am struggling with. The only day I have next week is Friday, the 12th, and I would rather not use that date because I'm pretty jam-packed Monday through Thursday, unless stuff has been settled that I haven't become aware of. So let me ask two things. First, when is the examiner motion set? I'm just wondering if there's a block of time we have coming up that --

MR. POMERANTZ: I believe that's March 2nd, Your Honor, so that's not for another month.

THE COURT: Oh, that's not for another month? All right.

Traci, are you on the line? I want to ask you --

THE CLERK: Yes, I am.

THE COURT: What about the following week? I know Monday, the 15th, is a federal holiday, but do we have

availability for -- I fear a full day is going to be needed for continuing this Friday setting.

THE CLERK: Wednesday, February 17th, is available.

THE COURT: We've got all day on Wednesday, February 17th?

THE CLERK: Yes.

THE COURT: All right. What about that? I think I heard Mr. Rukavina, I think he's the one who threw it out there -- or maybe it was Mr. Taylor; I'm getting mixed up -- the possibility that they would agree to a continuation of the preliminary injunction through -- well, I think you said through confirmation. Until the Court enters a confirmation order. And if I were to rule and approve confirmation Monday, then we're talking about an order that might be entered sooner than the 17th. So, do you all have any --

MR. RUKAVINA: Your Honor?

THE COURT: -- mutually-agreeable suggestions? If not, I'm just going to set it the 12th and I'll, you know, I'm killing myself, but I'll --

MR. TAYLOR: Your Honor?

MR. RUKAVINA: No, Your Honor. I think Your Honor is wise to do what's she's proposing. The agreed TRO against my clients expires on the 15th of February.

THE COURT: Uh-huh.

MR. RUKAVINA: We can easily move that back a week or

a sufficient amount of time so that there's no prejudice by going on the 17th, if that would be acceptable to the Debtor, and then we can just pick a date that's sufficiently after the PI hearing so that there's protection for everyone.

THE COURT: All right. Mr. Taylor, do you agree?

MR. TAYLOR: Yes, Your Honor. That is acceptable to Mr. Dondero.

THE COURT: Okay.

MR. TAYLOR: We can also push it back. Can you hear me?

THE COURT: Yes, I can. Uh-huh.

MR. TAYLOR: Okay.

THE COURT: All right.

MR. POMERANTZ: I just want to make -- I just want to make sure Mr. Morris, John Morris, is on, since he's taking the lead in those matters. I don't see his picture.

MR. MORRIS: I am, Jeff, and I appreciate that. I'm available, Your Honor. We were supposed to take the depositions of Mr. Leventon and Mr. Ellington tomorrow. I don't know if their counsel is on the phone. But given Your Honor's decision to adjourn the hearing from Friday, I would respectfully request at this time that counsel for those two individuals work with me to find a date next week in order to take those depositions.

THE COURT: All right. That's --

MS. DANDENEAU: Debra Dandeneau from --

THE COURT: Go ahead.

MS. DANDENEAU: This is Debra Dandeneau from Baker McKenzie. We agree, and we're happy to work with you on a rescheduled time.

MR. MORRIS: Thank you very much.

THE COURT: All right. All right. So, someone had filed a motion to continue Friday's hearing. I think it was your firm, Mr. Taylor. I already had a motion pending for a few days now. So I'm going to direct you to upload an order, Mr. Taylor, or someone at your firm, continuing the hearing to the 17th at 9:30, with language in there that your -- the injunction is continuing at least through that date. And, again, it's a continuance of the motion for contempt as well as the setting on the preliminary injunction. And, of course, run that by Mr. Morris and Mr. Rukavina.

MR. TAYLOR: Sure. Your Honor, this is -- I'm not handling the injunction hearing, or at least I don't think I am. But just so that I'm clear, should maybe the injunction continue through the next day or something, so depending on how Your Honor rules, there's not a rush to try and get an order to you?

MR. RUKAVINA: Your Honor, I think that Mr. Morris and I can work this out. Mr. Taylor is not involved in that adversary, that's true, but Mr. Morris and I will be able to

very quickly enter a proposed agreed order that extends that TRO for some period of time.

THE COURT: Okay.

MR. RUKAVINA: I'm not going to be difficult.

THE COURT: Okay. So we'll shift to you and Mr. Morris to be the scriveners. I just -- I suggested that because I thought there was a motion to link the order to that had been filed by Bonds Ellis. I may be --

MR. MORRIS: There was, Your Honor. There was an emergency motion to continue. We filed an opposition, and Your Honor has not yet ruled on that motion. You're exactly right.

THE COURT: Okay. All right.

MR. TAYLOR: Your Honor, this is Clay Taylor. I will make sure the right people confer with Davor and John, and we'll get -- we'll link it to that motion, because that makes sense, to have something to link it to.

THE COURT: Okay. Yes. And it can be a two-paragraph order, I would think.

All right. And then so I'm going to see you Monday at 9:00 o'clock Central time with the ruling.

Please, don't anyone file anymore paper. I threw that out earlier today. I've got all the paper I need. And I will see you Monday at 9:00 o'clock. Okay? We're adjourned.

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Proceedings concluded at 4:34 p.m.)

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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 **02/05/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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EXHIBITS, cont'd.

CLOSING ARGUMENTS

RULINGS

EXHIBIT 27

EXHIBIT 2

Holdings of Preference Shares[1] in CLOs

CLO	HIF	NSOF	NC	Total
Aberdeen	0%	30.21%	0%	**30.21%**
Brentwood	0%	40.06%	0%	**40.06%**
Eastland	31.16%	10.53%	0%	**41.69%**
Gleneagles	9.74%	8.52%	0%	**18.26%**
Grayson	49.10%	10.75%	0.63%	**60.48%**
Greenbriar	0%	53.44%	0%	**53.44%**
Jasper	0%	17.86%	0%	**17.86%**
Liberty	0%	10.64%	0%	**10.64%**
Red River	0%	10.49%	0%	**10.49%**
Rockwall	6.14%	19.57%	0%	**25.71%**
Rockwall II	14.56%	5.65%	0%	**20.21%**
Southfork	0%	7.30%	0%	**7.30%**
Stratford	0%	69.05%	0%	**69.05%**
Loan Funding VII (aka Valhalla)	0%	1.83%	0%	**1.83%**
Westchester	0%	44.38%	0%	**44.38%**

[1] Class E Certificates for Liberty CLO, Ltd.

EXHIBIT 28

Applications and Motions[1] filed in *In re: Highland Capital Management, L.P.*, Case No.19-bk-34054				
FILING DATE	**DOCKET NO.**	**DOCUMENT**	**DONDERO'S RESPONSE**	**DISPOSITION OF MOTION/APPLICATION**
01/09/2020	**340**	Application to employ Hayward & Associates PLLC as Attorney	**No Response**	**Granted by Dkt. 435**
	281	Motion to compromise controversy with Official Committee of Unsecured Creditors, filed by Debtor Highland Capital Management, L.P.)	**No Response**	**Granted by Dkt. 339**
01/13/2020	**351**	Motion to extend time to (Debtor's Motion for Entry of an Order Extending the Period Within Which It May Remove Actions Pursuant to 28 U.S.C. 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure)	**No Response**	**Granted by Dkt. 459**
01/15/2020	**359**	Agreed Motion to continue hearing on (related documents 218 Motion for relief from stay)	**No Response**	**Granted by Dkt. 361**
01/17/2020	**370**	*Joint Motion for Continuance of Hearing on (i) Debtor's Application for an Order Authorizing the Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date, and (ii) Debtor's Application for an Order Authorizing the Retention and Employment of Lynn Pinker Cox & Hurst LLP as Special Texas Litigation Counsel, Nunc Pro Tunc to the Petition Date)* Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 371**
01/23/2020	**389**	*First and Final Application for Compensation and Reimbursement of Expenses on behalf of Young Conaway Stargatt & Taylor, LLP as Co-Counsel* for Official Committee of Unsecured Creditors, Creditor Comm.	**No Response**	**Granted by Dkt. 458**
01/24/2020	**395** **396** **397**	-Motion to extend or limit the exclusivity period Filed by Debtor Highland Capital Management, L.P. -Motion for expedited hearing on Exclusivity Motion -Motion to enforce *(Motion of the Debtor for the Entry of an Order Concerning the "Sealing Motion" and for a Conference Concerning the Substance, Scope and Intent of Certain Recent Rulings)* (related document(s):	**No Response** **No Response** **No Response**	**Granted by Dkt. 460** **Granted by Dkt. 410**

[1] Motions for *Pro Hac Vice* admission and motions to seal have been excluded. Effort was made to include all other substantive motions and applications.

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
01/31/2020	**419**	- Agreed Motion to Extend by One Hundred Twenty Days the Deadline to Assume or Reject Unexpired Nonresidential Real Property Lease) Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 429**
	421	- *Debtor's Motion for an Order (i) Establishing Bar Dates for Filing Claims, Including 503(b)(9) Claims; and (ii) Approving the Form and Manner of Notice Thereof)* Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 488**
	422	-Motion for expedited hearing	**No Response**	**Granted by Dkt. 427**
02/14/2020	**451**	Motion for relief from stay Filed by Jennifer G. Terry, Joshua Terry	**No Response**	**Granted by Dkt. 519**
02/24/2020	**474**	- *Motion of the Debtor for Entry of an Order Authorizing, but Not Directing, the Debtor to Cause Distributions to Certain "Related Entities")* Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 477**
	475	-Motion for expedited hearing		
02/27/2020	**483**	Application to employ Deloitte Tax LLP as Other Professional Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 551**
03/23/2020	**545**	-Motion to extend time to file objection (Agreed Motion) (RE: related document(s)483 Application to employ) Filed by Creditor Committee Official Committee of Unsecured Creditors	**No Response**	**Granted by Dkt. 548**
03/31/2020	**557**	Motion to extend time to (Debtor's Emergency Motion for an Order Extending Bar Date Deadline for Employees to File Claims) (RE: related document(s)488 Order on motion for leave) Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 560**
04/07/2020	**569**	-Application for compensation *Sidley Austin LLP's First Interim Application for Compensation and Reimbursement of Expenses* for Official Committee of Unsecured Creditors, Creditor Comm. Aty, Period: 10/29/2019 to 2/29/2020	**No Response**	**Granted by Dkt. 661** **(Amended) Granted by Dkt. 666** **Granted by Dkt. 662**
	570	-Application for compensation *First Interim Application for Compensation and Reimbursement of Expenses* for FTI	**No Response**	**(Amended) Granted by Dkt. 665**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
		Consulting, Inc., Financial Advisor, Period: 10/29/2019 to 2/29/2020		
04/13/2020	**582**	Motion for relief from stay - agreed Filed by Interested Party Hunton Andrews Kurth LLP	**No Response**	**Granted by Dkt. 623**
04/15/2020	**590**	Motion to reclaim funds from the registry *[Motion for Remittance of Funds Held in Registry of Court]* Filed by Creditor CLO Holdco, Ltd.	**No Response**	**Denied by Dkt. 825**
04/17/2020	**593**	Motion for relief from stay Filed by Acis Capital Management GP, LLC, Acis Capital Management, L.P. Objections due by 5/1/2020.	**617** Response unopposed to motion filed by Interested Party James Dondero. **(05/01/2020)**	**Granted by Dkt. 764**
04/28/2020	**602**	- *First Interim Application for Compensation of Foley & Lardner LLP as Special Texas Counsel to the Debtor for the Period from October 16, 2019 through March 31, 2020* for Foley Gardere, Foley & Lardner LLP, Special Counsel,	**No Response**	**Granted by Dkt. 670**
	604	-Application to employ Hunton Andrews Kurth LLP as Special Counsel	**No Response**	**Granted by Dkt. 763**
	605	-Application to employ Wilmer Cutler Pickering Hale and Dorr LLP as Special Counsel *(*	**No Response**	**Granted by Dkt. 669**
	606	-Motion to extend or limit the exclusivity period (RE: related document(s)460 Order on motion to extend/shorten time) Filed by Debtor Highland Capital Management, L.P. Objections due by 5/22/2020.	**No Response**	**Granted by Dkt. 668**
	607	- *First Interim Application for Compensation and Reimbursement of Expenses of Pachulski Stang Ziehl & Jones LLP, as Counsel for the Debtor and Debtor in Possession, for the Period From October 16, 2019 Through March 31, 2020*	**No Response**	**Granted by Dkt. 663**
	608	- *First Interim Application for Compensation and Reimbursement of Expenses of Mercer (US) Inc., as Compensation Consultant to the Debtor for the Period From November 15, 2019 Through February 29, 2020* for Mercer (US) Inc., Consultant,	**No Response**	**Granted by Dkt. 664**
	609	-Application for compensation *(Hayward & Associates PLLC's First Interim Application for Compensation and Reimbursement of*	**No Response**	**Granted by Dkt. 667**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
		Expenses for the Period from December 10, 2019 through March 31, 2020) for Hayward & Associates PLLC, Debtor's Attorney, Period: 12/10/2019 to 3/31/2020		
04/29/2020	**615**	Motion to extend time to Assume or Reject Unexpired Nonresidential Real Property Lease (RE: related document(s)429 Order on motion to extend/shorten time) Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 616**
05/20/2020	**644**	Motion for relief from stay *(UBS's Motion for Relief From the Automatic Stay to Proceed With State Court Action)* Fee amount $181, Filed by Interested Parties UBS AG London Branch, UBS Securities LLC Objections due by 6/3/2020.	**No Response**	**Denied by Dkt. 765**
06/11/2020	**733**	-Motion for leave *to File an Omnibus Reply to Objections to UBS's Motion for Relief from the Automatic Stay to Proceed With State Court* Filed by Interested Parties UBS AG London Branch, UBS Securities LLC Objections due by 7/2/2020.	**No Response**	**Granted by Dkt. 910**
06/12/2020	**737**	Motion to extend or limit the exclusivity period Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 820**
06/15/2020	**747**	Motion to extend time to (Debtor's Motion for Entry of an Order Further Extending the Period Within Which It May Remove Actions Pursuant to 28 U.S.C. 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure) (RE: related document(s)459 Order on motion to extend/shorten time) Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 816**
06/23/2020	**774**	-Application to employ James P. Seery, Jr. as Other Professional *Debtors Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc to March 15, 2020* Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 854**
	775	-Application to employ Development Specialists, Inc. as Other Professional *Amended Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc to March 15, 2020* Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 853**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
07/08/2020	**808**	Motion to compel Production by the Debtor. Filed by Creditor Committee Official Committee of Unsecured Creditors Objections due by 7/29/2020.	-**832** Response opposed to (related document(s): 808 Motion to compel Production by the Debtor. filed by Creditor Committee Official Committee of Unsecured Creditors) filed by Interested Party James Dondero. **(07/14/2020)**	**Dkt. 942** The Discovery Motions are GRANTED to the extent specifically set forth herein and are otherwise DENIED. Except to the extent specifically set forth herein, the Objections are OVERRULED
07/09/2020	**810** **814**	-Motion for protective order *(Debtor's Motion for Entry of (i) a Protective Order, or, in the Alternative, (ii) an Order Directing the Debtor to Comply with Certain Discovery Demands Tendered by the Official Committee of Unsecured Creditors Pursuant to Federal Rules of Bankruptcy Procedure 7026 and 7034)* Filed by Debtor Highland Capital Management, L.P. -Motion for expedited hearing (related documents 808 Motion to compel) Filed by Creditor Committee Official Committee of Unsecured Creditors	**No Response**	**Dkt. 942** The Discovery Motions are GRANTED to the extent specifically set forth herein and are otherwise DENIED. Except to the extent specifically set forth herein, the Objections are OVERRULED
07/13/2020		Proof of Claim 23 filed by Acis Capital Management, LP and Acis Capital Management GP, LLC	827-Objection to Acis Claim Filed by Interested Party James Dondero.	**N/A**
07/14/2020	**831**	-Application for compensation *Sidley Austin LLP's Second Interim Application for Compensation and Reimbursement of Expenses* for Official Committee of Unsecured Creditors, Creditor Comm. Aty, Period: 3/1/2020 to 5/31/2020	**No Response**	**Granted by Dkt. 1048**
07/21/2020	**883**	Application for compensation *Second Interim Application for Compensation and Reimbursement of Expenses* for FTI Consulting, Inc., Financial Advisor, Period: 3/1/2020 to 5/31/2020	**No Response**	**Granted by Dkt. 1051**
07/22/2020	**886**	-Motion to extend time to assume or reject unexpired nonresidential real property lease Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 909**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
08/03/2020	**914**	-Motion for leave *[CLO Holdco, Ltd.'s Motion for Clarification of Ruling]* Filed by Creditor CLO Holdco, Ltd.	**No Response**	**Resolved by Dkt. 935**
08/06/2020	**924**	- *Second Interim Application for Compensation and for Reimbursement of Expenses of Foley & Lardner LLP as Special Texas Counsel to the Debtor for the Period from April, 2020 through July 31, 2020*	**No Response**	**Granted by Dkt. 1045**
08/12/2020	**944**	Chapter 11 plan filed by Debtor Highland Capital Management, L.P.	**No Response**	
	945	-Disclosure statement filed by Debtor Highland Capital Management, L.P.		
08/13/2020	**947**	- Joint Motion to continue hearing on (related documents 771 Objection to claim) *(Joint Motion to Continue Status Conference)* Filed by Debtor Highland Capital Management, L.P. (Annable, Zachery)	**No Response**	**Granted by Dkt. 951**
	949	- Motion to extend or limit the exclusivity period (RE: related document(s)820 Order on motion to extend/shorten time) Filed by Debtor Highland Capital Management, L.P. (Attachments: # 1 Exhibit A--Proposed Order) (Annable, Zachery)	**No Response**	**Granted by Dkt. 1092**
08/18/2020	**964**	*Hayward & Associates PLLC's Second Interim Application for Compensation and Reimbursement of Expenses for the Period from April 1, 2020 through June 30, 2020*	**No Response**	**Granted by Dkt. 1047**
08/19/2020	**971**	- *Second Interim Application for Compensation and for Reimbursement of Expenses of Pachulski Stang Ziehl & Jones LLP as Counsel for the Debtor and Debtor in Possession for the Period from April 1, 2020 through July 31, 2020*	**No Response**	**Granted by Dkt. 1043**
	972	- *Second Interim Application for Compensation and for Reimbursement of Expenses of Mercer (US) Inc. as Compensation Consultant for the Debtor for the Period from March 1, 2020 through May 31, 2020* for Mercer (US) Inc., Consultant	**No Response**	**Granted by Dkt. 1046**
	975	- *Consolidated Monthly and First Interim Application of Wilmer Cutler Pickering Hale and Dorr LLP for Allowance of Compensation for Services Rendered and Reimbursement of*	**No Response**	**Granted by Dkt. 1044**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
		Expenses as Regulatory and Compliance Counsel for the Period November 1, 2019 through June 30, 2020		
09/04/2020	**1025**	Motion to compromise controversy with Carey International, Inc. Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 1123**
09/16/2020	**1214**	Motion for partial summary judgment on proof of claim(s) 190 and 191 of UBS Securities LLC and UBS AG, London Branch filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 1526**
09/23/2020	**1087**	-Motion to compromise controversy with (A) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (B) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (C) Acis Capital Management, L.P. (Claim No. 159). Filed by Debtor Highland Capital Management, L.P.	-1121 Response opposed to Acis 9019 Motion filed by Interested Party James Dondero. **(10/05/2020)**	**Granted by Dkt. 1302**
	1089	-Motion to compromise controversy with (a) the Redeemer Committee of the Highland Crusader Fund (Claim No. 72), and (b) the Highland Crusader Funds (Claim No. 81). Filed by Debtor Highland Capital Management, L.P. Objections due by 10/19/2020.	**No Response**	**Granted by Dkt. 1273**
09/24/2020	**1099**	Motion for relief from stay - *Daugherty's Motion to Confirm Status of Automatic Stay, or alternatively to Modify Automatic Stay* Fee amount $181, Filed by Creditor Patrick Daugherty Objections due by 10/8/2020.	**No Response**	**Granted by Dkt. 1327**
09/28/2020	**1108**	Motion to Approve Disclosure Statement Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 1476**
10/02/2020	**1118**	- Motion to extend time to Assume or Reject Unexpired Nonresidential Real Property Lease Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 1122**
	1119	-Motion to extend time to Deadline To File An Adversary Proceeding Against CLO Holdco, Ltd. (EMERGENCY) Filed by Creditor Committee Official Committee of Unsecured Creditors	**No Response**	**Granted by Dkt. 1168**
	1120		**No Response**	

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
		-Motion for expedited hearing (related documents 1119 Motion to extend/shorten time) Filed by Creditor Committee Official Committee of Unsecured Creditors		
10/09/2020	**1154**	-Motion for leave *to Amend Certain Proofs of Claim* Filed by Creditor The Dugaboy Investment Trust Objections due by 10/30/2020.	**No Response**	N/A
10/16/2020	**1179**	Omnibus Objection to claim(s) of Creditor(s) Crescent Research; Hedgeye Risk Management, LLC; James D. Dondero; NexVest, LLC; James D. Dondero.. Filed by Debtor Highland Capital Management, L.P. Responses due by 11/18/2020.	**1502** Stipulation by James Dondero and Highland Capital Management, L.P.. filed by Interested Party James Dondero (RE: related document(s)1179 Objection to claim). (**12/03/2020)**	**Dkt. 1537**
10/18/2020	**1207**	Motion to allow claims *of HarbourVest Pursuant to Rule 3018(A) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* Filed by Creditor HarbourVest et al Objections due by 11/9/2020.	**No Response**	
10/16/2020	**1215**	-Redeemer Committee of the Highland Crusander Fund and the Crusader Funds' Motion for partial summary judgment on proof of claim(s) 190 and 191 of UBS AG, London Branch and UBS Securities LLC filed by Interested Party Redeemer Committee of the Highland Crusader Fun and the Crusader's Funds'	**No Response**	**Resolved by Dkt. 1526**
10/20/2020	**1244**	- *Third Interim Application for Compensation and Reimbursement of Expenses* for FTI Consulting, Inc., Financial Advisor, Period: 6/1/2020 to 8/31/2020.	**No Response**	**Granted by Dkt. 1685**
10/21/2020	**1263**	Emergency Motion to continue hearing on (related documents 1080 Disclosure statement) Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 1266**
10/23/2020	**1281**	-Motion for leave - *Daugherty's Motion for Temporary Allowance of Claim for Voting Purposes Pursuant to Bankruptcy Rule 3018* Filed by Creditor Patrick Daugherty	**No Response**	**Granted by Dkt. 1474**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
10/25/2020	**1289**	Amended disclosure statement filed by Debtor Highland Capital Management, L.P. (RE: related document(s)945 Disclosure statement, 1080 Disclosure statement).	**No Response**	N/A
10/27/2020	**1296**	Application for compensation *Sidley Austin LLP's Third Interim Application for Compensation and Reimbursement of Expenses* for Official Committee of Unsecured Creditors, Creditor Comm. Aty, Period: 6/1/2020 to 8/31/2020,	**No Response**	**Granted by Dkt. 1684**
11/06/2020	**1338**	*Motion for Temporary Allowance of Claims for voting Purposes Pursuant to Federal Rule of Bankruptcy Procedure 3018)* Filed by Interested Parties UBS AG London Branch, UBS Securities LLC	**No Response**	**Granted by Dkt. 1518**
11/09/2020	**1348**	Motion to continue hearing on (related documents 1207 Motion to allow claims) Filed by Creditor HarbourVest et al	**No Response**	**Granted by Dkt. 1352**
11/13/2020	**1384**	Amended disclosure statement filed by Debtor Highland Capital Management, L.P. (RE: related document(s)945 Disclosure statement, 1080 Disclosure statement, 1289 Disclosure statement).	**No Response**	N/A
11/18/2020	**1424** **1425**	- Motion for leave *(Motion of the Debtor Pursuant to 11 U.S.C. 105(a) and 363(b) for Authority to Enter into Sub-Servicer Agreements)* Filed by Debtor Highland Capital Management, L.P. - Motion for expedited hearing (related documents 1424 Motion for leave) *(Debtor's Motion for an Expedited Hearing on the Motion of the Debtor Pursuant to 11 U.S.C. 105(a) and 363(b) for Authority to Enter into Sub-Servicer Agreement)* Filed by Debtor Highland Capital Management, L.P.	1447 WITHDRAWN per # 1460 Response opposed to (related document(s): 1424 Motion for leave *(Motion of the Debtor Pursuant to 11 U.S.C. 105(a) and 363(b) for Authority to Enter into Sub-Servicer Agreements)* filed by Debtor Highland Capital Management, L.P.) filed by Interested Party James Dondero. (**11/20/2020)**	**Granted by Dkt. 1436 & 1475** **Granted by Dkt. 1436**
11/19/2020	**1439**	- WITHDRAWN per docket # 1622 Motion for leave *(James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the*	**N/A**	**Withdrawn by Dondero by Dkt. 1622**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
	1443	*Ordinary Course of Business)* Filed by Interested Party James Dondero - Motion for expedited hearing(related documents 1439 Motion for leave) *(Request for Emergency Hearing on James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business)* Filed by Interested Party James Dondero		**Denied by Bankruptcy Court on the Record during hearing on November 23, 2020**
11/25/2020	**1483**	*Third and Final Application for Compensation and Reimbursement of Expenses of Foley & Lardner LLP as Special Texas Counsel to the Debtor for the Period from October 16, 2019 through October 31, 2020*	**No Response**	**Granted by Dkt. 1691**
11/30/2020	**1491**	Motion for relief from stay Filed by Creditor Patrick Daugherty	**No Response**	**Denied by Dkt. 1612**
12/08/2020	**1528**	Motion for order imposing temporary restrictions on Debtor's ability, as portfolio manager, to initiate sales by non-debtor CLO Vehicles. Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Strategic Opportunities Fund.	**No Response**	**Denied by Dkt. 1605**
12/09/2020	**1530**	Motion to extend time to Time to File An Adversary Proceeding Against CLO Holdco, Ltd. (Agreed) (RE: related document(s)1168 Order (generic)) Filed by Creditor Committee Official Committee of Unsecured Creditors Objections due by 12/30/2020.	**No Response**	**Granted by Dkt. 1534**
12/11/2020	**1544** **1545** **1547**	-Application for compensation *(First Interim Application)* for Hunton Andrews Kurth LLP, Special Counsel - *(Hayward & Associates PLLC's Third Interim Application for Compensation and Reimbursement of Expenses for the Period from July 1, 2020 through September 30, 2020)* for Hayward & Associates PLLC, Debtor's Attorney - *Third Interim Application for Compensation and for Reimbursement of Expenses of Pachulski Stang Ziehl & Jones LLP as Counsel for the Debtor and Debtor in Possession for the Period from August 1, 2020 through November 30, 2020* - *Consolidated Monthly and Second Interim Application of Wilmer Cutler Pickering Hale and Dorr LLP for Allowance of*	**No Response** **No Response** **No Response** **No Response**	**Granted by Dkt. 1686** **Granted by Dkt. 1728** **Granted by Dkt. 1687** **Granted by Dkt. 1715**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
	1552	*Compensation for Services Rendered and Reimbursement of Expenses as Regulatory and Compliance Counsel for the Period from July 1, 2020 through November 30, 2020)*		
12/14/2020	**1564** **1565**	-Motion to quash *(Debtor's Emergency Motion to Quash Subpoena and for Entry of a Protective Order or, in the Alternative, for an Adjournment)* Filed by Debtor Highland Capital Management, L.P. - Motion for protective order *(Debtor's Emergency Motion to Quash Subpoena and for Entry of a Protective Order or, in the Alternative, for an Adjournment)* Filed by Debtor Highland Capital Management, L.P.	1571 Objection to Motion to Quash filed by Interested Party James Dondero, . (**12/14/2020)**	**Resolved by Dkt. 1603** **Resolved by Dkt. 1603**
12/16/2020	**1583**	-Motion to extend time to Remove Actions Pursuant to 28 U.S.C. 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure (RE: related document(s)816 Order on motion to extend/shorten time) Filed by Debtor Highland Capital Management, L.P	**No Response**	**Granted by Dkt. 1725**
12/17/2020	**1590**	Motion to pay *(Debtor's Motion Pursuant to the Protocols for Authority for Highland Multi Strategy Credit Fund, L.P. to Prepay Loan)* Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 1746**
12/23/2020	**1623** **1625**	-- Motion to extend time to assume unexpired nonresidential real property lease Filed by Debtor Highland Capital Management, L.P. -Motion to compromise controversy with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. Filed by Debtor Highland Capital Management, L.P.	**No Response** -1697 Objection to HarbourVest 9019 Motion filed by Interested Party James Dondero (**01/06/2021)**	**Granted by Dkt. 1636** **Granted by Dkt. 1788**
12/31/2020	**1649**	Joint Motion to continue hearing on (related documents 1207 Motion to allow claims) Filed by Creditor HarbourVest et al	**No Response**	**Granted by Dkt. 1652**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
01/04/2021	**1655**	Application for compensation *Fourth Interim Application for Compensation and Reimbursement of Expenses* for FTI Consulting, Inc., Financial Advisor, Period: 9/1/2020 to 11/30/2020, Fee: $710,280.45, Expenses: $1,479.47. Filed by Attorney Juliana Hoffman Objections due by 1/25/2021.	**No Response**	**N/A**
01/11/2021	**1719**	Notice *(Second Notice of (I) Executory Contracts and Unexpired Leases to Be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, If Any, and (III) Related Procedures in Connection Therewith)* filed by Debtor Highland Capital Management, L.P. (RE: related document(s)1606 Support/supplemental document *(Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.)* filed by Debtor Highland Capital Management, L.P. (RE: related document(s)1472 Chapter 11 plan).	1784 WITHDRAWN PER # 1876. Objection to (related document(s): 1719 Notice (generic) filed by Debtor Highland Capital Management, L.P.) filed by Interested Party James Dondero. **(01/20/2021)**	**N/A**
01/14/2021	**1745**	Motion to appoint trustee*Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* Filed by Get Good Trust, The Dugaboy Investment Trust	1756 Joinder by filed by Interested Party James Dondero (**01/15/2021)**	**Denied by Dkt. 1960**
01/19/2021	**1777**	*Motion of the Debtor for Entry of an Order Authorizing the Debtor to Implement a Key Employee Retention Plan with Non-Insider Employees and Granting Related Relief)* Filed by Debtor Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 1849**
01/27/2021	**1853**	*Sidley Austin LLP's Fourth Interim Application for Compensation and Reimbursement of Expenses* for Official Committee of Unsecured Creditors, Creditor Comm. Aty, Period: 9/1/2020 to 11/30/2020.	**No Response**	**N/A**
02/01/2021	**1878**	Motion to compel an Order Requiring James D. Dondero to Preserve Documents and to Identify Measures Taken to Ensure Document Preservation. Filed by Creditor Committee Official Committee of Unsecured Creditors	1969 Objection to UCC's Preservation Motion filed by Interested Party James Dondero. **(03/03/2021)**	**N/A**
02/08/2021	**1914**	Motion for leave *(Motion for Status Conference)* Filed by Interested Party James Dondero	**N/A**	**Denied by Dkt. 1929**

FILING DATE	DOCKET NO.	DOCUMENT	DONDERO'S RESPONSE	DISPOSITION OF MOTION/APPLICATION
02/28/2021	**1955**	Motion to stay pending appeal (related documents 1943 Order confirming chapter 11 plan) Filed by Interested Parties Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P.	**No Response**	**N/A**
03/01/2021	**1958**	Motion for expedited hearing (related documents 1955 Motion to stay pending appeal) Filed by Interested Parties Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P.	**No Response**	**N/A**
03/03/2021	**1967**	Motion to stay pending appeal (related documents 1943 Order confirming chapter 11 plan) Filed by Interested Parties Highland Global Allocation Fund, Highland Income Fund, NexPoint Capital, Inc., NexPoint Strategic Opportunities Fund (Hogewood, A.)	**No Response**	**N/A**
03/04/2021	**11973**	-Joinder by filed by Interested Party James Dondero (RE: related document(s)1955 Motion to stay pending appeal (related documents 1943 Order confirming chapter 11 plan))	**N/A**	**N/A**

EXHIBIT 29

Highland Capital Management, L.P. v. Dondero 20-03190-sgj				
FILING DATE	**DOCKET NO.**	**DOCUMENT**	**DONDERO'S RESPONSE**	**DISPOSITION OF MOTION/APPLICATION**
12/07/2020	**2** **5** **6**	- Motion for preliminary injunction (Plaintiff Highland Capital Management, L.P.'s Emergency Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero) filed by Plaintiff Highland Capital Management, L.P. - Motion for expedited hearing(related documents **2** Motion for preliminary injunction) (Plaintiff Highland Capital Management, L.P.'s Motion for Expedited Hearing on Its Emergency Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero) filed by Plaintiff Highland Capital Management, L.P. (Annable, Zachery). Related document(s) **6** Motion for protective order filed by Plaintiff Highland Capital Management, L.P - Motion for temporary restraining order filed by Plaintiff Highland Capital Management, L.P.	**52** Response opposed to (related document(s): **2** Motion for preliminary injunction (Plaintiff Highland Capital Management, L.P.'s Emergency Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero) filed by Plaintiff Highland Capital Management, L.P.) filed by Defendant James D. Dondero. **(01/07/2021)** **No Response**	**Granted by Dkt. 59** **Granted by Dkt. 9** **Granted by Dkt. 10**
12/16/2020	**24**	WITHDRAWN per # **29** Motion for leave (James Dondero's Emergency Motion to Modify Temporary Restraining Order) (related document(s) **10** Order on motion for protective order) filed by Defendant James D. Dondero	**29** Withdrawal filed by Defendant James D. Dondero (RE: related document(s)24 Motion for leave (James Dondero's Emergency Motion to Modify Temporary Restraining Order) (related document(s) 10 Order on motion for protective order)).	
12/28/2020	**32** **33**	Motion for protective order*(James Dondero's Emergency Motion for Entry of a Protective Order)* filed by Defendant James D. Dondero -Motion for expedited hearing(related documents 32 Motion for protective order) (Request for Emergency Hearing) filed by Defendant James D. Dondero	**34** Objection to (related document(s): **32** Motion for protective order(James Dondero's Emergency Motion for Entry of a Protective Order) filed by Defendant James D. Dondero) filed by Plaintiff Highland Capital Management, L.P. **(12/28/2020)**	**Denied by Dkt. 38**
01/07/2021	**48** **49** **51**	Motion for contempt against James Dondero regarding Violation of the Temporary Restraining Order (Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO) filed by Plaintiff Highland Capital Management, L.P. - Brief in support filed by Plaintiff Highland Capital Management, L.P. (RE: related document(s)**48** Motion for contempt against James Dondero regarding Violation of the Temporary Restraining Order (Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO)) - Motion for expedited hearing(related documents **48** Motion for Contempt) filed by Plaintiff Highland Capital Management, L.P.	**110** Objection to (related document(s): **48** Motion for contempt against James Dondero regarding Violation of the Temporary Restraining Order (Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO) filed by Plaintiff Highland Capital Management, L.P.)(James Dondero's Objection and Response to Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause and Brief in Support) filed by Defendant James D. Dondero. **(02/21/2021)**	**N/A** **N/A** **N/A**
01/13/2021	**64**	Motion for leave to appeal (related document(s): 59 Order on motion for preliminary injunction, 60 Notice of appeal filed by Defendant James D. Dondero) filed by Defendant James D.	**No Response**	**Denied by Dkt. 111**
01/27/2021	**75**	Emergency Motion to continue hearing on (related documents 48 Motion for Contempt, 49 Brief) filed by Defendant James D. Dondero	**77** Objection to (related document(s): **75** Emergency Motion to continue hearing on (related documents 48 Motion for Contempt, 49 Brief) filed by Defendant James D. Dondero) filed by Plaintiff Highland Capital Management, L.P.. **(01/29/2021)**	**N/A**
02/10/2021	**95**	Motion to continue hearing on (related documents 48 Motion for Contempt, 49 Brief) filed by Defendant James D. Dondero	**No Response**	**Granted by Dkt. 97**
02/17/2021	**102**	Motion to continue hearing on (related documents 48 Motion for Contempt) filed by Plaintiff Highland Capital Management, L.P	**No Response**	**Granted by Dkt. 104**
02/20/2021	**107** **108**	Motion to strike (related document(s): **48** Motion for contempt against James Dondero regarding Violation of the Temporary Restraining Order (Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO) filed by Plaintiff Highland Capital Management, L.P., 49 Brief filed by Plaintiff Highland Capital Management, L.P.) (James Dondero's Emergency Motion in Limine and to Exclude Evidence and Argument) filed by Defendant James D. Dondero. - Motion for expedited hearing(related documents 107 Motion to strike document) filed by Defendant James D. Dondero	**115** Objection to (related document(s): **107** Motion to strike (related document(s): **48** Motion for contempt against James Dondero regarding Violation of the Temporary Restraining Order (Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held i filed by Defendant James D. Dondero) filed by Plaintiff Highland Capital Management, L.P. **(02/24/2021)**	**N/A** **N/A**
03/02/2021	**119**	Motion to continue hearing on (related documents **48** Motion for Contempt) filed by Plaintiff Highland Capital Management, L.P.	**No Response**	**Granted by Dkt. 120**

03/10/2021	**126**	Motion to continue hearing on (related documents **48** Motion for Contempt, 49 Brief, 125 Certificate of service)(Motion for Continuance of Contempt Hearing) filed by Defendant James D. Dondero (Attachments: # 1 Ex. A - Mandamus # 2 Ex. B - Letter # 3 Proposed Order)	**No Response**	**N/A**

EXHIBIT 30

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Counsel for Movants

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

In re:	)	Case No. 19-34054-sgj-11
	)	
Highland Capital Management, L.P.,	)	Chapter 11
	)	
Debtor.	)	
	)	

DECLARATION OF MICHAEL J. LANG IN SUPPORT OF MOVANTS' MOTION FOR RECUSAL PURSUANT TO 28 U.S.C. § 455

I, Michael J. Lang, declare under penalty of perjury as follows:

1. I am more than 21 years of age and am competent to make this Declaration. I have personal knowledge of the facts set forth herein, and they are true and correct.

2. I am a partner at the law firm of Crawford, Wishnew & Lang PLLC and represent Movants 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, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "Movants") in the above-captioned action. I am authorized to make this Declaration in Support of Movants' Motion for Recusal Pursuant to 28 U.S.C. § 455 (the "Motion").

3. **Exhibit 1** referenced and incorporated into the Brief in Support of the Motion ("the Brief") and contained in the Appendix in Support of the Motion (the "Appendix") (at APP. 0001-APP.

0137) is a true and correct copy of a court record [ECF Dkt. 181] from the bankruptcy proceeding styled *In the Matter of: Highland Capital Management, L.P.*; Case No. 19-12239 (CSS) in the United States Bankruptcy Court for the District of Delaware.

4. The following exhibits referenced and incorporated into the Brief and contained in the Appendix are true and correct copies of court records from this above-captioned bankruptcy proceeding styled *In Re: Highland Capital Management, L.P.*; Case No. 19-34054-sgj-11, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division:

Exhibit Nos.	Description	Appendix Page Nos.
2	January 9, 2020 Debtor's Motion to Compromise Controversy with Official Committee of Unsecured Creditors Transcript	APP. 0138-APP. 0228
3	February 19, 2020 Transcript	APP. 0229-APP. 0416
4	December 8, 2020 Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles [ECF Dkt. 1522]	APP. 0417-APP. 0442
5	December 16, 2020 Transcript - Motion for Order Imposing Temporary Restrictions	APP. 0443-APP. 0508
9	February 8, 2021 Transcript - Bench Ruling on Confirmation Hearing and Agreed Motion to Assume	APP. 0990-APP. 1040
10	July 8, 2020 Transcript - Motion to Extend Exclusivity Period and Motion to Extend Time to Remove Actions	APP. 1041-APP. 1098
12	June 30, 2020 Transcript - Motion for Remittance of Funds Held in Registry of Court filed by CLO Holdco, Ltd. [ECF Dkt. 802]	APP. 1152-APP. 1251
13	July 21, 2020 Official Committee of Unsecured Creditors Emergency Motion to Compel Production by the Debtor Transcript	APP. 1252-APP. 1376
14	Applications to Employ James P. Seery and Development Specialists, Inc. Transcript [ECF Dkt. 864]	APP. 1377-APP. 1510
15	March 4, 2020 Transcript - Hearing on Motion of The Debtor for Entry of an Order Authorizing, but not Directing, the Debtor to Cause Distributions to Certain "Related Entities"	APP. 1511-APP. 1631
16	June 15, 2020 Transcript - UBS's Motion for Relief from the Automatic Stay to Proceed with State Court Action	APP. 1632-APP. 1758
22	January 14, 2021 Motion to Appoint Examiner [ECF Dkt. 1752]	APP. 2057-APP. 2070
23	February 2, 2021 Transcript of Proceedings	APP. 2071-APP. 2365
24	Servicing Agreement – Exhibit N to the February 2, 2021 Transcript of Proceedings	APP. 2366-APP. 2401

25	Servicing Agreement – Exhibit J to the February 2, 2021 Transcript of Proceedings	APP. 2402-APP. 2440
26	February 3, 2021 Transcript of Proceedings	APP. 2441-APP. 2697
27	Chart of Holdings of Preference Shares in CLOs – Exhibit 2 from February 3, 2021 Hearing	APP. 2698-APP. 2699

5. **Exhibit 11** referenced and incorporated into the Brief and contained in the Appendix (at APP. 1099-1151) is a true and correct copy of a court record [ECF Dkt. 1186] from the proceeding styled *In the Acis Capital Management, L.P. and Acis Capital Management GP, LLC*; Case No. 18-30264-SGJ-11 in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

6. The following exhibits referenced and incorporated into the Brief and contained in the Appendix are true and correct copies of court records from the adversary proceeding styled *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., et al.*, Adversary Proceeding No. 21-03000-sgj, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division:

Exhibit Nos.	Description	Appendix Page Nos.
6	January 6, 2021 Plaintiff Highland Capital Management, L.P.'S Verified Original Complaint for Declaratory and Injunctive Relief [ECF Dkt. 1]	APP. 0509-APP. 0527
7	January 26, 2021 Transcript - Motion for Entry of Order Authorizing Debtor to Implement Key Employee Plan	APP. 0528-APP. 0784
17	January 6, 2021 Debtor's Memorandum of Law in Support of its Motion for a Temporary Restraining Order and Preliminary Injunction Against Certain Entities Owned and/or Controlled by Mr. James Dondero [ECF Dkt. 6]	APP. 1759-APP. 1776

7. The following exhibit referenced and incorporated into the Brief and contained in the Appendix is a true and correct copy of a court record from the adversary proceeding styled *Highland Capital Management, L.P. v. James D. Dondero*, Adversary Proceeding No. 20-3190-sgj, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division:

Exhibit Nos.	Description	Appendix Page Nos.
8	January 8, 2021 Transcript - Preliminary Injunction Hearing	APP. 0785-APP. 0989

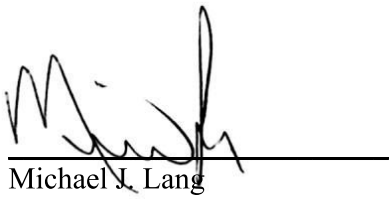
8. The following exhibits referenced and incorporated into the Brief and contained in the Appendix are true and correct copies of court records from the adversary proceeding styled *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., et al.*, Adversary Proceeding No. 21-03010-sgj, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division:

Exhibit Nos.	Description	Appendix Page Nos.
19	February 17, 2021 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 [ECF Dkt. 3]	APP. 1792-APP. 1812
20	February 24, 2021 Order on Mandatory Injunction [ECF Dkt. 25]	APP. 1813-APP. 1817
21	February 23, 2021 Transcript - Mandatory Injunction Hearing	APP. 1818-APP. 2056

9. **Exhibit 18** referenced and incorporated into the Brief and contained in the Appendix (at APP. 1777-1791) contains true and correct courtesy copies of the K&L Gates Letters (as defined in the Brief), which are attached to the Declaration of James Seery [ECF 4] in the Adversary Proceeding styled *Highland Capital Mgmt. v. Highland Capital Management Fund Advisors, L.P., et al*. Adversary No. 21-03000-sgj.

10. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED ON the 18th of March, 2021 in Dallas, Dallas County, Texas.



Michael J. Lang
Declarant

EXHIBIT 4

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	Case No. 19-34054 (SGJ)
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, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

MOVANTS' AMENDED MEMORANDUM OF LAW IN SUPPORT OF AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

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I. INTRODUCTION

This Renewed Motion to Recuse is necessary because the Court denied a prior motion by James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC (collectively, "Movants") to supplement the record in support of their original motion to recuse, making it impossible for Movants to have all evidence of the Court's bias considered on appeal. As set forth herein, the Court's animus toward Movants is so evident, persistent, and severe that Movants cannot receive fair treatment or justice in this Court. And while the Court previously suggested that Movants sought recusal too late, that suggestion rings hollow, because the Court continues to preside over several proceedings involving Movants, and because the Court's bias continues to pervade all proceedings before it. This Motion should be granted.

II. PROCEDURAL HISTORY

The Movants filed their original motion to recuse ("Original Recusal Motion") on March 18, 2021.[1] The Court denied the Motion less than a week later.[2] In doing so, the Court acknowledged "that the applicable statute and rule do not expressly address timeliness" but nonetheless concluded that the motion was untimely.[3] Moreover, despite recognizing that an objective standard should be applied to a recusal determination, the Court instead applied a subjective standard, based entirely on a self-assessment: "The Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Movants."[4]

The Movants appealed the Bankruptcy Court's order denying their Original Recusal

[1] *In re: Highland Capital Management, L.P.*, Case No. 19-34054-sgj11, Bankr. Dkt. No. 2061.
[2] Bankr. Dkt. No. 2083.
[3] *Id.* at 5.
[4] *Id.* at 10.

Motion to the United States District Court for the Northern District of Texas on April 6, 2021.[5] On February 9, 2022, the District Court denied the appeal for lack of jurisdiction.[6]

Thereafter, this Court continued to preside over the bankruptcy proceedings as well as at least nine adversary proceedings involving the Movants. Further, the Court has since held additional hearings and made additional rulings and other statements that demonstrate clearly the Court's ongoing animus toward Movants. As a result, on August 26, 2022, Movants filed an Amended Motion for Final Appealable Order and Supplement to Motion to Recuse Pursuant to 28 U.S.C. § 455 ("Motion to Supplement"), in which Movants sought: (1) to remove the "reservation language" in the Original Recusal Order; (2) an order stating that Original Recusal Order is final; and (3) to supplement the record on the Original Recusal Motion.[7] The Court held a hearing on the Motion to Supplement on August 31, 2022. At that hearing, the Movants informed the Court that Highland was *unopposed* to the relief requested in the Motion to Supplement. Nevertheless, the Court accused Mr. Dondero and his counsel of "carpet-bombing us with paper and causing us to expend resources," chastised Mr. Dondero's counsel at length for the size of the record submitted in support of the Motion, and asked counsel to "help me to understand why this is not wasting resources in your view and why this isn't just some strategy."[8]

Following the hearing, the Court issued an order denying the Motion to Supplement as procedurally improper.[9] In its order, the Court invited Movants to do one of two things: (1) file a "simple motion" (without attaching additional evidence) seeking the removal of the language

[5] *See Dondero v. Hon. Stacey G. C. Jernigan*, Civ. Action No. 3-21-CV-0879-K.

[6] *Id.*, Dkt. No. 39 at 1-2 (noting that the Bankruptcy Court "reserve[d] the right to amend or supplement" its ruling).

[7] Bankr. Dkt. No. 3470.

[8] Ex. U, August 31, 2022 Hr'g Tr. at 20:13-25. Based on the Court's comments, Movants have attached only relevant excerpts of transcripts to this Motion to minimize the volume of exhibits in the record. However, Movants can file an appendix attaching full transcripts at the Court's request.

[9] Bankr. Dkt. No. 3479 at 3.

in the Court's original order denying recusal that hindered immediate appeal, or (2) file a new motion to recuse based on "any alleged new evidence or grounds for recusal."[10] By invoking the first option, Movants would be free to seek mandamus of the Court's denial of the Original Recusal Motion, but would not have the benefit of a full and complete record. Consequently, Movants have elected to file a new Motion containing all evidence of record that supports recusal.

III. RELEVANT BACKGROUND AND EVIDENCE OF BIAS[11]

Many disparaging remarks have been made about Mr. Dondero, his employees, and his businesses during the course of these bankruptcy proceedings, few of which are tethered to facts or evidence adduced in this case. Among other things, Mr. Dondero has repeatedly been labeled "vexatious," "litigious," and a bad actor. HCMLP has, in turn, been described as a "Byzantine empire" and "ruinous web."[12] These accusations—which, to be clear, is all they are—have no basis in the realities of HCMLP's business or Mr. Dondero's management of it.

A. Mr. Dondero Ran A Successful And Profitable Business For More Than Two Decades Prior to Bankruptcy

HCMLP is an SEC-registered investment advisor founded in 1993 by Mr. Dondero and Mark A. Okada.[13] Although this Court has adopted various advocates' description of HCMLP and its affiliates as a complex "web" of entities operated at the whim and for the sole benefit of Mr. Dondero, for 26 years prior to filing a chapter 11 petition, HCMLP operated as a legitimate (and heavily regulated) investment advisor for the benefit of its managed funds and investors. As of the Petition Date, HCMLP continued to employ 76 employees, including executive-level

[10] *Id.*

[11] Movants have truncated the discussion of the relevant background that previously was discussed in Movants' Original Recusal Motion. Movants hereby incorporate the Original Recusal Motion by reference and, where appropriate, Movants specifically reference sections of that Motion to support their renewed arguments here.

[12] Ex. D, June 30, 2020 Hr'g Tr. at 22:18, 68:24.

[13] Order (I) Confirming Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief ("Confirmation Order"), Bankr. Dkt. No. 1943, ¶ 4.

managers.[14] Thus, while the Court has described Mr. Dondero as HCMLP's solitary decision-maker on all matters concerning the company's operation and management, that description makes no sense. At its high-water mark, HCMLP had assets under management exceeding $40 billion.

Following the financial crisis in 2008, HCMLP and some of its managed funds and affiliates, like many other financial institutions and advisors across the globe, faced several lawsuits. Notably, although the Court has repeatedly characterized Mr. Dondero as "litigious" and "vexatious," in virtually all of the lawsuits involving HCMLP before its bankruptcy filing, HCMLP was *the defendant*.[15] What is more, between 2008 and HCMLP's bankruptcy filing in 2019, virtually none of the lawsuits filed against HCMLP resulted in any sizeable liability *against HCMLP*, and certainly none that would render HCMLP insolvent.[16] Indeed, the only significant award issued against HCMLP at any time between 2008 and 2019 is an arbitration award in favor of the Redeemer Committee. It also bears mentioning that at no time prior to HCMLP's bankruptcy filing had Mr. Dondero ever personally been held liable for *any* misconduct in relation to his management of HCMLP's business.

B. The Court Formed An Animus Against Mr. Dondero During The Acis Bankruptcy Case That Infected This Bankruptcy Case From The Outset

The Court's animus toward Movants stems from its earlier involvement in the bankruptcy case of Acis Capital Management, L.P., a Delaware limited partnership formed in 2010. In January 2018, Joshua Terry, filed an involuntary petition in bankruptcy against Acis and its general partner,

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[14] *Id.*, ¶ 5.

[15] *See, e.g.*, *UBS Securities, LLC v. Highland Capital Mgmt., L.P., et al.*, Index No. 650097/2009 (N.Y. Sup. Ct.); *Citibank, N.A. v. Highland CDO Opportunity Master Fund, L.P., et al.*, Case No. 1:12-cv-02827-NRB (S.D.N.Y.); *HYMF, Inc. v. Highland Capital Mgmt., L.P., et al.*, Index No. 601027/2009 (N.Y. Sup. Ct.); *Daugherty v. Highland Capital Mgmt., et al.*, Case No. 2017-0488-SG (Del. Ch. Ct.).

[16] Although this Court has suggested that HCMLP owes "$1 billion" to UBS, the UBS judgment was not against HCMLP but two of its managed funds. *See* Bankr. Dkt. 177-4. The Debtor itself objected to UBS's $1 billion proof of claim on this basis. *See* Bankr. Dkt. No. 906.

Acis Capital Management GP, L.L.C. (collectively, "Acis").[17] This Court presided over the Acis Bankruptcy. Prior to its bankruptcy, Acis served as portfolio manager for "hundreds of millions of dollars' worth" of collateralized loan obligations ("CLOs").[18] Mr. Dondero served as Acis's Chief Executive Officer, and HCMLP provided certain services to Acis pursuant to shared services agreements. The Court's Bench Ruling confirming Acis's Chapter 11 plan makes abundantly clear that the Court formed negative opinions of Mr. Dondero during that bankruptcy case. The ruling is replete with negative remarks about Mr. Dondero, his management decisions, and the structure of his businesses.

HCMLP, a separately owned entity, filed its Chapter 11 petition in bankruptcy for entirely different reasons in Delaware on October 16, 2019.[19] At the time, Debtor's counsel—Pachulski, Stang, Ziehl & Jones, LLP ("Pachulski")—explained that it filed the bankruptcy in Delaware to give HCMLP and its then-existing management (including Mr. Dondero), a "fresh start."[20] The Official Committee of Unsecured Creditors (the "UCC") moved to transfer the proceedings to this Court, arguing that transfer was appropriate because the Court had the benefit of a "learning curve" because of the Acis Bankruptcy.[21] At the time, Pachulski resisted the transfer, arguing that the UCC only wanted to take advantage of the Court's preexisting negative views of HCMLP's management.[22] Thus, it was Pachulski that initially questioned the Court's impartiality. The

[17] *In re Acis Capital Mgmt., L.P.*, Case No. 3:18-bk-30264 (N.D. Tex.) ("Acis Bankruptcy"), Dkt. No. 1; *see also* Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan ("Bench Ruling), Acis Bankr. Dkt. No. 287 at 10-11.

[18] Bench Ruling, Acis Bankr. Dkt. No. 827 at 4.

[19] Bankr. Dkt. No. 3.

[20] Ex. A, December 3, 2019 Hr'g Tr. at 78:21-23.

[21] *Id.*

[22] *Id.* at 78:3-8; *see also id.* at 79:14-20 (referring to the opinions the Court formed in the Acis bankruptcy as "baggage").

Delaware Bankruptcy nonetheless granted the UCC's motion to transfer.[23]

Following transfer, this Court foreshadowed that it would rely on the negative opinions it formed during the Acis Bankruptcy in dealing with Mr. Dondero, his former employees, and his affiliated entities.[24] Indeed, *at the very first hearing* before this Court on January 9, 2020, the Court reiterated its many negative opinions.[25] And the Court pointed to actions purportedly taken by Mr. Dondero in the Acis Bankruptcy as "evidence" of a presumed propensity of Mr. Dondero to engage in similar actions in the HCMLP bankruptcy. For that reason, the Court insisted on including language in its order allowing it to hold Mr. Dondero (but no other party) in contempt of court.[26] Notably, at the time of this first hearing, *Mr. Dondero had not filed a single motion or objection to any motion*. Consequently, there was nothing in the record before the Court to justify its specific rulings and comments relating to Mr. Dondero.

C. The Court's Animus Continued To Infect It Decision-Making And Treatment Of Movants

1. The February 19, 2020 Motion to Retain Hearing

Just over a month after the Court's initial hearing in the bankruptcy case, on February 19, 2020, the Court held a hearing on HCMLP's application to retain the law firm Foley Gardere to pursue appeals relating to the Acis Bankruptcy on behalf of Neutra Ltd., a company owned by Mr. Dondero that succeeded to the ownership of Acis. Importantly, during the hearing, former Bankruptcy Judge Russell Nelms—one of the three independent directors appointed to Debtor's Independent Board—testified that, in the Board's business judgment, employment of Foley

[23] *Id.* at 90:15-24.

[24] Shortly after the case was transferred, the United States Trustee likewise relied on the Court's comments and conclusions in the Acis Bankruptcy as the basis for its motion to appoint a Chapter 11 trustee. *See* Bankr. Dkt. No. 271. None of the evidence cited in the Trustee's motion had yet been adduced in HCMLP's bankruptcy proceeding.

[25] Ex. B, January 9, 2020 Hr'g Tr. at 78:23-79:16 (stating, "I can't extract what I learned during the Acis case, it's in my brain," and explaining its opinion that Mr. Dondero acted in a "bad way" in the Acis case).

[26] *Id.* at 80:3-6; *see also id.* at 52:10-25.

Gardere and payment of its legal fees was in the Debtor's best interest.[27] Despite that testimony, the Court *sua sponte* expressed a belief (untethered to evidence) that Mr. Dondero may have somehow used his "powers of persuasion" to unduly influence the Independent Board's business judgment.[28] The Court did not stop there. It went on to comment: "Highland is in bankruptcy because of litigation, litigation, litigation. The past officers and directors and controls' propensity to fight about everything . . . It's about years of litigation coming home to roost. And this appears to be more of the same, potentially."[29] That unsolicited commentary is surprising for two reasons. *First*, again, Mr. Dondero had not yet "fought" anything in the context of the HCMLP proceedings (and indeed, was not even present at the hearing on the Debtor's motion to retain Foley Gardere). *Second*, HCMLP was the *defendant* in the various lawsuits spawning "years of litigation," which the Court nonetheless blamed on "past officers and directors" of HCMLP.[30] Where, as here, the Court has manifested an early distrust of one party and made unsolicited negative comments about the party's practices and intent, federal appellate courts have required recusal.[31]

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[27] Ex. C, February 19, 2020 Hr'g Tr. at 62:6-17.

[28] *Id.* at 177:7-178:3 (emphasizing the Court's "long history" with Mr. Dondero—a history that came entirely from the Acis Bankruptcy). In the same hearing, the Court also suggested that Mr. Dondero could not be "trusted" to "keep his word." *Id.* at 174:11-175:13. When applying the reasonable business judgment standard to Mr. Seery and Debtor management, by contrast, the Court has said it is a very low standard requiring judicial deference. *See* Ex. W, August 4, 2021 Hr'g. Tr. at 77:4-78:20.

[29] Ex. C, Feb. 19, 2020 Hr'g Tr. at 178:4-12.

[30] *See id.* at 177:7-178:17. Again, the *only* pre-petition lawsuit that ended in any sizeable judgment *against HCMLP* was the arbitration award issued against HCMLP in favor of the Redeemer Committee. Further, the Debtor *objected* to proofs of claim filed by the parties litigating or attempting to litigate against HCMLP—including those filed by Acis, UBS, Pat Daugherty, and HarbourVest—arguing that their proofs of claim were unmeritorious. *See* Bankr. Dkt. Nos. 771 (Acis and Terry), 1008 (Daugherty), 906 (HarbourVest), 928 (UBS).

[31] *See Sentis Group, Inc. v. Coral Group, Inc.*, 559 F.3d 888, 904-05 (8th Cir. 2009) (judge's "apparent distrust of Plaintiffs as manifested early in the litigation" were among the reasons that reassignment on remand was appropriate); *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1464-65 (D.C. Cir. 1995) (district judge made "several comments during proceedings which evidenced his distrust of Microsoft's lawyers and his generally poor view of Microsoft's practices" arising out of "other alleged misdeeds," none of which were at issue in the actual case before it).

From that point on, unsurprisingly, HCMLP and its counsel began to leverage the Court's predisposition against Mr. Dondero (*i.e.*, what the Debtor had previously described as the Court's "baggage") for the Debtor's own benefit.[32]

2. The June 30, 2020 CLO Fund Release Hearing

The Court's animus against Movants persisted, and if anything, got worse, from there. In April 2020, CLO Holdco—a non-debtor wholly-owned subsidiary of a charitable Donor-Advised Fund (the "DAF") established by Mr. Dondero, moved to have $2.5 million in funds that indisputably belonged to CLO Holdco released from the registry of the Court.[33] The UCC objected. At a June 2020 hearing, CLO Holdco introduced 16 exhibits supporting its claim to the funds, and the Court admitted that CLO Holdco's lawyer made "perfect arguments" regarding the potential legal ramifications of refusing to release the funds, including that "holding the money in the registry of the Court that a non-debtor asserts is its property" is "tantamount to a prejudgment remedy."[34] Nonetheless, based entirely on arguments made by counsel for the UCC, the Court again concluded that Mr. Dondero was behind the CLO Holdco filing and, therefore, questioned whether it was filed in "good faith," despite the absence of evidence in the record supporting this belief.[35] The Court therefore denied the motion.

3. The July 8, 2020 Exclusivity Hearing

Just over one week later, at a hearing on HCMLP's motion to extend the exclusivity period,

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[32] This is similar in kind to what happened in *Sentis Group, Inc.*, in which the U.S. Court of Appeals for the Eighth Circuit reversed and remanded for reconsideration by a different judge a district court's order dismissing the case as a sanction for perceived discovery misconduct by the plaintiffs. In a case marred by contentious discovery disputes, the Eight Circuit first noted that "defense counsel's goal shifted from conducting effective discovery to fanning the flames of the court's frustration and building a case for sanctions." *Id.* at 891. Ultimately, the Eighth Circuit reversed the sanctions order and held that the district court's statements, in combination with its misconstruction of a prior order and "its apparent distrust of Plaintiffs as manifested early in the litigation" showed a "sufficiently high degree of antagonism to require reassignment of the case on remand." *Id.* at 904-05.

[33] Bankr. Dkt. No. 590.

[34] *See* Ex. D, June 30, 2020 Hr'g Tr. at 85:17-22.

[35] *Id.* at 82:3-11, 85:4-16.

the Court, acting *sua sponte*, directed HCMLP's counsel to investigate Mr. Dondero and certain "Highland affiliates" after allegedly seeing a news article (that was not part of the record) that referenced "Mr. Dondero or Highland affiliates" receiving PPP loans.[36] Notably, neither Mr. Dondero nor the "Highland affiliates" referred to in the article were the property of or controlled by HCMLP. In fact, as HCMLP would later confirm, the PPP loans at issue had nothing whatsoever to do with the HCMLP.[37]

4. The December 16, 2020 And January 26, 2021 CLO Hearings

In keeping with its habit of accusing entities that the Court perceives to be affiliated with Mr. Dondero of acting "bad faith," the Court did so again in December 2020.[38] On December 16, 2020, the Court held a hearing on a motion by various third-party financial advisors and retail funds to prevent HCMLP's liquidation of certain CLO assets (the "Restriction Motion").[39] During the hearing, the Court chastised counsel for the advisors and retail funds for filing the Restriction Motion (*i.e.*, for advocating a good faith position on behalf of their clients), stating that it was "dumbfounded" by the motion, and opining that Mr. Dondero was behind it, notwithstanding that it was filed by separate and distinct legal entities represented by independent counsel.[40] The Court concluded, without any evidentiary basis, that the Restriction Motion was brought for an improper purpose.[41] The Court further declared the Restriction Motion frivolous, "almost Rule 11

[36] *See* Ex. E, July 8, 2020 Hr'g Tr. at 42:10-24.

[37] Ex. F, July 14, 2020 Hr'g Tr. at 53:17-59:3.

[38] The federal courts have repeatedly required recusal or reassignment to a different judge where the sitting judge questions the integrity of one party or their counsel or suggests that their actions constitute "bad faith." *See, e.g.*, *Johnson v. Sawyer*, 120 F.3d 1307, 1334-37 (5th Cir. 1997); *In re U.S.*, 572 F.3d 301, 311-12 (7th Cir. 1999); *U.S. v. Kennedy*, 682 F.2d 244, 258-60 (3d Cir. 2012).

[39] Bankr. Dkt. No. 1522. The basis and context for the motion is described in detail in Movants' Original Recusal Motion, Bankr. Dkt. No. 2061, at pp. 8-16. Notably, the retail funds are registered investment advisors that owe independent fiduciary duties to their investors pursuant to the Investment Advisors Act of 1940.

[40] Ex. J, December 16, 2020 Hr'g Tr. at 63:14-25.

[41] *Id.*

frivolous," notwithstanding that the motion was filed in good faith.[42] The Court then used the hearing to condemn Mr. Dondero on the record.

Yet another display of the Court's bias toward Movants came in the context of this same dispute, several weeks later. On January 26, 2021, the Court held a preliminary injunction hearing in which it considered whether the advisors and retail funds had tortiously interfered with agreements relating to management of the CLOs.[43] It was abundantly clear at the hearing that HCMLP could not make the requisite showing to justify injunctive relief.[44] And the evidence was undisputed that Mr. Dondero did not influence or cause the advisors or retail funds to take any action. Nevertheless, the Court once again turned its focus to Mr. Dondero, warning him that the Court had prohibited him from taking action to interfere with the CLOs. Incredibly, the Court then made the implied finding that Mr. Dondero had caused counsel for the retail funds to take certain actions.[45] The Court further stated that it was "leaning" toward finding Mr. Dondero in contempt of court and threatening to shift the "whole bundle of attorney's fees" to Mr. Dondero in connection with a motion for injunctive relief filed by HCMLP that had nothing to do with him.[46]

5. The Court's Ruling On Movants' Motion For An Examiner

Another concerning thing that has happened at the hands of this Court is the repeated disenfranchisement of Movants from judicial process. For example, the Court has repeatedly wielded its scheduling powers as a sword against Movants, often preventing any real consideration

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[42] *See id.* at 64:1-7. The statutory basis for the requested relief was section 363(c)(1) or section 1108 of the Bankruptcy Code, which provide that the debtor-in-possession may engage in ordinary course business "unless the court orders otherwise." That was all that the Advisors and Retail Funds asked the Court to do.

[43] *See* Adv. Proc. No. 21-03000-sgj, Dkt. 1; Ex. L, January 26, 2021 Hr'g Tr.

[44] HCMLP's failures in this regard are detailed in Movants' Original Recusal Motion, Bankr. Dkt. No. 2016, at pp. 13-16.

[45] This finding was in direct contravention of the Court's statements just one week earlier, where it implied that Mr. Dondero lacked such control and prohibited Mr. Dondero from testifying that he exercised no control of the advisors, the retail funds, or their counsel. Ex. K, January 8, 2021 Hr'g Tr. at 119:6-122:25.

[46] Ex. L, Jan. 26, 2021 Hr'g Tr. at 251:24-252:5.

of legitimate motions filed by Movants by ensuring that hearings on those motions happen too late. In one such instance, on January 14, 2021, Dugaboy and Get Good (the "Trusts") requested the Court direct the appointment of a neutral third-party examiner pursuant to 11 U.S.C. § 1104(c) as a less costly means to resolve various issues that had arisen in the HCMLP bankruptcy (the "Examiner Motion").[47] The Trusts sought the appointment of an examiner to address, among other things (i) the issues raised by the advisors and the retail funds in the Restriction Motion, (ii) various objections to the proposed plan of reorganization raised by the advisors, the retail funds, and the United States Trustee (discussed below), and (iii) concerns expressed by the Court about costs and expenses incurred in the context of the bankruptcy proceedings.[48]

Given the timing of the Examiner Motion relative to the expected date of the hearing on Debtor's Fifth Amended Plan of Reorganization (as Modified) (the "Plan"), the Trusts asked the Court to consider the Motion on an "emergency" basis to avoid interference with the Plan.[49] Despite this request (and despite the Court's willingness to hear motions filed by HCMLP on an emergency basis), the Court set the hearing on a date long after the expected hearing on Plan confirmation, thereby ensuring that the Motion would be rendered moot.

D. The Court Confirms A "Monetization Plan" Over Movants' Objections

The Court's biased decision-making tethered to its preexisting negative views of Mr. Dondero persisted through Plan confirmation.

On February 8, 2021, the Court announced its oral ruling regarding the Plan, in which the Court referred inexplicably and extensively to proceedings in the Acis Bankruptcy.[50] In its ruling,

[47] Bankr. Dkt. No. 1752.
[48] *Id.*
[49] *Id.*
[50] Ex. M, February 8, 2021 Hr'g Tr. at 15:15-16:5.

the Court summarily rejected all of the Plan objections lodged by Movants, decreeing them as filed in bad faith.[51] Next, even though it had "not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants per se," the Court deemed Mr. Dondero and other Movants "vexatious litigants."[52] The Court's ruling failed to comport with its own iteration of the prerequisites to declaring a litigant vexatious.[53] Indeed, the Fifth Circuit recently explained that the Bankruptcy Court failed to follow proper procedures to designate Mr. Dondero vexatious.[54]

On February 22, 2021, the Court issued its Confirmation Order. Against the backdrop discussed herein, it is perhaps not surprising that the Court again took the opportunity to criticize and accuse Mr. Dondero and Movants:

- "Naturally, [the independent board members] were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically. Based on the record of this case and the proceedings in the Acis chapter 11 case, it seemed as though everything always ended in litigation at Highland."[55]

- "The Debtor's Chief Executive Officer, James P. Seery, credibly testified at the Confirmation Hearing that the Debtor was 'run at a deficit for a long time and then would sell assets or defer employee compensation to cover its deficits.' The Bankruptcy Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses incurred by the Debtor due to its culture of litigation . . . ."[56]

- "[T]he Bankruptcy Court questions the good faith of Mr. Dondero's and the Dondero Related Parties' objections. In fact, the Bankruptcy Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors."[57]

- "Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds

[51] *Id.* at 20:17-20.

[52] *Id.* at 46:20-25, 45:12-14.

[53] *See id.* at 46:6-15 (describing factors to be considered prior to deeming a litigant vexatious).

[54] *See In the Matter of Highland Capital Mgmt., L.P.*, 48 F.4th 419 n.19 (5th Cir. 2022) (citing *In re Carroll*, 850 F.3d 811, 815 (5th Cir. 2017) (per curiam)). The problems with the Court's ruling regarding vexatiousness are further described in detail in Movants' Original Recusal Motion, Bankr. Dkt. No. 2061 at pp. 21-27.

[55] Confirmation Order, Bankr. Dkt. No. 1943, ¶ 14.

[56] *Id.*, ¶ 7.

[57] *Id.*, ¶ 17.

have independent board members that run the Funds, but the Bankruptcy Court was not 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."[58]

- In discrediting the objections of various NexBank entities, the Court likewise surmised that "Mr. Dondero appears to be in control of these entities as well."[59]

- "[T]he Bankruptcy Court has allowed . . . these objectors to fully present arguments and evidence in opposition to confirmation, even though . . . the Bankruptcy Court questions their good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero."[60]

Again, the Bankruptcy Court offered up no specific evidence of any bad faith on behalf of Mr. Dondero or the other "objectors." Nor did the Court offer any evidence (or explanation) of why it had "good reason to believe" that Mr. Dondero and the other objectors were seeking to do anything other than protect their legitimate economic interests.[61] In short, an objective observer reading the language of the Confirmation Order would have reason to question this Court's impartiality.

E. The Court's Post-Confirmation Decisions Have Continued To Give The Appearance Of Bias

Since confirmation, the Court has continued to act in a biased manner.

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[58] *Id.*, ¶ 18. Notably, at the time of these comments, there was no evidence of record even suggesting that the Funds were managed by anything other than independent boards, and there was no evidence—other than the Court's own conjecture—that Mr. Post's resignation from his position at HCMLP had anything to do with Mr. Dondero. Nor is it clear how Mr. Post's mere association with Mr. Dondero could possibly impact his competency or credibility to testify about the management of various Funds that he personally came into contact with during "12 years of service" for the Debtor.

[59] *Id.*

[60] *Id.*, ¶ 19.

[61] Notably, the Fifth Circuit previously has admonished this Court for making findings and decisions based on mere "suspicion" and "indirect inference" rather than evidence. In *The Cadle Co. v. Moore*, the Fifth Circuit reversed an order of dismissal issued by this court as a sanction for "abuse of judicial process," finding that the "bankruptcy court's mere suspicions do not add up to clear and convincing evidence." 739 F.3d 724, 731 (5th Cir. 2014). In addition, the Fifth Circuit emphasized that it was "troubled by the bankruptcy court's use of indirect inferences" to support its decision. *Id.* at 731 n.11.

1. The Court's August 2021 Sanctions Order

Perhaps one of the most telling orders issued by the Court since the Original Recusal Motion was filed is the Court's order sanctioning various entities and individuals because two entities—the DAF and CLO Holdco—in consultation with legal counsel, decided to file a lawsuit against HCMLP in the Northern District of Texas. Specifically, on April 12, 2021, a complaint was filed against HCMLP and two HCMLP-controlled entities (Highland HCF Advisor, Ltd. ("HCFA") and Highland CLO Funding, Ltd. ("HCLOF")) alleging, *inter alia*, impropriety by the Debtor, HCFA, and HCLOF in brokering the sale of CLO interests held by HarbourVest[62] to the Debtor, without prior notice to other CLO investors and without respecting those investors' right of first refusal.[63] Shortly after filing the complaint, the DAF and CLO Holdco filed a motion for leave to amend the complaint to add Mr. Seery as a defendant, based on his role brokering the HarbourVest transaction.[64] Within days of these filings, HCMLP filed a motion seeking an order holding the DAF, CLO Holdco, and "the persons who authorized the DAF and CLO Holdco . . . to file the Seery motion," including their attorneys, Sbaiti & Company, PLLC, in civil contempt.[65]

The Court held an evidentiary hearing on HCLMP's sanctions motion on June 8, 2021. At that hearing, Mark Patrick, who was then serving as the DAF's general manager, testified that he hired Sbaiti & Co. and that he authorized the DAF to file the lawsuit and the motion to add Mr.

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[62] "HarbourVest" refers to HarbourVest Dover Street IX Investment, L.P., HarbourVest 2017 Global AIF, L.P., HarbourVest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and HarbourVest Skew Base AIF, L.P.

[63] *Charitable DAF Fund, L.P. v. Highland Capital Management, L.P.*, Case No. 21-cv-00842 (N.D. Tex.) ("DAF Action").

[64] DAF Action, Dkt. No. 6.

[65] Bankr. Dkt. No. 2247. Specifically, HCMLP argued that the lawsuit and the motion seeking to add Mr. Seery as a defendant violated the Court's Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course [Dkt. 339] and as well as its Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr. as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020 [Dkt. 854]. *Id.* at 2.

Seery as a defendant.[66] Mr. Dondero testified that, while he provided certain information to the DAF and Sbaiti & Co. in relation to the lawsuit, he was not involved at all in authorizing or preparing the motion to add Mr. Seery (the main reason for the motion for civil contempt).[67]

Despite this testimony and the absence of any contravening testimony, the Court concluded that "Mr. Dondero sparked this fire" and that the evidence "was clear and convincing that Mr. Dondero encouraged Mr. Patrick to do something wrong, and Mr. Patrick basically abdicated responsibility to Mr. Dondero."[68] The Court then concluded that the lawsuit filed by the DAF and CLO Holdco was, "***from this Court's estimation, wholly frivolous.***"[69] In fashioning its sanctions award, the Court took into consideration the invoices submitted by HCMLP's counsel reflecting what the firm actually incurred in connection with the civil contempt motion ($38,796.50), and then compounded the sanction by nearly *seven times* that amount. In the end, the Court ordered the DAF, CLO Holdco, Sbaiti & Co. (including Mazin Sbaiti and Jonathan Bridges individually), Mark Patrick, and Mr. Dondero to pay $239,655 in sanctions to HCMLP.[70] Worse still, the Court tacked on a monetary sanction of $100,000 to be paid by anyone that filed any appeal.[71]

In short, the Court ignored the undisputed testimony of record to find "clear and convincing evidence" of Mr. Dondero's responsibility for the motion to name Mr. Seery as a defendant, concocted a way to saddle Mr. Dondero and others with a multi-hundred thousand dollar liability, and prophylactically sanctioned any effort to invoke a legal appellate process.[72]

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[66] Bankr. Dkt. No. 2660 at 19.

[67] *Id.* at 21.

[68] *Id.*

[69] *Id.* at 26 (emphasis added).

[70] *See id.* at 28-30.

[71] *Id.* at 30. The District Court subsequently confirmed the sanctions award. Mr. Dondero intends to appeal.

[72] The District Court recently found that the claims against the Debtor with respect to the Debtor's dealings with HarbourVest *had merit*—despite the Bankruptcy Court's lengthy and opinionated vocalizations to the contrary. *Compare The Charitable DAF Fund, L.P. v. Highland Capital Mgmt., L.P.*, Adv. Proc. No. 3:21-cv-3129-B, Dkt. No. 28, *with* Bankr. Dkt. 2247. Judge Boyle reversed the Bankruptcy Court's dismissal of the claims against the Debtor

2. The Court's Order To Appear

The Court has further targeted Mr. Dondero (as well as his sister Nancy Dondero) by requiring their presence at all hearings, regardless of whether their presence is needed. In ordering Mr. Dondero's presence, the Court explained that Mr. Dondero's participation in the bankruptcy and related proceedings was "taking up time."[73] By the Court's own admission, this is a departure from its usual approach, where a party would be expected to attend hearings only if they are "taking a position" on the issue at hand.[74]

At the same hearing (which was to decide a motion to compel the Debtor's deposition testimony), the Court openly speculated that there was an ulterior motive of "antagonism" behind Mr. Dondero's good-faith litigation conduct.[75] The Court's statements indicate that, when Mr. Dondero engages in routine litigation steps, like making discovery motions, the Court will treat such actions as nefarious "antagonistic move[s]" rather than ordinary invocation of legal process.

3. The Court's September 12, 2022 Withdrawal of Claim Hearing

And in the most recent example of the Court's biased decision-making, on September 12, 2022, the Court held a hearing on several motions, including a motion by Movant NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC ("HCRE") to withdraw its proof of claim.[76] In that hearing, HCRE sought the Court's approval to withdraw a disputed proof of claim relating to HCRE's asserted interest in a fund called SE Multifamily Holdings.[77] Counsel for HCMLP

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on the basis of collateral estoppel, noting that the Bankruptcy Court had raised collateral estoppel *sua sponte*—neither party had raised collateral estoppel below, nor even briefed the issue—and holding that the elements of collateral estoppel *could not be met* under the circumstances. *See* Adv. Proc. No. 3:21-cv-3129-B, Dkt. 28 at 7-13.

[73] Ex. P, May 20, 2021 Hr'g Tr. at 20:19-21:14.

[74] *Id.*; *see also id.* at 21:1-8.

[75] *Id.* at 34:3-9 (criticizing Mr. Dondero for engaging in "a fight with Mr. Seery" and commenting that "the motion to compel names him by name. It just — it feels like another antagonistic move").

[76] Ex. V, Sept. 12, 2022 Hr'g Tr.

[77] Bankr. Dkt. No. 3443 at 3.

objected to HCRE's withdrawal in the absence of certain concessions by HCRE, including a stipulation that HCRE would not contest HCMLP's 46.6% interest in SE Multifamily Holdings and that HCRE would waive any right to appeal a final order on its withdrawn proof of claim.[78] In what can only be described as an incredible exchange, the Court first asked HCRE's counsel, Bill Gameros ("Mr. Gameros"), if HCRE would consent to those conditions. Mr. Gameros agreed to both.[79] But that did not satisfy the Court. The Court instead demanded that a "client representative" of HCRE appear and testify that the conditions were acceptable. At that point, DC Sauter, in-house counsel for Mr. Dondero, appeared and confirmed that HCRE would agree to the conditions for withdrawal of its proof of claim.[80] Still, the Court was not satisfied:

> THE COURT: All right. Well, it sounds like hearsay to me. I don't know – Counsel, let me have you both respond. You know, *I worry about this will fall apart the minute Mr. Dondero is instructing a lawyer*, I never agreed to that. I mean I just don't know. This is highly unusual.[81]

When Mr. Sauter explained that Mr. Dondero felt more comfortable having a lawyer make legal representations on the record, the Court responded: "I mean I'm not sure I care what you say, no offense. I don't think I have a person with clear authority here."[82] The Court then rebuffed Mr. Gameros's suggestion he could make binding representations on behalf of his client: "Mr. Gameros, come on. You know this is the client's decision to make. Okay. I don't have a client representative."[83]

At that point, Mr. Gameros offered to get Mr. Dondero on the phone to give the exact same

[78] Ex. V, Sept. 12, 2022 Hr'g Tr. at 32:22-34:2.
[79] *Id.*
[80] *Id.* at 34:3-20, 35:36.
[81] *Id.* at 36:4-8 (emphasis added).
[82] *Id.* at 36:12-37:9.
[83] *Id.* at 37:7-22.

representation that Mr. Gameros and Mr. Sauter had already given. Before taking Mr. Dondero's sworn testimony, the Court rebuffed him for failing to have access to video, even though he no previous notice he would have to give testimony at the hearing.[84] Mr. Dondero testified that HCRE would agree to all of the Debtor's conditions to withdrawal of the proof of claim.[85] Even then, the Court told Mr. Gameros: "*I mean he needs to be asked every which way from Sunday whether he's waiving the right* to challenge Highland's 46.06 interest *from now until eternity, okay*. That's basically, you know, we either have that agreement or we'll just have a trial.[86] Mr. Dondero then again agreed to the entry of an order denying HCRE's proof of claim with prejudice and agreed not to challenge HCMLP's equity ownership in SE Multifamily Holdings.[87]

After all of that, the Court stated: "[I]t feels like we had a little bit of reluctance to say it as forcefully as we would need to have it said to avoid relitigation" and then denied HCRE's motion to withdraw its proof of claim.[88] In doing so, the Court found that HCRE had acted with "undue vexatiousness" in pursuing the proof of claim merely because HCMLP opposed the claim and had spent "hundreds of thousands of dollars" doing so.[89] The Court therefore ordered additional depositions to take place and the parties to attend trial. And as a parting shot, the Court asked the U.S. Trustee to investigate HCRE and Mr. Dondero (who signed the proof of claim):

> I don't mean to be alarming, but I want it run by the U.S. Trustee because, you know, I've heard some things that have troubled me about the, you know, lack of good faith with regard to the proof of claim and, you know alleged gamesmanship. And, you know, I talked earlier about this goes to the integrity of the system, you know, filing a proof of claim under penalty of perjury. . . . It's just something uncomfortable going on in my brain about, you know, again a proof of claim being on file two, almost two and a half years and then, you know, okay, never mind, okay, I agree to never mind as long as you agree to

[84] *Id.* at 38:24-39:3, 39:8-24.
[85] *Id.* at 40:9-17, 41:10-22, 42:13-25.
[86] *Id.* at 42:21-25 (emphasis added).
[87] *Id.* at 43:23-44:6.
[88] *Id.* at 54:6-15.
[89] *Id.* at 52:4-53:14.

> XYZ. . . . I just know if there are quid pro quos I feel like, you know, maybe I need to have the U.S. Trustee, not per se signing off on any agreed order but at least kind of looking at it . . . .[90]

The suggestion that the U.S. Trustee investigate supposed "gamesmanship" by HCRE and Mr. Dondero and whether *they* had given quid pro quos is particularly concerning, where the entire record of the hearing makes clear that it was *HCMLP and its counsel* asking for quid pro quos in return for agreeing to the withdrawal of HCRE's proof of claim.

IV. THE COURT SHOULD IMMEDIATELY RECUSE ITSELF

Application of the appropriate standard for recusal leaves little doubt that recusal is required in this case. Under Section 28 U.S.C. § 455, a judge "*shall* disqualify [her]self in any proceeding in which h[er] impartiality may reasonably be questioned."[91] A judge "*shall* also disqualify [her]self" if one of several enumerated circumstances exist, including if the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[92] The provisions of section 455 are mandatory and afford separate, though overlapping, grounds for recusal.[93]

Under section 455(a), recusal is required whenever a judge's partiality might reasonably be questioned, even if the judge does not have actual personal bias or prejudice.[94] The test is not whether the judge believes he or she is capable of impartiality and not whether the judge possesses actual bias.[95] Instead, 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.[96] As Congress

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[90] *Id.* at 57:18-59:4.

[91] 28 U.S.C. § 455(a) (emphasis added).

[92] 28 U.S.C. § 455(b)(1) (emphasis added).

[93] *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).

[94] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (2001); *Andrade*, 338 F.3d at 454.

[95] *See Burke v. Regolado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted); *Liljeberg*, 486 U.S. at 805.

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

explained when enacting section 455, litigants "ought not have to face a judge where there is a reasonable question of impartiality."[97] Thus, this statutory provision was "designed to promote public confidence in the impartiality of the judicial process."[98] Accordingly, recusal is warranted where a judge's comments during proceedings would "cause a reasonable observer to question whether [the judge] 'would have difficulty putting h[er] previous views and findings aside.'"[99]

With respect to 28 U.S.C. § 455(b), although "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," the Supreme Court has recognized that predispositions developed during the course of a trial can suffice to demonstrate the requisite bias or prejudice.[100] In this regard, the words "bias" and "prejudice" mean a disposition or opinion that is somehow wrongful or inappropriate, either because: (a) it is undeserved; (b) it rests upon knowledge that the holder of the opinion ought not to possess; or (c) it is excessive in degree.[101] Notably, a court's consideration of an extrajudicial source of information is a factor in favor of finding either an appearance of partiality under section 455(a) or bias or prejudice under section 455(b)(1).[102] Moreover, "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," may evidence bias if the opinions reveal that they "derive from an extrajudicial source; and ***they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible***."[103]

In short, the Movants, like all other litigants, are entitled to a full and fair opportunity to

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

[98] *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (quoting H.R. Rep. No. 1453); *Liljeberg*, 486 U.S. at 859-60.

[99] *Microsoft Corp.*, 56 F.3d at 1465 (quoting *United States v. Torkington,* 874 F.2d 1441, 1447 (11th Cir.1989)).

[100] *Liteky v. U.S.*, 510 U.S. 540, 555 (1994).

[101] *Id.* at 554.

[102] *Bell v. Johnson*, 404 F.3d 997, 1004 (6th Cir. 2005) (citations omitted). Importantly, consideration of an extrajudicial source is not necessary to a finding of bias or prejudice. *Liteky*, 510 U.S. at 551, 554-55.

[103] *Liteky*, 510 U.S. at 555(citation omitted) (emphasis added).

make their case in an impartial forum—regardless of their history with that forum.[104] Indeed, "fundamental to the judiciary is the public's confidence in the impartiality of [its] judges and the proceedings over which they preside."[105] Thus, "justice must satisfy the appearance of justice."[106] For this reason, the Fifth Circuit has held that "[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal."[107]

In this case, the balance can tip only in one direction because recusal is appropriate under both prongs of 28 U.S.C. § 455. At a minimum, the Court's statements and actions in this case would cause any objective observer to question the Court's impartiality, which mandates recusal.[108] As set forth above, the Court has made antagonistic statements to and about Movants and has manifested an "apparent distrust" of Movants since "early in the litigation."[109] Indeed, the Court deemed Mr. Dondero a bad actor at the very first hearing it held in the case, based entirely on opinions formed during the Acis Bankruptcy.[110] At that first hearing, the Court singled Mr. Dondero out for potential future sanctions before he had taken any action in this case. Just one month later, the Court accused Mr. Dondero of misconduct at a hearing that he did not attend in connection with a motion that he did not file.[111] The Court's subsequently repeatedly accused Movants and their counsel of acting in "bad faith," repeatedly called Mr. Dondero "vexatious" or "litigious" when he acted in a legally justifiable manner, and generally manifested a distrust of

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

[105] *Id.*

[106] *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

[107] *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997).

[108] *Liljeberg*, 486 U.S. at 850; *Andrade*, 338 F.3d at 454.

[109] *Sentis Group, Inc.*, 559 F.3d at 904-05 (reassigning case to a new judge on remand for engaging in similar behavior).

[110] *See* Section III.B, *supra* at pp. 6-7; *see also* Original Recusal Motion, Bankr. Dkt. No. 2061 at pp. 5-6.

[111] *See* Section III.C.1, *supra* at pp. 7-8.

Movants and their counsel. Courts repeatedly have found recusal appropriate in circumstances that mirror these.[112]

But in addition to *appearing* biased, which itself would mandate recusal, the Court in this case has *acted* in a manner that demonstrates such a "high degree of favoritism or antagonism as to make fair judgment impossible."[113] Although the record is replete with examples, by way of summary, the Court has (1) admitted that the negative opinions about Mr. Dondero formed during the Acis Bankruptcy cannot be excised from the Court's mind;[114] (2) made repeated negative statements about Mr. Dondero and entities that the Court perceives be affiliated with him in connection with the Court's rulings;[115] (3) repeatedly targeted Mr. Dondero with threats of contempt or sanctions, singled Mr. Dondero out for disparate treatment, and and questioned the good faith of Movants and their counsel for defending lawsuits and motions and/or asserting valid

[112] *See, e.g.*, *In re U.S.*, 572 F.3d at 311-12 (reversing district judge's order denying motion to recuse and ordering that "all orders entered by the Judge after the motion for recusal was filed . . . be vacated" where judge questioned one party's decision to pursue a course of action and made comments that were critical of the party's position); *Kennedy*, 682 F.2d at 258-60 (ordering reassignment of the case to a different judge on remand where judge openly questioned the integrity of one party's counsel, suggested he was proceeding in "bad faith," and called certain decisions made by him "suspicious"); *Johnson*, 120 F.3d at 1334-37 (ordering reassignment of the case to a different judge on remand where judge questioned in open court "the conduct of the lawyers" for one party, and the judge questioned one party's "good faith"); *Microsoft Corp.*, 56 F.3d at 1465 (where judge's comments "evidenced his distrust of [one party's] lawyers and his generally poor view of [one party's] practices," a reasonable observer could question whether judge "would have difficulty putting his previous views and findings aside," requiring recusal on remand).

[113] *Liteky*, 510 U.S. at 555.

[114] *See* Section III.C., *supra* at pp. 6-7 & n.25.

[115] *See* Sections III.B, *supra* at pp. 6-8; Section III.C.4, *supra* at p. 11; Section III.E.1, *supra* at pp. 16-17; Section III.E.2, *supra* at pp. 17-18; Section III.E.3, *supra* at pp. 19-20. In addition, the Court has repeatedly described Mr. Dondero as "vexatious" and "litigious" as a justification for its actions. *See* Ex. G, Sept. 23, 2020 Hr'g Tr. at 51:14; Ex. M, Feb. 8, 2021 Hr'g Tr. at 17:15, 37:18, 40:21, 45:13, 46:21; Ex. N, Feb. 23, 2021 Hr'g Tr. at 232:18; Ex. S, June 25, 2021 Hr'g Tr. at 109:21. The Court also has repeatedly surmised that the actions of Mr. Dondero, Movants, and their attorneys are in "bad faith" or "frivolous." *See* Ex. J, Dec. 16, 2020 Hr'g Tr. at 64:1-5; Ex. L, Jan. 26, 2021 Hr'g Tr. at 254:4; Ex. N, Feb. 23, 2021 Hr'g Tr. at 233:18; Ex. O, May 10, 2021 Hr'g Tr. at 43:3; Ex. R, June 10, 2021 Hr'g Tr. at 87:6. And the Court has repeatedly referred to Mr. Dondero and his companies, including Movants, in a pejorative manner, as a "Byzantine complex," "Byzantine empire" and "web." *See* Confirmation Order, ¶ 6; Ex. D, June 30, 2020 Hr'g Tr. at 80:17-18, 86:19, 87:5-8; Ex. E, July 8, 2020 Hr'g Tr. at 46:11; Ex. M, Feb. 8, 2021 Hr'g Tr. at 7:15; Ex. Q, June 8, 2021 Hr'g Tr. at 294:3. And the Court has singled out Mr. Dondero, his affiliates (including Movants), and his attorneys for disparate treatment at every possible opportunity. *See* Ex. H, Oct. 21, 2020 Hr'g Tr. at 10:21-24, 34:1-5, 36:1-14; Ex. I, Dec. 10, 2020 Hr'g Tr. at 24:19-25; Ex. N, Feb. 23, 2021 Hr'g Tr. at 232:7-234:19; Ex. T, Mar. 1, 2022 Hr'g Tr. at 83:12-23.

legal positions;[116] (5) sanctioned Mr. Dondero in connection with a motion that he and others testified he had no role in filing or responsibility for authorizing;[117] (6) prophylactically sanctioned Mr. Dondero for asserting his lawful appellate rights;[118] (7) concluded, without supporting evidence, that any entity the Court deems connected to Mr. Dondero is essentially no more than a tool of Mr. Dondero;[119] (8) disregarded the testimony of any witness with a connection to Mr. Dondero as per se less credible, which includes attorneys and persons who owe fiduciary duties and ethical obligations;[120] and (9) ruled against Mr. Dondero and the Movants at every possible opportunity, regardless of the evidence and the testimony before the Court. Each of these examples alone would mandate recusal, but cumulatively they leave no doubt that the Court's antagonism for Movants goes far beyond is acceptable and makes fair judgment impossible.

Moreover, contrary to the Court's prior suggestion that any motion to recuse filed by Movants is untimely, there is a very real and present reason to seek recusal even now.[121] As explained above, the Court continues to preside over the bankruptcy proceedings, acted in a manner that was very clearly partial less than two weeks ago, and continues to preside over no less than nine adversary proceedings. Where, as here, the Court will be called upon to issue future rulings affecting Movants, a motion to recuse is timely.[122]

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[116] *See, e.g.*, Section III.C.2, *supra* at p. 9; Section III.C.4, *supra* at pp. 10-11; Section III.D., *supra* at p. 14 & nn.59, 62; Section III.E.2, *supra* at pp. 17-18.

[117] *See* Section III.E.1, *supra* at pp. 15-17.

[118] *See id.*

[119] *See* Section III.C.4, *supra* at pp. 10-11.

[120] *See, e.g.*, Section III.D, *supra* at pp. 13-14; Section III.E.3 at pp. 19-20.

[121] The sole case cited by the Court for this proposition—*Davies v. C.I.R.*, 68 F.3d 1129 (9th Cir. 1995)—is inapposite because the basis for the recusal motion was *one* event —a pretrial disclosure by the judge—which occurred eight months prior to the petitioners' motion to recuse. In stark contrast, the Court's bias in this case has been pervasive and consistent throughout the ongoing proceedings and continues to this day.

[122] Indeed, various courts have ordered recusal even on remand, after the district judge has presided over the action through pre-trial proceedings and trial. *See, e.g.*, *Johnson*, 120 F.3d at 1334 (recusal after trial and explaining that "the loss of efficiency and economy pales in comparison" to "the necessity to preserve the appearance of impartiality, fairness, and justice" on remand); *Kennedy*, 682 F.2d 259-60; *Sentis Group*. 559 F.3d at 905.

V. CONCLUSION

Litigants before the federal bankruptcy courts should be able to expect fair treatment, such that they may obtain justice, exercise remedies, and freely appeal adverse decisions, whatever the judge's personal opinions of the litigants. That is not what has happened in the proceedings before this Court, which is precisely why federal statute affords litigants the tool of recusal. This Court is evidently biased, cannot act in a just manner with respect to the Movants, and should recuse itself and allow all parties the fair day in court that the Constitution requires. Movants respectfully request that their Motion be granted. In the alternative, Movants hereby request that the Court make clear that any order denying recusal is final so that Movants may appeal the Court's order to the Northern District of Texas.

Dated: October 17, 2022

Respectfully submitted,

CRAWFORD, WISHNEW & LANG PLLC

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 17, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT 5

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Debtor.	Chapter 11 Case No. 19-34054 (SGJ) 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, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S APPENDIX TO MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

APPENDIX TO MEMORANDUM OF LAW IN SUPPORT OF AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC (collectively, "Movants") file this Appendix to Memorandum of Law in Support of Amended Renewed Motion to Recuse Pursuant to 28 U.S.C § 455:

Exhibit	Description	Appendix Page No.
A	December 3, 2019, Hearing Transcript	APP. 0001 – APP. 0010
B	January 9, 2020, Hearing Transcript	APP. 0011 – APP. 0021
C	February 19, 2020, Hearing Transcript	APP. 0022 – APP. 0034
D	June 30, 2020, Hearing Transcript	APP. 0035 – APP. 0053

W	August 4, 2021, Hearing Transcript	APP. 0240 – APP. 0246

Dated: October 17, 2022

Respectfully submitted,

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Attorneys for Movants

CERTIFICATE OF SERVICE

The undersigned certifies that on October 17, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT A

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

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

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

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

However -- Your Honor pointed to this at the beginning, in mentioning comments about forum-shopping -- 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.

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

appoint a trustee after this hearing. The motion has not yet been filed, Your Honor, because they want Judge Jernigan to rule on that motion. And it's not because she's familiar with this debtor's business, this debtor's assets, or this debtor's liabilities, because she generally is not. 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.

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

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

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

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

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

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

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

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

think it highlights the weakness of their argument.

It is clear that the Delaware venue is proper, and 1408 says the places where a Chapter 11 debtor can file the case. As the vast majority of debtors who file cases in this district, the debtor filed here because it was domiciled in Delaware. It is a Delaware LP. But it goes further than that. 99.94 percent of its LP interests are owned by Delaware entities. And the general partner, Strand Advisors, is a Delaware general partner.

While many cases, Your Honor, before this court, rely on the domicile of one affiliate to bring other non-Delaware related affiliates before the court, that's not the case here. All you have, virtually, are Delaware entities, through the ownership structure.

As I will also discuss in a few moments, Your Honor, domicile is not the only connection that this debtor has to this district, as significant litigation matters involving the debtor, including those commenced by committee members, that was the catalyst to the filing, are pending in Delaware. Accordingly, the committee acknowledges, as they must, that Delaware is, of course, a proper venue.

However, they rely on 1412 which sets forth the standard -- test that the movant has to meet in order to transfer venue, either for the convenience of the parties or the interest of the justice.

willingness to hire Delaware Counsel.

The last argument --

THE COURT: Even when you do have mom and -- again, to comment on reality, even when you do have mom-and-pop creditors in businesses that are very locally focused, general practice today is to make their claims irrelevant, in that to the extent they have avoidance claims, they're paid on the first day. Their real concern is whether the business will continue or not.

Now, it's certainly true that pension claims are important, and proofs of claim are important. But we have many -- all courts have many procedures in place to ensure that those types of creditors can participate without having to go to the courthouse.

MR. POMERANTZ: Yes. So, Your Honor, Judge Gross also mentioned that in the Restaurants Acquisition case, which was a Texas-based --

THE COURT: He's a smart guy.

MR. POMERANTZ: We'll be sorry to see him go, Your Honor.

THE COURT: Yeah, absolutely.

MR. POMERANTZ: Which was a Texas-based restaurant chain that had more of a local flair. But he made the comments Your Honor made.

The last argument the committee makes is that Texas is

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

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

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

THE COURT: 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.

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

familiarity with the type of business -- if I wasn't speaking to Your Honor or your brethren or many other judges around the country, I'd say well, maybe there are certain judges who haven't dealt with large financial services company, may not know what a CLO, may not know what a hedge fund is or private equity fund is. I'm very confident that Your Honor has had many cases with sophisticated financial instruments, likely CLO obligations, so that Your Honor not only has a good base of knowledge that would give you the same base of knowledge that Judge Jernigan has, but as we've also found, you are a fairly quick study and that I have no doubt that you could come up-to-speed without very little effort.

So their argument is a grossly overstated interpretation of what the Acis case was about and that what was learned in that case has any relevance. As a part -- as a result of the Acis plan confirmation, Acis is no longer part of the debtor's organizational structure. The debtor owns no equity in Acis. And the debtor no longer provides any advisory services to Acis.

We admit that Judge Jernigan conducted many hearings, and she issued several lengthy opinions, and she heard from a variety of witnesses. And I'm sure Your Honor -- if Your Honor has not -- Your Honor might read the opinions that she wrote that are attached to the exhibits, the plan confirmation opinion, the arbitration opinion, the involuntary opinion; and

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 B

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	January 9, 2020
	)	9:30 a.m. Docket
Debtor.	)	
	)	DEBTOR'S MOTION TO COMPROMISE
	)	CONTROVERSY WITH OFFICIAL
	)	COMMITTEE OF UNSECURED
	)	CREDITORS [281]

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

APPEARANCES:

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For the Debtors:	Melissa S. Hayward Zachery Z. Annable HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104

MS. LAMBERT: Well, I mean, either that or we need to clear the room.

THE COURT: I've read the arbitration award.

MS. LAMBERT: Right.

THE COURT: It's in my brain.

MS. LAMBERT: Right. Okay.

THE COURT: Uh-huh.

MS. LAMBERT: And so one of the arguments here today is that the U.S. Trustee is representing the SEC and representing other Government agencies and things. No. Obviously, that is not the U.S. Trustee --

THE COURT: I didn't hear that.

MS. LAMBERT: Okay. The -- one of the positions has been, in the papers, is, well, that we don't have standing to raise their issues. And that's true.

THE COURT: Okay.

MS. LAMBERT: But the problem is that the U.S. Trustee has been constrained from discussing those issues with the SEC. The arbitration award is very relevant to the SEC's oversight. I anticipate the evidence today will be that the SEC, after the financial crisis of 2008, imposed restrictions on this Debtor on breach of fiduciary duty issues. I anticipate that the arbitration findings would be very relevant to whether those issues are ongoing or not.

THE COURT: Okay. Let me weigh in. I view the legal

standard that this Court has to weigh today as being: Is the Debtor proposing something that is reflective of sound business judgment, reasonable business judgment? And to the extent this is a compromise of controversies with the Committee, is this fair and equitable and in the best interest of the estate?

And as Mr. Pomerantz has said, you know, a lot of this maybe doesn't even need Court approval. But to the extent there are aspects of this that are appropriate to seek Court approval on, you know, this is my task. I have to look at what's presented, and is this reflective of sound business judgment? Is this fair and equitable? Is it in the best interest?

So, assuming there are tons of bad facts here reflected in the arbitration award, reflected in other evidence, bad facts that might justify a trustee, a Chapter 11 trustee, is this nevertheless, what's proposed today, a reasonable compromise of, you know, the trustee arguments the Committee could make or, you know, is this a reasonable framework for going forward? Okay?

So I guess what I'm saying is I'm confused about, you know, do I need to look at the arbitration award? Do we need to have evidence of all of that? I can assume that there are terrible facts out there that might justify a trustee, but I'm looking at what's proposed. Is this a fair and equitable way

to resolve the disputes? Is it sound business judgment? Frankly, is it a pragmatic solution here to preserve value? So that's the legal standard I have in my mind here.

MS. LAMBERT: Yes, Your Honor.

THE COURT: Okay.

MS. LAMBERT: The standard is whether it is fair and equitable to resolve the issues in the Chapter 11 trustee motion, and it is the U.S. Trustee's position that they are not resolved by this. And how are they not resolved? Number one, they're not resolved because the problems that led to the breach of fiduciary duty issues and findings are more pervasive, both based on this Court' finding in the *Acis* case and in the arbitration court's finding in Mr. Dondero. Other officers are implicated.

THE COURT: But how --

MS. LAMBERT: Other employees are implicated.

THE COURT: Okay. I feel like maybe we're talking at each other, not getting each other. I've got a proposed solution here to totally change the playing field, if you will. Bring in incredibly qualified people to --

MS. LAMBERT: Those people --

THE COURT: -- to change out the, you know, the person that you say breached fiduciary duties, the, you know, mismanagement, whatever bad labels we have here, but bring in a clean slate.

very compelling appeal. Among them, certainly, the Committee that's negotiated this term sheet retains the right at any time to move for a Chapter 11 trustee if it believes there are grounds. The Committee is granted standing to pursue estate claims, certain estate claims right off the bat, without having to come back and ask the Court, without having to rely on the Debtor to pursue that. There are document production provisions, document preservation provisions, a shared privilege negotiated, that are very powerful tools for the Committee, and certainly operating protocols that have been negotiated regarding the Debtor's operations that are very powerful tools for the Committee.

I said many times during the *Acis* case -- those who were here will remember -- that the company, *Acis*, was not a great fit for Chapter 11. Lots of companies aren't great fits for Chapter 11, I suppose, but the kind of business it was was kind of tough to maneuver in Chapter 11. Human beings and their expertise create value. And while we had a Chapter 11 trustee, a stranger come in and take control over Acis, you know, there's great uncertainty whether that stranger is going to be able to preserve value and have the smooth transition into Chapter 11 that's really going to be the best fit.

Here, as I've said earlier, the legal standard I view as controlling here is 363 and whether what has been proposed reflects reasonable business judgment. Is there a sound

business justification for proposing the independent slate of directors at the GP level for the Debtor, the protocols, the negotiation with the Committee, the document sharing, the standing given to them? Does all of this reflect reasonable business judgment? And I find, quite clearly, it does. I find it to be a pragmatic solution to the Committee's concerns about existing management and control.

And I think I used the words "fair and equitable," not just Ms. Lambert, because it is also presented to the Court as a 9019 compromise of disputes with the Committee, and we traditionally use a fair and equitable and best interest of the estate analysis in this context. So, to the extent that applies, I do find this a fair and equitable way of resolving the disputes with the Committee, and I find this to be in the best interest of the estate. So I do approve this.

And by approving this motion, I'm approving the term sheet as it's been presented, the various terms therein, the exhibits thereto. I'm specifically approving the new independent directors, the document management and preservation process, the standing to the Committee over certain of the estate claims, the reporting requirements, the operating protocols, the whole bundle of provisions.

Now, there is one specific thing I want to say about the role of Mr. Dondero. When Ms. Patel got up and talked about the newest language that has been added to the term sheet, she

highlighted in particular the very last sentence on Page 2 of the term sheet, the sentence reading, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor." Her statement that that was important, it really resonated with me, because, you know, as I said earlier, I can't extract what I learned during the *Acis* case, it's in my brain, and we did have many moments during the *Acis* case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way.

So not only do I think that language is very important, but I am going to require that language to be put in the order. Okay? So we're not just going to have an order approving the term sheet that has that language. I want language specifically in the order. You know, you can figure out where the appropriate place to stick it in the order is, but I want specific language in here regarding Mr. Dondero's role. I also -- the language in there that his role as an employee of the Debtor will be subject at all times to the supervision, direction, and authority of the Debtors, I want that language in there as well. Let's go ahead and put the language in there that at any time, in any event, the

independent directors can determine he's no longer going to be retained. I want that in the order.

And I'm sure most of you can read my mind why, but I want it crystal clear that if he violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court. He needs to understand that. Mr. Ellington needs to understand that. You know, if there are any games behind the scene, not only do I expect the Committee is going to come in and highlight that to the Court and file a motion for a trustee or whatever, but we're going to have a contempt of court issue.

So, anybody want to respond to that?

MR. POMERANTZ: Your Honor, Jeff Pomerantz; Pachulski Stang Ziehl & Jones.

We hear Your Honor. What I thought I'd do now is I have a clean redline of the order, of course not including the provision you just requested, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- which we will go back and upload and hope to get an order signed by Your Honor today, if you're around. But to go over the other changes, the changes to Jefferies, the other language changes I discussed before. I gave a copy to Ms. Lambert and to the Committee. May I approach with a --

THE COURT: You may.

MR. POMERANTZ: Thank you.

THE COURT: Okay. All right. (Pause.) All right. The form of order looks fine to me. Obviously, you'll add the Dondero-related language, and we may have further wording tweaks negotiated with the CLO Issuers. But, again, I approve all of this. I didn't say on the record the compensation, but certainly I am approving that as reasonable. I expect these three directors are going to be working very, very hard. And so, as you said, not 50,000-foot level monitoring, actually rolling up sleeves on-site, so I think the compensation is reasonable.

MR. POMERANTZ: Thank you, Your Honor. We will submit an order shortly that includes Your Honor's language requested.

THE COURT: Okay.

MR. POMERANTZ: Are you around this afternoon?

THE COURT: I am around, --

MR. POMERANTZ: Okay.

THE COURT: -- so just pick up the phone or send an email to Traci, my courtroom deputy, --

MR. POMERANTZ: Yes.

THE COURT: -- so she can tell me, "It's in your queue to sign."

MR. POMERANTZ: She has been extremely helpful and responsive.

THE COURT: All right. Very good. I'll sign your order on the CRO, then.

MR. DEMO: Okay. Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing else, I'll be on the lookout for your orders. And, again, if you could coordinate with Traci to make sure she's clear on everything you need set on the 21st.

MR. POMERANTZ: Thank you very much, Your Honor.

THE COURT: All right.

MR. CLEMENTE: Thank you, Your Honor.

MR. DEMO: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 11:54 a.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 **12/10/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT C

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

In Re:	)	**Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas 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 John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Debtor:	Melissa S. Hayward Zachery Z. Annable HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

the original motion but which the Debtor no longer seeks to pursue?

A One of the matters that was pending when we took office was an appeal, and I believe it was still in the District Court, and that related to an alleged conflict of interest by the Winstead firm. And so there was an objection to their fees and an appeal concerning payment of Winstead fees. And the Board has decided not to go forward with that appeal.

Q Okay. So the Board -- did you hear the opening from Acis's counsel that charged that the Debtor was just doing more scorched-earth litigation tactics? Did you hear that charge?

A I heard that, yes.

Q Okay. But yet the Board has instructed Foley not to pursue the Winstead matter; is that right?

A That's correct.

Q And just again, for the record, why did the Board make that decision?

A The Board made that decision because we just thought it was in the best interest of the Debtor and this estate not to do that.

Q And did the Debtor see any benefit to pursuing that particular litigation?

A You know, there -- a benefit could be articulated, but we decided not to pursue it.

Q Okay. So, that, plus the Neutra appeal, are two -- I mean, I apologize, withdrawn. That, plus the DAF matter, are two examples where the Board exercised its judgment not to pursue pending litigation; is that fair?
A That's correct.
Q Okay. Is the Board supportive of the Debtor's application to retain Foley for the three matters you have described?
A It is.
Q And without revealing privileged communications, can you describe generally the diligence that the Board conducted to reach that decision?
A Well, we met with some of the people that work at Highland. We met with the Debtor's attorneys, the Pachulski firm. We did have a couple of meetings with Ms. Patel and Mr. Terry. Some of us have reviewed the pleadings, some more than others. And, well, we may have done other things, but those are the ones that come to mind right now.
Q I don't know if you mentioned it, but did you confer with Ms. O'Neil?
A Oh, yes, we did. We talked with Ms. O'Neil about it.
Q Okay. And what was the purpose of the diligence that you just described for the Court?
A Well, ultimately, what we as a board were trying to do was to conduct kind of a cost-benefit analysis to the estate: How much will this potentially cost us? What's the potential

upside of pursuing it? And based upon that cost-benefit analysis, we thought that this was the best thing to do.

Q Okay. Let's just focus on a couple of very narrow 327(e) issues. Is the Debtor seeking to retain Foley to act as general bankruptcy counsel?

A No.

Q And which firm serves as general bankruptcy counsel?

A That would be the Pachulski firm.

Q Okay. And do you know whether Foley Gardere represented the Debtor's interest in each of the three matters that you've described?

A It has been representing the Debtor previously.

Q Okay. So let's talk about those three matters. The first one I believe you said was with respect to the representation of the Debtor in connection with an $8 million claim that it has against Acis; is that right?

A That's correct.

Q And is that the claim -- is that the subject of a formal proof of claim?

A Yes.

Q Okay.

A It is a claim filed in the Acis case.

Q I've placed before you an exhibit binder, and I would ask you to turn first to Exhibit 4.

A Okay.

that benefits everybody.

So I guess, Your Honor, I mean, I don't know what else to say about the benefits of the Neutra appeal except that the testimony, I think, speaks for itself. But, you know, I -- and in terms of --

THE COURT: Again, fight the claim of a creditor. Foley can represent Highland in the adversary proceeding, wherever that goes forward.

MR. DEMO: Yeah.

THE COURT: Probably District Court, not this Court. At least some of it, if not all of it. But anyway, I'm digressing. They can object to Acis's proof of claim. They can object to Terry's proof of claim. I mean, --

MR. DEMO: And conversely, Your Honor, if -- if --

THE COURT: -- this has nothing to do with -- I mean, I don't get the appeal. I mean, I --

MR. DEMO: Right.

THE COURT: Neutra can appeal, HCLOF can appeal, but I'm not seeing the benefit to Highland.

MR. DEMO: And I guess the only thing I would say, Your Honor, is if there is an improper benefit, we are not saying that the fee applications are sacrosanct. People can challenge the improper benefit there.

And again, the settlement gave broad discretion to the Committee to pursue insider claims. So if an insider is

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

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

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

MR. DEMO: One second, Your Honor.

(Counsel confer.)

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

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

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

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

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

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

to benefit if Neutra wins that appeal. Right?

MR. DEMO: Yes. Yes, Your Honor.

THE COURT: Okay. So that --

MR. DEMO: Highland would benefit greatly --

THE COURT: Okay.

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

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

MR. DEMO: No.

THE COURT: -- Highland only secondarily benefits --

MR. DEMO: I -- I --

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

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

THE COURT: Okay.

MR. DEMO: So, worst case, --

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

MR. DEMO: Worst --

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

MR. DEMO: Well, --

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

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

THE COURT: -- that's going to happen anytime soon.

MR. DEMO: But I guess worst-case scenario is that it's $8 million in hundred-cent dollars.

THE COURT: Okay.

MR. DEMO: And that's not nothing for $500,000. And only a portion of that $500,000.

THE COURT: Okay.

MR. DEMO: Thank you, Your Honor.

THE COURT: Okay. Mr. Lamberson?

MR. LAMBERSON: Your Honor, do you want a closing from me? Or no?

THE COURT: I don't really need it. Thank you.

MR. LAMBERSON: Okay.

THE COURT: Okay.

MR. LAMBERSON: Because I know your hearing starts in about two minutes.

THE COURT: All right. So, I just hate it that we spent so much time on this. I hate it that we spent so much time, but, I mean, I understand. I understand. You know, I think the employment application was filed pretty early in the case, right, and -- October 29th. And it was continued, continued, continued, because we were getting objections from the Committee, or they wanted time to look at it, I guess. And now you're kind of up against the wire, right, because oral arguments are set at the Fifth Circuit next month. So I,

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

But I'm concerned. I'm concerned -- well, here's the deal. We have a great board, and I totally get that Bankruptcy Courts should defer heavily to the reasonable exercise of business judgment by a board. And we've got great professionals. And we've got this case, I think, on a good track as a general matter now. 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.

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

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

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

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

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

that's my ruling.

I will additionally rule, for the avoidance of doubt, that if Foley wants to represent Neutra in the appeals and get paid by Neutra, I don't have any problem with that. In other words, I'm not going to find something like there's a conflict with the estate, you know, because of its simultaneous representation of Neutra. That's fine. But I'm not going to approve Highland paying anything in connection with either of those appeals. So that is the ruling of the Court.

Have I left any gaps here?

MR. DEMO: Your Honor, just one clarification.

THE COURT: Uh-huh.

MR. DEMO: Foley is representing Highland Capital Management in the appeal of the confirmation order to the Fifth Circuit. I just want to clarify that your ruling that Highland can represent -- I'm sorry -- Foley can represent Highland in all Acis matters extends to their representation of Highland Capital Management in the appeal of the confirmation order that's set for March 30th.

THE COURT: Okay. Let me think through that.

MR. DEMO: And again, Your Honor, there's been no objection to that.

THE COURT: King & Spalding is in there representing HCLOF. Foley would be representing both Neutra and Highland in connection with the confirmation order?

THE COURT: Okay. Thank you all.

(Proceedings concluded at 1:44 p.m.)

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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 Date
Certified Electronic Court Transcriber

EXHIBIT D

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

In Re:	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas June 30, 2020 9:30 a.m. Docket
Debtor.	MOTION FOR REMITTANCE OF FUNDS HELD IN REGISTRY OF COURT FILED BY CLO HOLDCO, LTD. (590)

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Debtor:	John A. Morris Greg Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For CLO Holdco, Ltd., Movant:	John J. Kane Brian W. Clark KANE RUSSELL COLEMAN LOGAN, P.C. 901 Main Street, Suite 5200 Dallas, TX 75202 (214) 777-4261
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

the argument that you can't look at the Bankruptcy Code to determine whether the money should come out of the registry or not, and then be back in front of you, you know, three or four weeks later to relitigate any of those issues.

So that was absolutely my recollection and understanding, Your Honor, and I think from your comments I intuit that it was your understanding as well, that this was not something that we were going to deal with again very quickly, but was something to preserve the status quo, a reasonable solution, an equitable solution under Section 105. And I believe that's what Your Honor ordered.

THE COURT: All right. Well, I'll let you go ahead and make your opening statement. I think Mr. Kane was finished before I started asking my questions.

MR. CLEMENTE: Okay.

THE COURT: Mr. Clemente, you may proceed.

MR. CLEMENTE: Thank you, Your Honor. I appreciate that. So, and I'll try and be brief on the opening.

OPENING STATEMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

MR. CLEMENTE: Your Honor, like it or not, CLO Holdco is not an independent, unrelated, third-party investor merely seeking distributions on account of its own arm's-length independent investments. Instead, CLO is a related party in literally every sense of the word. That's not in dispute.

That is part of the Jim Dondero or Mr. Dondero web of entities.

CLO Holdco is effectively controlled by Mr. Dondero. It was seeded and received assets transferred from the Debtor, including the assets giving rise to the distribution that's in the registry. None of that is in dispute. All of this at a time when Mr. Dondero controlled the Debtor as well as the parties through the various intermediate transactions that ultimately resulted in the assets arriving in CLO Holdco. That is not in dispute.

Mr. Dondero's past fraudulent conduct, including fraudulent transfers, is also not in dispute. He was on all sides of this transaction. And therefore this transaction, along with many of the others, must be viewed with skepticism and scrutinized very closely by the Committee and by this Court.

The Committee has only just begun such work, Your Honor. And given the Byzantine empire created by Mr. Dondero, it will take time and significant resources to fully and properly conduct an investigation.

And Mr. Kane referred to, did we do discovery? We did not. Our reaction to this motion was the same as Your Honor. And as you can see by the stipulations that we have agreed to for purposes of this hearing, we didn't want this to be a situation where the estate would spend a tremendous amount of

resources to deal with something that we thought that was dealt with on March 4th.

But aside from that, given the web that's been created here, we can't just isolate one piece of it. We can't just be like, I'm going to look at the CLO Holdco documents and be able to develop a full theory. This is a tapestry of interrelated entities that is opaque and vague and purposely so. So you can't just focus on one piece and then try and say, well, I know what this piece is, because that piece has many interrelated complex ramifications and relationships where, frankly, you can't just say, okay, let's focus on this one issue, because you're going to miss the entire tapestry.

We still need to examine, as I mentioned, the whole thing, and this takes time and it takes an investment. So while I understand CLO Holdco wants to receive its distribution, I also understand that my constituency wants to be paid, some of whom have been waiting for over a decade.

To be clear, Your Honor, my constituency didn't choose to be here in the bankruptcy. But CLO Holdco chose to associate itself with Mr. Dondero and to take assets from Highland in convoluted related-party transactions and reap the benefits of those transactions. CLO Holdco can't now step away from that and try and suggest to Your Honor that this is about taking time under 28 U.S.C. 2042. That was never what it was about on March 4th, and it's not what it's about today.

Holdco has or doesn't have, we have no idea. And it's controlled, ultimately, let us not lose sight of the fact, by Mr. Dondero.

So, allowing CLO Holdco to take distributions will place them with an offshore entity, potentially outside the jurisdiction of this Court, or at the very least, placed in five or six entities removed or who knows where, including potentially other foreign entities.

Therefore, exercising authority under Section 105 is consistent with preserving, protecting, and maximizing the value of the Debtor's estate, which estate includes claims, causes of action, and avoidance actions.

As you know, 105 is the means and -- circumstances (audio gap) preserve and protect the estate.

And to be sure, this is not inconsistent with any other provision of the Bankruptcy Code, and it's, in fact, from our perspective, in furtherance of the goals of the Code.

Your Honor, regarding the payments that Mr. Kane (audio gap), the fact that a few payments were made on the note doesn't change the fact that Section 105 applies and the Court should deny the motion.

As with all that is Highland, nothing is simple or easy. First, CLO Holdco received millions more in assets and transfers, aside from the interests giving rise to the distributions at issue. So the fact that there were payments

on the notes really speak nothing to the fact of whether the overall transaction was for reasonably equivalent value or otherwise problematic, especially when there is nothing in the record regarding the Dugaboy Trust, its wherewithal to pay, or the fairness of the terms of the note, or any of that. Or why the note was structured this way or, you know, what the Get Good Trust and the Dugaboy Trust do, how they interact, who makes decision on what gets paid and doesn't get paid.

The few payments, while interesting, Your Honor, again, do not establish reasonably equivalent value or the propriety, in our view, of the transfers.

Finally, as this Court knows, reasonably equivalent value is not determinative of whether the transfer was intentionally fraudulent or otherwise potentially avoidable or problematic. So, while deeds are interesting, Your Honor, I would submit that they don't move the needle in changing the fact that the motion should be denied.

Now, Your Honor, to the point that you raised with me before I started my remarks here. Much has been made about inappropriate prejudgment remedy or attachment or similar arguments. I submit this case is moot, Your Honor. Again, at the risk of repeating myself, I will emphasize that CLO Holdco is not an independent third party. Like it or not, it is tied up in a ruinous web with Mr. Dondero, and that in and of itself makes this case unique and distinguishes it from the

other cases cited by CLO Holdco.

Additionally, Your Honor, the current circumstances are distinguishable because the Debtor had control over these funds. That's why we were in front of you on March 4th. I agree, and I'm not arguing, that the Debtor did not own these funds. But it clearly had control over them at the time that it sought to make the distributions on March 4th. So, in my humble opinion, Your Honor, that means the Court had control over that.

Having them held in a registry while an investigation occurs is not akin to slapping a lien on someone's house or taking possession of an automobile, like the cases cited by Mr. Kane where they require there's some -- an adversary proceeding or some type of complaint.

The situation here, again, Your Honor, matters. The Debtor was before you seeking your authority to make this distribution. That is entirely different than if I were to walk in here and say my colleague, Mr. Twomey, I think that, you know what, I don't like him and so I have a claim against him, and I want Your Honor to enjoin him from being able to sell his automobile. That is entirely different, and in my view completely distinguishes it from any of the cases that Mr. Kane cited, including, of course, I have much respect for Judge Houser, but including the case authored by Judge Houser.

So, Your Honor, again, having them held in the registry is

attachment. Bankruptcy Rules aren't structured like that.

But importantly, Mr. Clemente presented no facts to support his balancing of harms argument and presented no facts to establish that he has any viable claims against CLO Holdco. Arguments that James Dondero participated in frauds does not mean that there's a claim or cause of action that the Committee can assert against CLO Holdco, which is what would be required to obtain an injunction.

This is a big if. If the Committee is seeking to obtain an injunction, it must satisfy its burden of proving under 7065 and the four-factor test established by *Janvey v. Alguire* in the Fifth Circuit in 2011 and the many cases before that. And it just can't do it.

So I want to leave the Court with one case citation, because if the Court is considering some means of entering a preliminary injunction outside of an adversary proceeding, I was able to find a grand total of one case that address that in the Fifth Circuit. And that is the 1995 decision of *In re Zale* in which the Fifth Circuit noted that the only way a 105(a) preliminary injunction could be issued, after a finding of these unusual circumstances and the like, was if all of the protections of an adversary proceeding had been afforded to the non-movant and if the party that was requesting the injunction satisfied the four-factor test that's found in 7065.

There are no extraordinary circumstances or unusual circumstances here. And if this Court believes that the context of this case warrants that, then the Committee would still have to satisfy that four-factor test for a preliminary injunction. And it has the burden of proof on those four factors. It hasn't presented any evidence whatsoever to support that it can meet the first, let alone the second, third, and fourth factors of that test.

So, Your Honor, with that, I'll close our case, unless you have additional questions, and request that the Court grant CLO Holdco's motion.

THE COURT: A couple of follow-up questions. I have certain facts in my brain, and I can't remember if they're in evidence or stipulated to or I read them in a pleading. So, I just want to ask: Somewhere I remember seeing that CLO Holdco, or, you know, maybe it's its parent, I think -- Mr. Clemente said we have a Byzantine structure here and we have a sub-web within a bigger web with regard to CLO Holdco. But, anyway, CLO Holdco or its parent has assets of approximately $225 million? Is that evidence or undisputed?

MR. KANE: Your Honor, that was contained in one of the pleadings asserted, I believe, by the Committee, and that was the Charitable DAF entities, not necessarily CLO Holdco. There hasn't been any evidence presented by the Committee of the assets held by CLO Holdco other than what we have before

the Court.

THE COURT: Okay. So it's not something you would stipulate or offer one way or another?

MR. KANE: No, Your Honor, I think that's factually incorrect and I don't stipulate to that.

THE COURT: Okay. I think my notes show that that was the alleged amount of assets as of September 30, 2019. But, again, that may have just been a pleading, not anything in evidence.

All right. And are Mr. Scott or Mr. Dondero on the phone today or on the video? I'm just curious.

MR. KANE: Your Honor, I lost you on the video a little bit, but assuming you can hear me, though, Mr. Scott is not. We had conversations with the Committee about various exhibits and whether or not Mr. Scott would be here to testify to prove up exhibits. Once the exhibits were all stipulated as admissible, then there was no need for Mr. Scott to participate.

THE COURT: Okay. I was not going to ask him anything. I just was curious if he was listening in. Or Mr. Dondero, for that matter. I guess Mr. Dondero is not on the line, correct? (Pause.) All right. I'll --

MR. KANE: Your Honor, I -- I think -- I'm sorry. I've had no conversations with Mr. Dondero. I have no idea whether he's on the line.

THE COURT: Okay. I'll take silence to mean he's probably not, but --

All right. I asked that question for, I guess, a couple of reasons. But the main reason I asked is -- and I'm going to say this as kindly as I can. They're not here to hear it anyway. But I feel like perhaps they are a little tone deaf, for lack of a better term, on how this all looks to the Court today. And what I mean by that is, obviously, I assume it was their decision to bring this motion, at least Mr. Scott's, and likely Mr. Dondero as well had some involvement in that decision. And the reason I say that it feels like they're a little tone deaf about how this looks is that we just had an extensive hearing and some very thorough pleadings, a lot of evidence uploaded, on a $2.5 million issue. And I don't -- you know, I appreciate that that is a significant sum of money, but we've used the word context a lot this morning: In the context of this reorganization, it seems like a very big deal was raised here, at the choice of Mr. Scott and Mr. Dondero, over a $2.5 million issue, in the context of a reorganization that involves at least hundreds of millions of dollars of debt, if not over a billion. UBS says they're owed a billion.

And I just asked my question a minute ago about the value of assets that the DAF or CLO Holdco or that sub-structure has managed, because while no one will commit, is it $225 million

or not, you know, I take it that the Committee had a good faith basis for saying that, and if it's not that, it's probably a quite sizable number.

Again, so I'm kind of thinking out loud about the proportionality of this issue. $2.5 million, not anything to sneeze at, but we're talking about a Charitable DAF that probably has many, many, many more times that of assets. And so there was certainly no equitable argument of hardship or, you know, significant detriment that's befalling CLO Holdco by the tying up of this money in the registry of the Court for this relatively short time period. So, again, it feels a little tone deaf to be bringing this argument, occupying so much time from the parties, the lawyers, the Court, over this issue.

And just to further elaborate on that, it matters to me, and I say this about the tone-deafness, partly because I thought -- I said this at the beginning of the hearing, and I still say it -- we already put this issue to rest, albeit temporarily, in March. And in April, we get this new motion. Again, I recognize the language of the March order reserved everyone's rights to come back and argue about this, but, again, the buzzwords for this hearing are going to be context matters, I guess. Mr. Clemente, you get credit for that buzz phrase, those buzzwords.

Again, I issued the order with regard to putting these

monies in the registry of the Court at the suggestion of Mr. Dondero's very wonderful lawyer, retired Judge Lynn. And, again, the context was we had a protocol order early in this case that the Committee negotiated heavily with regard to monies being disbursed out under the control of the Debtor, and heavily negotiated. I remember the CLO Issuers, I think, had some pause and concerns and got their language into that order.

So we had this protocol order. Debtor was worried about violating the protocol order, so Debtor files the motion February 24th, wanting the blessing of a court order before it transferred these monies to CLO Holdco and some other Highland-affiliated entities. There were vehement objections, and the Court issued the order saying, Let's put these monies into the registry of the Court, at the suggestion of very able counsel as to how we could resolve that contested matter we were there on on March 4th.

So, you know, a month later, April, we have this new motion of CLO Holdco reviving the dispute, the $2.5 million dispute that we had just put to rest temporarily in March at the suggestion of lawyers. I didn't issue a 105 injunction outside the context of an adversary proceeding just on my own, *sua sponte*. It was suggested to me that this was a good solution. People embraced it. That's what we did. And I sure didn't have in my brain that a month later we'd have a

brand new motion regarding whether these monies should be disbursed to CLO Holdco all over again, when that was the issue that was already before the Court in March.

I, again, fully recognize that everybody reserved their rights, but I focus on this context because, again, I wish Mr. Dondero and Mr. Scott were on the call to hear this: This almost feels like a good faith issue to me. You know, maybe I would feel slightly different if there had been a broad emphasis, heavy emphasis, CLO Holdco standing up through a lawyer that day saying, We're just letting you know, we're going to get together a motion in very short order and tee this up again. Because I would have probably said no. You know, if -- let's just hear it right now today, if this is only a three-week mandate or whatever. So, good faith is something that I can't help but scratch my head and be troubled by.

So, I want to emphasize that CLO Holdco's lawyer has made perfect arguments regarding the potential legal issues here. There are some valid arguments here about is this tantamount, holding the money in the registry of the Court that a non-debtor asserts is its property, is that tantamount to a prejudgment remedy? You know, did it require an adversary proceeding? Did it require the traditional four-prong prove-up for a preliminary injunction? And did the Court just give short shrift to those legal technicalities?

Again, these are compelling arguments, but I'm overruling the arguments because, again, I believe it ignores the context that CLO Holdco essentially consented, acquiesced, in this placeholder keep-the-status-quo solution. And I question its good faith in, so quickly after consenting, bringing this motion.

But moreover, I do find that in the unique context of the disputes before the Court on March 4th, I did have authority to issue a 105 injunction. 105, as we all know, at Subsection (a) gives a bankruptcy court authority to issue orders necessary or appropriate to carry out provisions of Title 11, and the last sentence even provides a mechanism for the Court to *sua sponte* take action to, among other things, prevent an abuse of process or just do what's necessary or appropriate to implement court orders or rules.

So I think, again, in the context before the Court, it was not only a consensual thing, but the Court had authority. And the backdrop of this, again, cannot be overstated. Again, to use Mr. Clemente's word, we have this Byzantine structure here. It's a lot for the Committee to get its arms around. And even the CLO Holdco structure -- again, I'm looking at my notes, my fancy chart -- we have CLO Holdco, a Cayman Island entity. Its parent is Charitable DAF Fund, LP, another Cayman Island entity. It, in turn, is owned by Charitable DAF Holdco, Ltd., yet another Cayman Island entity. Its general

partner happens to be a Delaware entity, Charitable DAF GP, LLC, but the beneficial owners of it are the three Highland Foundations, of which Dondero is president and director, and Mr. Scott the treasurer and director.

So, I'm not saying the Byzantine structure is in and of itself problematic, although one might wonder why a charitable organization needs to have three offshore entities as part of its structure. I digress. But we all know a Byzantine structure and ties to Dondero do not mean something is attackable in and of itself, but we have had issues raised about the Dynamic Fund and the various transfers with regard to Dugaboy, the Dondero Family Trust, and Get Good Trust and the note. All of that is worthy of examination, and the Committee has not had all that long in this case to investigate it.

So, I'm going to say a couple of more things. First, the motion is denied, but I'm going to put more strings on it than that. I'm denying the motion, but as part of this ruling I'm going to order that the Committee has 90 days, unless the Court happens to extend that on motion or agreement of the parties, to file an adversary proceeding against CLO Holdco or the money shall be released. Okay?

So, again, I intended it, as I think everybody did, to be a placeholder, to keep the status quo little bit. Again, Mr. Kane has raised good arguments that maybe an adversary

conceivably was necessary or might become necessary. So here we have a requirement of an adversary within 90 days or the money shall be released to Holdco -- again, unless someone moves to extend that or I get an agreement to extend that and I happen to decide to issue an order extending that.

I presume that if an adversary is filed, then if the Committee wants that money to continue to be held in the registry of the Court, then they would have to file an application for injunctive relief, essentially, to keep the money in the registry of the Court pending the resolution of the adversary proceeding.

So that is the ruling of the Court. Mr. Clemente, I'll ask you to draft up the order. And I reserve the right to supplement this oral ruling in that form of order. And please run it by Mr. Kane before electronically submitting it to the Court.

Now, I'm going to say a couple of other things, and then I'll, before closing, I'll ask if there are questions or other announcements. I have told the parties and the lawyers to focus on a plan and problem-solving how we're going to pay creditors. And I think I expressed my strong hope that people would stop litigating everything. I think I'm remembering saying this most recently at the UBS hearing a few weeks ago on a motion to lift stay. Once again, we had a very lengthy hearing that day. I denied the motion. And here we are

as I can to distance CLO Holdco from that taint, because understanding that it's in what has been alleged as a Byzantine web, we think it's important to separate CLO Holdco and its operations to ensure that things are done in an appropriate fashion with square corners.

That's all I have, Your Honor. We have no objection to the additional funds being pled into the registry of the Court. We can agree those funds would be adjudicated as part of this dispute. We understand that we did not prevail, and we appreciate your Court hearing our argument.

(Proceedings concluded at 12:06 p.m.)

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CERTIFICATE

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

/s/ Kathy Rehling **07/02/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT E

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

In Re:	)	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas July 8, 2020
Debtor.	)	1:30 p.m. Docket
	)	- MOTION TO EXTEND EXCLUSIVITY PERIOD (737)
	)	- MOTION TO EXTEND TIME TO REMOVE ACTIONS (747)

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

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For Acis Capital Management GP, LLC:	Rakhee V. Patel Annmarie Antoinette Chiarello WINSTEAD, P.C. 2728 N. Harwood Street, Suite 500 Dallas, TX 75201 (214) 745-5250

been working very cooperatively with our creditors over the last few months and we're just seeking to do it the best way.

So nothing I've said today, nothing, you know, should come as and will come as a surprise to the Committee, but we're working better, recognizing that ultimately the creditors want to be paid, and doing that in an appropriate manner and a thoughtful manner is what the Debtor is committed to do with its partner, the Committee, in this process.

THE COURT: Okay. Sort of jumping back, I forgot to ask earlier when we were talking about Acis: Has the Fifth Circuit rescheduled oral argument on the appeal of the Acis confirmation order and order for relief?

MR. POMERANTZ: I believe -- Your Honor, maybe Ms. Patel would know off the top of her head.

THE COURT: Ms. Patel?

MS. PATEL: Your Honor, it was -- it was briefly -- I -- and I say briefly, it was briefly we had -- we got a notice at some point, I believe in early June, that the Fifth Circuit had reset oral argument. And then approximately, I can't remember exactly, but it was like, I don't know, a week or maybe ten days later, we got a notice that it was cancelled again. We have not received notice that it is rescheduled, so it is still pending. But it has not been taken off oral -- it has not been taken off oral argument at some juncture.

THE COURT: Okay. Well, I acknowledge that that is a

pandemic disruption for sure. It would have been nice to have that resolved one way or another by now.

MS. PATEL: Agreed, Your Honor. We were trying to figure out, frankly, in the week to ten days that it took from the scheduling to how it was cancelled, exactly how our team was going to get down to New Orleans. And the -- I think the leading contender was to rent an RV and drive down so we could safely get there. So it certainly has been a casualty of the pandemic.

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.

MR. POMERANTZ: So, look, Your Honor, the first I

could say is that, to my knowledge, Highland Capital, the Debtor, has not obtained a PPP loan. I know there have been discussions with certain funds that basically have certain assets, private operating companies, about obtaining PPP loans. I don't have the specifics for Your Honor. I'm happy to provide that.

Of course, to the extent Mr. Dondero, on any of his affiliated funds that are under the control of the Debtor, I would have no way of answering that, but I'm happy to follow up with that with the Board and report back to Your Honor in whatever appropriate manner you felt to obtain that information.

THE COURT: Okay. Well, let's have a report on that on the 14th when we come in. You know, maybe Mr. Seery or Mr. Sharp or some other person. But you can probably imagine the different things going through my brain. You know, well, first, let's see if it was -- you know, I don't -- again, I'm not expecting it to be Highland Capital Management, LP. I would be beyond shocked if, you know, that somehow happened when they're in bankruptcy. And, you know, I think it would require a 364 motion, just like any other borrowing, although I know it's kind of a forgivable loan. Strange bird.

But then if it's some affiliate of Highland, I still feel like we need some transparency and disclosure on that. I mean, I -- and who were the human beings behind it. It just

busiest judges in the country right now. I'm wondering when were they contacted. Was it really recently, or a week or two ago? Because they've probably gotten ten new mega-cases in the past two weeks.

MR. POMERANTZ: So, Your Honor, the last -- the last two weeks, again, probably since June 15th, we had been discussing the structure of a mediation. We, the Debtor, proposed perhaps a combination of Judge Isgur and Jones. We initially had that conversation with Mr. Clemente, and then we socialized it with the rest of the Committee members. As of last Thursday, I believe it was, we had consensus that Judge Jones, and if available, also Judge Isgur, would make sense.

I sent an email to Judge Jones' clerk, indicating that we had a hearing today, that it would be helpful if we got a response, and this morning, two hours before the hearing, Judge Jones' clerk responded and told Mr. Clemente and I that he is available and ready and suggested that we have a conference with -- again, I'm not sure if it'll be him or his clerk, to talk about availability. Of course, we didn't want to go ahead and have that discussion until, you know, we got Your Honor's input on it.

THE COURT: Okay. I mean, a couple of things come to mind. One is I am just flabbergasted that they would have any availability. I know they're -- I'm aware of Judge Jones doing hearings on weekends.

But second, I'm also concerned what is their idea of availability. Because in order for a mediator to meaningfully help you on this, I mean, it's going to take not just hours but days of time, unless you want the mediator to just have a 30,000-foot view. And I mean, I just cannot imagine, --

MR. POMERANTZ: So, --

THE COURT: -- once again, that they would have days and days to come up to speed with, you know, 11 years of litigation or however long it was, not that long, with UBS, you know the years with Acis, you know, the various alleged claims and causes of action, and, you know, the Byzantine structure here. I mean, you know, not that they have to be, you know, as educated as a judge presiding over litigated matters, but I just cannot imagine they could meaningfully spend time on this.

So what are you all envisioning? Because I know what I'm envisioning, and maybe we're not seeing it the same way. I mean, what are you thinking? That you'll go in and spend a day with, you know, maybe just each of you doing a 25-page white paper, and you'll either settle it by the end of the day or not, or what?

MR. POMERANTZ: So, let me start by saying that when everyone raised the issue of Judge Jones and Isgur, everyone had the same potential concern that Your Honor has mentioned. You know, my firm and me personally, I'm involved in a couple

of cases before Judge Jones now, significant cases. So there was a concern.

I think people also generally thought that if they accepted and they knew what they were getting into, they would want to do a good job and they'd have the time.

We have not had the ability to have an extensive discussion. That discussion could either occur with Mr. Clemente and myself speaking to the clerk or the judge, or if Your Honor -- nothing stops Your Honor from picking up the phone, speaking to Judge Jones and asking him as well.

But I expect it to be a very intensive mediation process. I do understand that Judge Jones only does mediations in person, so this would require people getting to Houston, which, in my experience, while I have participated in mediations virtually on the phone, it's a lot more effective to be in person. We would anticipate detailed mediation briefs. We would envision each of the parties speaking to Judge Jones to give him their perspective. But it would be -- it would be a significant assignment.

Again, whether we would conclude at the end of August, I don't know, but I would contemplate a good two, three days of in-person mediation at the end of August, and then probably, if necessary, to set up for something else, which, again, there are several different things. And I mentioned in my opening remarks why I think people like Judge Jones -- and

nothing else, we'll go ahead and adjourn for today. And I'll keep -- if there's anything worthwhile to report on the mediation front before we have our hearing on the 14th, I'll have my courtroom deputy reach out to all counsel by email and let you know. Okay? All right.

MR. POMERANTZ: Thank you very much, Your Honor.

MS. PATEL: Thank you, Your Honor.

THE COURT: Thank you. We stand adjourned.

THE CLERK: All rise.

(Proceedings concluded at 3:00 p.m.)

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CERTIFICATE

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

/s/ Kathy Rehling **07/09/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT F

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

In Re:	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas July 14, 2020 1:30 p.m. Docket
Debtor.	APPLICATIONS TO EMPLOY JAMES P. SEERY AND DEVELOPMENT SPECIALISTS, INC. (774, 775)

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

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file Multi-Strat as a bankruptcy, it was hard to get folks to really come to the table and think about how to settle that issue.

These issues in regard to the total case are much more complicated. We're going to file a plan. We believe that will set a bit of a crucible to folks to think about how to move forward with their claims. We are, as Jeff Pomerantz mentioned last time, agreed in principle, but we have some issues to work through with Redeemer that we hope to be able to resolve by this week. And so that's my internal goal, but I expect to be able to do it.

The reason that's complex is not that it's simply a -- the arbitration award is not simply a money award; it actually requires certain offsets, it requires certain assets be sold and paid for. And we're trying to carve our way around some of those, because they (inaudible) agreement, because they're -- they're more difficult than simply exchanging cash for assets, because we don't have the ability to do that right now. We don't have the cash, and we're in bankruptcy.

So I do believe that we can get these done. And then if mediation is something that would work, great. We're going to try to do it without mediation as well. Going to try to do it before we get to mediation and resolve claims. And if we're unable to do that, hopefully mediation will push it forward or we have to have a fallback, which will be dispositive motions

with respect to certain of the claims.

But we expect to have and I think we have a number of claims objections that have (inaudible). We've resolved those. We're really down to three claims. And one of them is almost done.

Q All right. At the last hearing, --

MR. MORRIS: Your Honor, that really does finish the substance of the testimony with respect to this motion, but at the last hearing Your Honor raised some questions about PPP loans.

THE COURT: Yes.

MR. MORRIS: Would you like me to just take a moment with Mr. Seery to address that?

THE COURT: Yes, please.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Mr. Seery, you're aware that the Judge raised some questions about whether and to what extent the Debtor may have been involved in any of the PPP loans?

A Yes.

Q And have you done any work to try to figure out the answers to the questions the Judge posed?

A Well, work in response to the question, but also work previously. So, just a -- quickly, as I think we all know, the PPP program was put forth to try to give companies cash

that they had to use for employee payments, to continue to keep payroll supported and to continue to have folks hold their jobs.

We have -- and I think the *Business Insider* article, which I'm not familiar, I know the publication is not something I seen much, but I'm not familiar with the specifics of that article, and -- but any PPP, away from the assets that HCMLP actually owns or controls. And we've got -- we've got three -- and I think there's some substance to the article. But we've got three businesses. And these are -- this is public, but I'll go into the -- sort of the obvious reasons without going into the specifics of the business around the ones that I know of well.

Carey Limousine is a business that transports folks in high-quality cars from airports or from events or between businesses. It was hit severely by the COVID-19 pandemic., particularly with respect to the air transportation, which was really one of its biggest areas. The business, notwithstanding Uber and the other type of shared ride services, had actually done quite well, and Highland was an owner of a significant portion of that business related to some loans that it held in various funds.

That business's management, with its own outside counsel, sought a PPP loan. Then our director came to us and discussed with the Board the propriety of that loan. We engaged outside

counsel, not bankruptcy counsel but counsel that had particularized expertise in PPP, and spent a ton of time really understanding both the law as well as the specific regs. Carey did get a PPP loan. It is potentially forgivable, depending on how it's used.

The second entity that was similar but didn't come to the Board, we have a business called SSP, which is an excellent highway business that provides equip -- materials for a lot of different road construction, but primarily highway road construction. Very well run business. That entity got a PPP loan as well, primarily worried about whether the construction on the highways would shut down.

So it's been -- I don't believe that's really happened in Texas, which is where most of their business is, but they qualified for that loan. They did not come to the Board. A very specific carve-out, because one of the interest holders that we share that position with is a Small Business Administration fund and, so it was very clear that it was entitled to that loan.

Then there's a third entity called Roma that got a very small PPP loan. We don't control the entity and we were not involved in its acquisition of that loan. Again, it would have to be used as required.

One of the things I want to make sure that is in the record and for Your Honor with respect to Carey, we spent a

lot of time as a Board focused on, one, whether it was legal to get that loan, first. We're doing everything right, by the book. We're not going to play in the gray. There is no gray. There's black and white in these areas.

Number two, was it ethical, was it appropriate that we went and got this loan or that Carey went and got this loan? Management, with the outside counsel, was sure that we could do it, but we didn't want to take their word for it, so we went out and got our own counsel, third-party counsel for the Board to make sure that this was appropriate.

Three, the requirements around these loans are significant and the penalties for violating them are severe. So if you get a loan by mistake, are you really required to pay it back? And if you're mistaken, that will be expensive, but it won't be a real penalty. But if you get a loan that's really inappropriate, that you shouldn't have gotten, that was a material misstatement of any of the facts around it, the penalties are significant. And not only in terms of the opprobrium that you'd suffer in the press, because that's coming, but in terms of how you use the funds.

So they can only be used in very specific ways, and we were exceptionally careful around this program.

The basis of the program is to keep people employed. And with a business like Carey Limousine in particular, where there's a significant amount of debt, where the business is

shut down by COVID, where we didn't have the funds to put into Carey, nor even if we wanted to, we might not have been able to do it without the Committee's approval because of the protocol, a PPP loan was not only legal but it was appropriate. And it's being used in that fashion, meaning to keep employees employed.

Q Thank you very much, Mr. Seery.

MR. MORRIS: Your Honor, I have no further questions of Mr. Seery. Does the Court have any questions?

THE COURT: I actually have a follow-up question regarding the PPP, just to kind of put a bow on this.

EXAMINATION BY THE COURT

THE COURT: I'm looking at the demonstrative aide. I don't know if you, Mr. Seery, have it there handy.

THE WITNESS: I do, Your Honor.

THE COURT: Okay. So I'm turning to Page 6, the chart, the subchart, Investments and Subsidiaries. The third column, Privately-Held Equity, Various Companies. I mean, that would be the type of investment entity we're talking about here that got the PPP loan: Carey Limousine, SSP, Roma? Nothing that was -- well, I'm going to say Highland affiliate. Affiliate, that's a dicey term, but that's the type of entity in the organizational structure we're talking about, correct?

THE WITNESS: Those are the ones -- I want to be very careful, because I know what I know and I know I won't

represent anything that I don't know.

So, with respect to the entities that HCMLP, the Debtor, controls, that's absolutely the case. I don't know, and I can try to find out, but they are not HCMLP-controlled entities. Whether other entities in the related-party complex received loans -- so, obviously, HCMLP did not receive a loan. And the only entities that we were involved with is the ones I mentioned to you.

And I should mention, there are other entities in the privately-held equity that got other government money, in the medical space, that they didn't even ask for. HHS pushed forward payments to folks in the business, medical healthcare-providing businesses, to assure that they had liquidity to provide. And so -- and this has been described to me exactly this way, that they woke up in the morning and found money in their account. And with one of the companies, they actually returned a bunch of the money because it was from a dormant provider number and they didn't believe it was appropriate to keep that money. So that was one of the entities that we control with other investors.

But with respect to our HCMLP entities, these are the only ones I know. With respect to other related entities that might be in the family of businesses, for lack of a better term, that were alluded to in the *Business Insider* article, I don't know that answer. So, I -- if I -- I can try to find

out. I just don't know the answer, Your Honor.

THE COURT: All right. Thank you. Well, this has been extremely helpful.

I should ask does anyone have any questions of Mr. Seery? The Committee counsel, perhaps? Anyone else?

MR. CLUBOK: Your Honor, this is Andrew Clubok. In light of the testimony, I do have some questions on behalf of UBS.

THE COURT: All right. Briefly. Go ahead.

MR. CLUBOK: Okay.

MR. MORRIS: Your Honor? Your Honor, I'm sorry to interrupt, but there's no objection lodged here. If Your Honor wants to permit it, that's obviously the Court's prerogative. But as just a point of order, having not lodged an objection, I don't know what right anybody has to cross-examine the witness.

THE COURT: All right. Well, that's why I said briefly. I think that Mr. Morris makes a good point, Mr. Clubok. You could have filed a written objection, response, comment, or something. So, you're a party in interest. I'll give you a little bit of leeway here. But please keep it brief.

MR. CLUBOK: Yeah. Thank you, Your Honor. It's just some of the things that Mr. Seery said which we didn't expect to hear that has raised a few questions that I just very

briefly will try to address.

CROSS-EXAMINATION

BY MR. CLUBOK:

Q Mr. Seery, good afternoon. I'm Andrew Clubok, Latham & Watkins, on behalf of UBS.

Mr. Seery, you talked about the fiduciary duties you've understood yourself to have with respect to certain parties, and my question to you is: Have you understood, since the beginning of your service as an Independent Director of Strand, that you had fiduciary duties to the unsecured creditors of the Debtor?

A It's a -- it's a -- the answer is I understand the fiduciary duties very well. I think we have fiduciary duties to the estate. So Highland -- what I tried to explain is that Highland, as an asset manager, has very specific fiduciary duties that are set forth in (inaudible) in the cases and the rules that have interpreted it. We, as directors of Strand, have a duty to the estate.

I don't think it's -- I don't think it's fair, and I'd have to subject myself to some education from counsel, I don't think it's fair to say we had a specific fiduciary duty to a particular creditor.

So, for example, if I had a fiduciary duty to UBS, it would be very difficult for me to object to UBS's claim. It would be -- I don't know how I could do that as a fiduciary.

yesterday counsel for Mr. Dondero filed a joinder in the Debtors' objection to Acis's claim. So, again, just thinking about this in the context of mediation, I think, with that joinder, they will be a necessary party. So, going back to Mr. Seery's point, this is not just --

THE COURT: Oh, absolutely. Mr. Dondero is --

MS. PATEL: -- a two-party --

THE COURT: -- going to be a required party in mediation. Absolutely. So, --

MS. PATEL: Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing further, we'll see you on the 21st. And, again, my courtroom deputy may be reaching out before then if we've got things nailed down on mediation.

(Proceedings concluded at 4:54 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **07/16/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT G

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	) Case No. 18-30264-SGJ-11
	) Case No. 18-30265-SGJ-11
	) (Jointly administered under
ACIS CAPITAL MANAGEMENT, L.P.	) Case No. 18-30264-SGJ-11)
and ACIS CAPITAL MANAGEMENT GP,	)
LLC,	) DEBTORS' MOTION to FILE
	) REDACTED QUARTERLY REPORTS
Debtors.	)
	) September 23, 2020
	) Dallas, Texas

Appearances via video and/or telephone:

For the Reorganized Debtors:	Annemarie Chiarello Rahkee V. Patel Winstead PC 500 Winstead Building 2728 North Harwood Street Dallas, Texas 75201
For James Dondero:	D. Michael Lynn, of Counsel Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Forth Worth, Texas 76102
For William T. Neary, United States Trustee:	Lisa L. Lambert, Assistant U.S. Trustee Office of the U.S. Trustee, Region 6 1100 Commerce Street, Room 976 Dallas, Texas 75242-1496
Digital Court Reporter:	United States Bankruptcy Court Northern District of Texas Michael F. Edmond, Judicial Support Specialist Earle Cabell Building, U.S. Courthouse 1100 Commerce Street, Room 1254 Dallas, Texas 75242 (214) 753-2062, direct; 753-2072, fax
Certified Electronic Transcriber:	Palmer Reporting Services 1948 Diamond Oak Way Manteca, California 95336-9124

Proceedings recorded by digital recording;
transcript produced by federally-approved transcription service.

thing that it might be is commercial information, but I really don't think there's been a showing that it is of the nature that 107(b) is intended to address.

Now don't get me wrong, I am very troubled by some of what I've heard today. I doubt Mr. Dondero is listening in personally, but I'm going to say, and maybe it will get back to him, maybe it won't, but that I'm very troubled by hearing that Dondero-controlled entities, and I believe the DAF, based on what I've heard in the past, is Dondero controlled, I'm very troubled that Dondero-controlled entities are suing Acis and parties that have dealt with Acis, U.S. Bank, Brigade, and the Moody's one is really mind-boggling, but I'm very troubled that this could be hampering Acis' ability to do a reset and it's driving up expenses.

And if these lawsuits were brought before me through a removal or any other mechanism, you know, first, I would have to look at subject matter jurisdiction of the Bankruptcy Court. Yes, we're way past the effective date of Acis' plan, but the Fifth Circuit case authority provides that if there is a dispute postconfirmation that bears on the interpretation, implementation, or execution of a confirmed plan, then the Bankruptcy Court has subject matter jurisdiction in that context. And it sure sounds like, hearing Mr. Terry's version of things today, which sounded very credible, that this is potentially impinging on the reorganization and plan of Acis.

So it's very troubling to me that — well, I've said it before in Highland hearings, that these battles just continue on, but if it's impairing with a plan I confirmed, it's impairing a plan I confirmed, it's impairing the ability to perform under that plan, then that is a problem for the plaintiffs.

Now I've heard there is no pending litigation in that regard, but I'm troubled by the April 2020 letter I saw that is essentially a suggestion we may start this up again, the litigation that we dismissed. 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. I haven't seen it, but, come on.

So, bottom line, I don't find the 107 standard here is met today, so I am denying entirely the motion. I haven't been convinced that this is commercial information that 107(b) justifies redacting or sealing. But, again, I am most troubled by what I've heard today.

I have found Mr. Terry to be a very credible witness today on these points. He's testified in this Court many times and I continue to find him a very credible witness.

And so to the extent Mr. Dondero is listening or gets

a transcript, I hope it's loud and clear to him that to the extent you are engaging in efforts surreptitious or overt to derail Acis in its reorganization, there is going to be a price to pay for that. So I hope that message gets to him.

Very troubled, very troubled by what I've heard today.

All right. Well, I think that concludes our business here today. Is there anything else anyone wants to raise?

MS. LAMBERT: Judge Jernigan, Ms. Lambert for the U.S. Trustee. Would you like me to prepare an order just as for the reasons stated?

THE COURT: I would like you to do that. Thank you very much. All right.

MS. LAMBERT: And I think I will order the — I think I will order the transcript and have it sent to Mr. Lynn.

THE COURT: All right. Thank you.

(The hearing was adjourned at 5:21 o'clock p.m.)

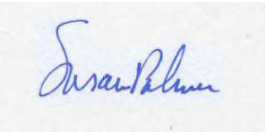
—o0o—

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services

Dated September 26, 2020

EXHIBIT H

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

In Re:	**Case No. 19-34054-sgj-11** Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Dallas, Texas Wednesday, October 21, 2020 10:00 a.m. Docket MOTION TO COMPROMISE CONTROVERSY WITH ACIS CAPITAL MANAGEMENT [1087] *Continued from 10/20/2020*

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor:	Ira D. Kharasch Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For Acis Capital Management GP, LLC:	Annmarie Antoinette Chiarello WINSTEAD, P.C. 2728 N. Harwood Street, Suite 500 Dallas, TX 75201 (214) 745-5250
For Acis Capital Management GP, LLC:	Brian Patrick Shaw ROGGE DUNN GROUP, P.C. 500 N. Akard Street, Suite 1900 Dallas, TX 75201 (214) 239-2707

motion that ever comes before it.

I daresay that Mr. Terry and Ms. Patel and Mr. Shaw firmly believe that their client has been wronged and that they're entitled to $75 million or more. Thankfully, they were able to check their egos at the door and come to an agreement, I guess, that they believe represents a fair and reasonable compromise.

So I understand that while -- that Mr. Dondero embraced and appreciated the arguments that the Debtor made in its pleading, but the fact of the matter is the Debtor came to a position when it had the choice of either going forward with that litigation, with all of the costs and risks and uncertainty that were described, or taking this settlement. And it came to the -- I believe the record shows -- the very considered and reasonable decision to end all of the litigation with Acis on the terms set forth in the agreement.

And I just wanted to kind of -- that doesn't go to any of the particular -- necessarily go to any of the particular elements of the legal standard, but so much time was spent trying to tie Mr. Seery and the Debtor to the objection, and I think -- I think it's important for the Court to look at this in context.

And frankly, there are other very substantial claims out there. And Mr. Seery was very clear that each case is going to be judged on its own merits. And just because we've

settled a case where we put forth a strong legal position here, it's only because we got to terms that the Debtor felt were fair and reasonable. We've taken -- and parties do this all the time. They take their litigation position and we're going to take our litigation position. But when it comes to settlement, you have to view: What are the alternatives? And that's all Mr. Seery did. That's what the board did, servant of their fiduciary duties.

And I'm going to talk in a few minutes about the benefits to the estate that this settlement entails, but I just -- I was a little surprised that anybody would try to say that because we took a position in litigation we're not allowed to compromise that position. Because if that were the standard, Your Honor, no 9019 would ever be approved, because, by definition, 9019s are compromises.

So let me turn for a moment now to the actual elements of the standard under 9019. The first one is the probability of success on the merits. As I said, Mr. Seery felt strongly about the position, but he also articulated some very, very specific concerns, from *Mirant* to the Court's views on equities that may not be -- the Court may not share our views on equities. The Court may not share. The Court has a lot of experience with these particular litigants. The Court has already assessed the credibility of certain witnesses in relation to the claims at issue in this matter. The Court has

already rendered decisions with respect to certain aspects of this matter. And so the Debtor took all of those things into account in assessing the probability of success on the merits, and that's all very much in the record.

But I did want to point to one other piece of evidence that hasn't been discussed yet, and that is Professor Rapoport's expert report that has now been admitted into evidence. You know, I question the weight that the Court should give, but never -- only because I'm not sure how -- the depth of the opinion. But nevertheless, Professor Rapoport specifically says at the top of Page 5, on Page 13, at the very end of her opinion as to Question 1, she says, in substance, if the Court follows *Mirant* and otherwise finds that damages would benefit the Acis estate, then the Acis claim, valued by Acis at least $75 million, could have significant value. Still, that value would depend on how the Court found -- how the facts fall after the Court hears testimony and is able to weigh the evidence.

That's kind of what Mr. Seery did. So I'm not even sure that there's a dispute, frankly, over the probability of success. Nobody has quantified it. Nobody asked Mr. Seery to quantify it. We haven't gone down that path.

But Professor Rapoport, in her very first opinion, said: Could be zero, could be $75 million or more. It depends on where the Court comes out.

consistent with the Bankruptcy Rules. The notice was given on September 23rd, so we're certainly good from notice and opportunity to be heard, from that standpoint.

As we all know and as I went through yesterday in ruling on the Redeemer Committee settlement, I am consulting Bankruptcy Rule 9019 as well as the abundance of jurisprudence that tells bankruptcy courts how they are to evaluate compromises and settlements: Cases such as *AWECO*, *Jackson Brewing*, *TMT Trailer*, *Cajun Electric*, and *Foster Mortgage*, significantly, among the cases.

I am to look at, obviously, whether the proposed compromise is fair and equitable and in the best interest of creditors when considering probability of success in future litigation, with due consideration for the uncertainty of law and fact; when considering the complexity and likely duration of future litigation and any attendant inconvenience and delay; and all other factors bearing on the wisdom of the compromise.

Case law also talks about the Court probing into whether a settlement is within the range of reasonableness, and obviously the Court should consider the paramount interests of creditors.

So, here, giving all due consideration of the record before me and the very eloquent arguments, I am going to approve the compromise today.

I'm going to turn for a moment to Mr. Seery's testimony. Just as I found his testimony to be very credible with regard to the Redeemer Committee settlement, I once again found it to be very credible and compelling in connection with the Acis and Terry settlements.

Among other things, I believe his testimony reflected a deep understanding of the risks and rewards of further litigation and the uncertainty that there was in both the law and the fact. He mentioned his understanding of the *Mirant* holding and how that absolutely posed some risks for the estate in challenging the claims of the reorganized Acis. He mentioned what I consider significant due diligence that he performed. He mentioned not only reading many of the rulings of this Court throughout the tortured history of the Acis bankruptcy, but he mentioned meeting with the board members. In fact, meeting with Mr. Terry and Acis's professionals. He picked out certain of the issues, the fact issues, the $10 million note transfer that was argued to be a fraudulent transfer. He described the disputes regarding the changing of the fee structure imposed by Highland or Highland entities on Acis, and he expressed concerns regarding the cost of litigating all of that.

He spoke in depth about Mr. Terry's claims regarding his retirement funds, and said he thought it was a pretty straightforward win for the Terrys that he thought should have

been settled years ago for full value.

He mentioned his knowledge about the Guernsey litigation, that being a jurisdiction where loser pays. So that was sort of an open-shut one as far as he was concerned. And he talked about the Acis GP proof of claim in some depth, regarding the lawsuits in New York.

So, again, I find that he was very compelling and his testimony reflected significant due diligence.

Now, the next thing I want to highlight that is very compelling to me in deciding I should approve this settlement is -- and I probably should have mentioned this first and foremost -- this was a mediated settlement. This is certainly some indication of its good faith and arm's-length nature, and certainly is a point in favor of the wisdom of the settlement, given that we had two very respected co-mediators, retired Judge Gropper from the Bankruptcy Court of the Seventh District of New York. Ms. Mayer was a partner at Weil Gotshal with a very impressive career background. And so it, again, it is a point very much in favor of the *bona fides* of this settlement. So I cannot overstate that one.

A few other points I will make. In looking at the risks and rewards and likely expense and inconvenience of further litigation, while Professor Rapoport estimated maybe $350,000 to $1.1 million of fees might be incurred for future litigation of the issues between Highland and Acis, and while

I respect her views tremendously -- I know she's been a fee examiner in many, many cases and really has some *bona fides* in speaking about fees in bankruptcy cases -- I tend to think that is an extremely low estimate. And I can't separate from this analysis my own experience and knowledge with how litigious and expensive things have historically been between Acis and Highland.

I cannot remember the final fee application amounts of the Chapter 11 Trustee and his professionals, but I know that in a year-plus of the Acis case, the fees were much, much larger than this amount, and I seem to remember that at least Foley Lardner had a very, very large unsecured claim in this case related to its fees representing *Highland v. Acis*, millions of dollars.

So, with complete respect to Professor Rapoport, I believe with all my heart that that number is way, way low as far as future fees and expenses.

And as Ms. Chiarello pointed out and I think Mr. Morris pointed out, we don't actually have evidence of Mr. Dondero's willingness to pay legal fees for fights of *Highland v. Acis*. While certainly I believe one hundred percent that Mr. Lynn was told that Dondero would pay those fees and he has every reason to believe him, I just don't have the equivalent of evidence there that I can point to, evidence being Mr. Dondero testifying that he would do that and maybe putting something

else in front of me to show a commitment.

So I again will turn to Ms. Rapoport's report. While she used words to the effect of, you know, she thought challenging this would be a reasonable endeavor, I think that, all in all, Mr. Seery was just very credible in his evaluation of things and his strong feeling from the beginning that we're going to fight this, it should be zero, and then as he did his due diligence, as he looked at some of the issues -- and I will point out that Professor Rapoport identified 16 issues of law this Court would have to determine, in her estimation, and then there could be potentially 12 fact issues the Court might have to rule on, depending on how I ruled on the 16 issues of law. I don't think I could do that as swiftly as maybe this case needs and deserves to get on its way to reorganization, and I do think the settlement enhances the likelihood of confirmation of a plan in the near future. While we may have miles to go before we get there, I think this settlement is a step in the right direction, just like the settlement with the Redeemer Committee is a step in the right direction. And that's a big factor in my mind. I'm supposed to look at all factors bearing on the wisdom of the compromise, and I think the compromise enhances the prospect of a reorganization sooner rather than later.

All right. I reserve the right to supplement in more detailed findings and conclusions, but Mr. Morris, I'm going

THE COURT: All right.

MR. KHARASCH: If we need more time, obviously, we will be letting you know.

THE COURT: All right. So, rescheduled for 10:30 tomorrow morning. And if there's nothing further, we're adjourned. Thank you.

MR. KHARASCH: Thank you, Your Honor. Appreciate it.

THE CLERK: All rise.

(Proceedings concluded at 11:26 a.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **10/24/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT I

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	December 10, 2020
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	- MOTION FOR PRELIMINARY INJUNCTION
v.	- MOTION FOR TEMPORARY RESTRAINING ORDER
JAMES D. DONDERO,	
Defendant.	

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

WEBEX/TELEPHONIC APPEARANCES:

For the Plaintiff:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Plaintiff:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Chicago, IL 60603 (312) 853-7539

THE COURT: Yes.

MR. BONDS: Can I have a second? Mr. Dondero did apologize to counsel and to Mr. Seery as well, and so the idea that Mr. Dondero has not apologized is not entirely correct.

THE COURT: Okay. Well, if I misunderstood, I apologize. But I guess what I was really trying to convey is, in a situation like this, I think coming into court and taking his lumps and saying things under oath might have been a better way to proceed.

I guess the second thing I want to say is I wish Mr. Dondero was here, because maybe I'm reading this wrong, but I think he needs to hear and know he is not in charge anymore of Highland. It may have been his baby. He may have created its wealth. But when he and the board made the decision to file Chapter 11, number one, that changed everything. And then number two, when the Committee was formed and was threatening "We think we need a Chapter 11 trustee because of conflicts of interest of Mr. Dondero and others," and when the Committee negotiated something short of that with the Debtor in January 2020, you know, a settlement that involved Mr. Dondero no longer being in charge, no longer being CEO, no longer having any role except portfolio manager with the Debtor, and when various protocols were negotiated, heavily negotiated, for weeks, detailed, complex protocols, life changed even further. It changed when he filed Chapter 11, when he put his baby,

Highland, in Chapter 11, and then it changed further in January 2020 when this global corporate governance settlement was reached. As we know, it involved independent new board members coming in and eventually a new CEO. He's not in charge.

Now, that doesn't mean he's not a party in interest, and he can certainly weigh in with pleadings in the bankruptcy court. But these communications that I've admitted into evidence, and the declaration, the sworn declaration of Mr. Seery, suggest to me that he's not fully appreciating that, sorry, you're not in charge. And when you chose to put the company in bankruptcy because of the overwhelming debt, it started a cascade of events, so that now I'm depending on a debtor-in-possession with a new board and a new CEO and a Committee of very sophisticated members and professionals who are working in tandem with the Debtor to be in charge, basically. All right? So that's another thing I just feel compelled to say for Mr. Dondero's benefit.

I guess another thing is there was a little bit of a theme, Mr. Bonds, in your comments that Mr. Dondero is just concerned, more than anything else, about the way employees are being treated, or at least that's a major concern. And I don't find that to be especially compelling. I mean, maybe if he was sworn under oath and testified, I would believe that, but it doesn't feel like what's really going on here. Again,

he took the step of deciding that the company should file Chapter 11. We had the change in corporate governance in January. And he has the ability -- everyone, I think, would very much be interested in a plan that he supports. You know, he wants to get the company back. That has been made clear in hearings from time to time, and I believe, from Seery's declaration and Highland's lawyers, that they've been and will remain receptive to Mr. Dondero's ideas for a different type of plan that might allow him to get back into control of Highland, if he puts in adequate consideration that makes the Committee and others happy.

But we're in a proverbial the-train-is-leaving-the-station posture right now. Okay? We've got confirmation coming up the second week of January or something like that. Okay. So the train is leaving the station, so we're running out of time to hear what Dondero might want to do as far as an alternative plan.

So, as far as the requested TRO, I appreciate that Mr. Dondero and his counsel are worried about some ambiguity, but I'm looking through the literal wording that has been proposed, and the wording proposed is that Dondero is temporarily enjoined and restrained for communicating, whether orally, in writing, or otherwise, directly or indirectly, with any board member, unless Mr. Dondero's counsel and counsel for the Debtor are included in such communications. Not ambiguous

Court next Wednesday, he needs to testify. And if NexPoint, through whoever their decision-maker is, is wanting to urge a position to the Court, they need a human being to testify. And I'll hear Seery and I'll hear Dondero and I'll hear whoever that person is, and that's what's going to matter, you know, most to me. Yeah, we have some legal issues, certainly, but I like to hear business people explain things, no offense to the lawyers. But it's always very helpful to hear the business people in addition to the lawyers. All right. So, Mr. Morris, you're going to upload that TRO for me.

MR. MORRIS: Yes, Your Honor.

THE COURT: Mr. Wright, you can upload your order setting your motion for hearing next Wednesday at 1:30. And I think we have our game plan for now. Anything else? All right. We're adjourned.

THE CLERK: All rise.

(Proceedings concluded at 11:33 a.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **12/11/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT J

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	Wednesday, December 16, 2020
	)	1:30 p.m. Docket
Debtor.	)	
	)	- MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS [1528]
	)	- DEBTOR'S EMERGENCY MOTION TO QUASH SUBPOENA AND FOR ENTRY OF PROTECTIVE ORDER [1564, 1565]
	)	- JAMES DONDERO'S MOTION FOR ENTRY OF ORDER REQUIRING NOTICE AND HEARING [1439]
	)	

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

The Movants are not parties to those agreements. The testimony is undisputed that there are many holders of preferred shares and notes that have had no notice of this proceeding that will undoubtedly be impacted by the tying of the hands of the portfolio manager. The chart that was attached as Exhibit B expressly shows just what a large portion of interested parties and people who would be affected by this motion are not -- they didn't get notice. There was no attempt to get notice. There was no attempt to get their consent. All of that testimony is now in the record, and I think due process alone would prevent the entry or even the consideration of an order of this type.

There is nothing improper that's been alleged. There is no -- there is no allegation of fraud. There is no allegation of breach of contract of any kind. There's not even a question of business judgment. The Movants didn't even do their diligence to ask the Debtor why they made these transactions. There is nothing in the record that shows that the Debtor, as the portfolio manager of the CLOs, did anything improper.

The only thing that the Movants care about is that they don't like the results in two particular trades. I don't think that that meets their burden of persuasion that the Court should enter an order of this type, and I would like to relieve Mr. Seery of the burden, frankly, and the Court, of

having to put on testimony to justify transactions that really aren't even being questioned, Your Honor.

So the Debtor would respectfully move for the denial of the motion and the relief sought therein.

THE COURT: All right. Your request for a directed verdict, something equivalent to a directed verdict here, is granted. I agree that the Movant has wholly failed to meet its burden of proof here today to show the Court, persuade the Court that, as Mr. Morris said, I should essentially tie the hands of the Debtor as a portfolio manager here, as stated. Nothing improper has been alleged. There has been no showing of a statutory right here, or a contractual right here, on the part of the Movants.

I am -- I'm utterly dumbfounded, really. I agree with the -- I was going to say innuendo; not really innuendo -- I agree with part of the theme, I think, asserted by the Debtor here today that this is Mr. Dondero, through different entities, through a different motion. I feel like he sidestepped the requirement that I stated last week that if we had a contested hearing on his motion, Dondero's motion, that I was going to require Mr. Dondero to testify. He apparently worked out an eleventh hour agreement with the Debtor on his motion to avoid that. But, again, these so-called CLO Motions very clearly, very clearly, in this Court's view, were pursued at his sole direction here.

This is almost Rule 11 frivolous to me. You know, we're -- we didn't have a Rule 11 motion filed, and, you know, I guess, frankly, I'm glad that a week before the holidays begin we don't have that, but that's how bad I think it was, Mr. Wright and Mr. Norris. This is a very, very frivolous motion. Again, no statutory basis for it. No contractual basis. You know, you didn't even walk me through the provisions of the contracts. I guess that would have been fruitless. But you haven't even shown something equitable, some lack of reasonable business judgment.

Bluntly, don't waste my time with this kind of thing again. You wasted my time. We have 70 people on the video. Utter waste of time.

All right. So, motion is denied. Mr. Morris, please upload an order.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. Do we have any other business to accomplish today?

MR. POMERANTZ: I don't think so, Your Honor. I know we will see you tomorrow in connection with Mr. Daugherty's relief from stay motion.

THE COURT: Well, yeah, we do have that. Okay. We will see you tomorrow. We stand adjourned.

MR. CLEMENTE: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 3:05 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 **12/17/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT K

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

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

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor/Plaintiff: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

David Klos, who is the person who put the model together, who has been working on it for six or nine months, and no one else S has a copy of? Yes. Yeah, I have to -- I have to access him. I don't believe that's the -- inappropriate or in any way violating the spirit of the TRO.

I believe settlement in this case is only going to happen with somebody fostering communication. And Ellington's role, which I thought was a good one and I thought he was performing well as settlement counsel, was an important role. And I used him for things like -- and Seery also used him for things. As recently as two days before Ellington was fired, Seery gave him a shared services proposal to negotiate with me. Ellington has always been the go-between from a settlement and a legal standpoint. I think his role there was -- it was valued. To try to honor the TRO was things like Multi-Strat, that I didn't remember correctly. Ninety percent of the time or for the last 20 years I would have gone directly to Accounting and Dave Klos for it, but I purposely went to settlement counsel in terms of Ellington in order to get the Multi-Strat information which we needed in order to put the pot plan together that we went to the Independent Board with at the end of December.

Q (faintly) And do you recall the questions that Debtor's counsel had regarding the letters sent by K&L Gates to clients of the Debtor?

MR. MORRIS: I'm sorry, Your Honor. I had trouble hearing that question.

THE COURT: Please repeat.

MR. BONDS: Sure.

BY MR. BONDS:

Q Do you recall the questions Debtor's counsel had regarding the letters sent by K&L Gates to the clients of the Debtor -- to the Debtor?

A Yes.

Q You testified on direct that the letters were sent to do the right thing; is that correct?

A Yes.

Q What did you mean by that?

A I don't want to repeat too much of what I just said, but the Debtor has a contract to manage the CLOs, which in no way is it not in default of. It doesn't have the staff. It doesn't have the expertise. Seery has no historic knowledge on the investments. The investment staff of Highland has been gutted, with me being gone, with Mark Okada being gone, with Trey Parker being gone, with John Poglitsch being gone.

And there's -- there's a couple analysts that are a year or two out of school. The overall portfolio is in no way being understood, managed, or monitored. And for it to be amateur hour, incurring losses for no business purpose, when the investors have requested numerous times for their account

not to be traded, is crazy to me. Where the investors say, We just want our account left alone. We just want to keep the exposure. And Jim Seery decides no, there's -- I'm going to turn it into cash for no reason. I'm just going to sell your assets and turn them to cash and incur losses by doing it the week of Thanksgiving and the week of Christmas. I think it's -- it's shameful. I'm glad the compliance people and the general counsel at HFAM and NexPoint saw it the same way. I didn't edit their letters, proof their letters, tell them how to craft their letters. They did that themselves, with regulatory counsel and personal liability. They put forward those letters.

MR. MORRIS: Your Honor (garbled) the testimony that Mr. Dondero just gave about these people saw it. They're not here to testify how they saw it. We know that Mr. Dondero personally saw and approved the letters before they went out. He can testify what he thinks, what he believes. I have no problem with that. But there should be no evidence in the record of what the compliance people thought, believed, understood, anything like that. It's not right.

THE COURT: All right. That's essentially a --

MR. BONDS: Your Honor?

THE COURT: -- a hearsay objection, I would say, or lack of personal knowledge, perhaps. Mr. Bonds, what is your response?

MR. BONDS: Your Honor, my response would be that there are several exhibits the Debtor introduced today that stand for the proposition that the compliance officers were concerned. So I think there is ample evidence of that in the record.

THE COURT: I didn't --

MR. MORRIS: Your Honor, the letter --

THE COURT: I did not understand what you said is in the record. Say again.

MR. BONDS: Your Honor, I'm sorry. The -- there are -- there are references that are replete in the record that have to do with the compliance officers' understanding of the transactions.

THE COURT: I don't know what you're referring to.

THE WITNESS: Your Honor?

THE COURT: I've got a lot of exhibits. You're going to have to point out what you think --

THE WITNESS: Can I -- can I -- can I -- can I answer for -- that for a second? The letters that were signed by the compliance people or by the businesspeople at NexPoint and HFAM objecting to the transactions, those letters were their beliefs, their researched beliefs. They weren't --

THE COURT: Okay.

THE WITNESS: -- micromanaged by me. You know, they weren't -- I agree with them, but those weren't my beliefs

that they've stated. Those were their own beliefs and their own research, --

THE COURT: All right.

THE WITNESS: -- and the record should reflect --

THE COURT: This is clearly hearsay. I mean, it's one thing to have a letter, but to go behind the letter and say, you know, what the beliefs inherent in the words were is inadmissible. All right? So I strike that.

THE WITNESS: Maybe ask your question again.

BY MR. BONDS:

Q Yeah. What is your understanding of the rights that these parties had and what do you believe that was intended to be conveyed by the compliance officers?

MR. MORRIS: Objection. Calls -- calls for Mr. Dondero to divine the intent of third parties. Hearsay.

THE COURT: I sustain.

MR. BONDS: Your Honor, --

MR. MORRIS: No foundation.

MR. BONDS: -- I don't agree. I think that this is asking Mr. Dondero what he thinks.

MR. MORRIS: The letters speak for themselves, Your Honor.

THE COURT: Okay. I sustain --

MR. MORRIS: And Mr. --

THE COURT: I sustain the objection.

MR. MORRIS: All right. Thank you.

THE WITNESS: Ask me what I know. Or ask me what my concerns --

BY MR. BONDS:

Q Let me ask you this. What were your concerns relating to the compliance officers' exhibit?

A My concerns regarding the transaction, the transactions, which may repeat what I've said before, but I do want to make sure it gets in the record. So if we have to make a -- these were my concerns, whether or not they were the compliance people's concerns. I believe they were, and I believe they were similar, but I'm just going to say these are -- these were my concerns.

The Debtor, with its contractual -- with its contract with the CLOs, were in no way -- was in no way compliant with that contract or not in default of that contract. Bankruptcy is a reason for default. Not having the key men specified in the contract currently employed by the Advisor is a violation. Not having adequate investment staff to manage the portfolio is a violation of that contract. Announcing that you're laying off everybody and will no longer be a registered investment advisor is proclaiming that you, if you even have any -- any -- pretend that you're qualified or in compliance with the contract now, you're broadcasting that you won't be in three weeks, are -- are all mean that you're not in good

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 Date
Certified Electronic Court Transcriber

EXHIBIT L

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	Tuesday, January 26, 2021
	)	9:30 a.m. Docket
Debtor.	)	
	)	MOTION FOR ENTRY OF ORDER
	)	AUTHORIZING DEBTOR TO
	)	IMPLEMENT KEY EMPLOYEE
	)	PLAN [1777]
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	**Adversary Proceeding 21-3000-sjg**
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFF'S MOTION FOR A
	)	PRELIMINARY INJUNCTION AGAINST
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.	)	CERTAIN ENTITIES OWNED AND/OR CONTROLLED BY MR. JAMES DONDERO [5]
	)	
Defendants.	)	

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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10100 Santa Monica Blvd.,
13th Floor
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(310) 277-6910

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

can't talk them about specifically, but they're at least 20 percent better than what the Debtor has put forward as far as a plan. And what we put forward is elegant, it's simpler, it treats the employees fairly, it gives the business continuity, it gives investors continuity, and it's not just a harsh, punitive liquidation that's going to end up in a myriad of litigation.

We're paying a premium, it's a capitulation price, to try and get to some kind of settlement. And I encourage you to look at it. It's elegant. It's straightforward. It's simple. And now that you've encouraged and gotten us up to a number that's well in excess of the Debtor, maybe a little pressure on other people to treat employees fairly, maybe not liquidate a business that's important in Dallas, that has been a big business for a number of years, doing enormous good things for a lot of people.

You know, we went into bankruptcy with $450 million of assets and almost no debt. And we've been driven into the ground by the process. And then the plan is to just harshly liquidate going forward. I -- I -- it's crazy. I don't know what else to do to stop the train other than what we've offered.

THE COURT: All right. Well, I hear what you're saying, and I do, just because -- I don't know if you left the room or not, but we did have discussion of Section 206 of the

Investment Advisers Act today. It was put on the screen. Mr. Post was asked what was unlawful as far as what had happened here, what was going on here, what was fraudulent, deceptive, or manipulative, in parsing through the words of the statute. And he said Mr. Seery engaged in deceptive acts because he wasn't trying to maximize value. Okay? I'm not an expert on the Investment Advisers Act, but I know that that was not a deceptive act.

And so I'll allow the plan to be filed under seal, but it's not going to be unsealed absent an order of the Court. Okay? So we'll just leave it at that for now. And while I still encourage good-faith negotiations here, I've said it umpteen times, where you're tired of the cliché, probably: The train is leaving the station. And if you want the Court to have patience in the process and if you want the parties to cooperate in good faith, it might help if we didn't have things like Dugaboy and Get Good Trust filing a motion for an examiner 15 months into the case.

I mean, it feels to me, Mr. Dondero, whether I'm right or wrong, that it's like you've got a twofold approach here: I either get the company back or I burn the house down. And I'm telling you right now, if we don't have agreements, --

MR. DONDERO: That's not true.

THE COURT: -- if we don't have agreements and we come back on the 5th for a continuation of this hearing and a

motion to hold you in contempt, you know, I'm leaning right now, based on what I've heard so far, and I know I haven't heard everything, but I'm leaning right now towards finding contempt and shifting a whole bundle of attorneys' fees. That, to me, seems like the likely place we're heading.

I mean, I commented at the December hearing on the preliminary injunction against you personally that it had been like a $250,000 hearing, I figured, okay, just guesstimating everybody's billable rate times the hours we spent. Well, here we were again, and I know we've got all this time outside the courtroom preparing, taking depositions. I mean, what else is a judge to think except, by God, let's drive up administrative expenses as much as we can; if we can't win, we're going to go down fighting? That's what this looks like. Okay? So if it's not really what's going on, then you've got to work hard to change my perceptions at this point.

MR. RUKAVINA: Your Honor, I hear everything what you're saying, and I'm going to discuss it very bluntly with my clients. But we're being asked not to exercise contract rights in the future. This is not a contempt hearing. And Your Honor, we did ask and offered the estate a million dollars, found money, plus to waive almost all our plan objections, if they would just put this case on pause for 30 days.

So we are trying. We are trying creative solutions here.

We know that the train is leaving. We've put our money where our mouth is. We will continue trying. But Your Honor, this is not a contempt proceeding, and my clients are not Mr. Dondero. You've heard they're independent boards.

MR. POMERANTZ: I can't leave that last comment without a response. Yes, there was an offer of a million dollars, by an entity that owes the estate multiples of that. So they are offering to pay us something that they already owe us. So Mr. Rukavina continues try to do this. We will not stand for it.

MR. RUKAVINA: That is not a fair statement, sir. I misrepresented nothing. We were offering you a million dollars, with no conditions, earned upon receipt, with no credit, no deduction for any of our liability. So you're free to say no, sir, but you're not going to tell the judge that I misrepresented something.

THE COURT: All right.

MR. POMERANTZ: Should tell the Court --

THE COURT: You know what?

MR. POMERANTZ: -- that that entity owed the Debtor.

THE COURT: You know what? You know what? I am more focused on, Mr. Rukavina, your comment that this Court can't enjoin your clients from exercising contractual rights when, again, in January of 2020, the representation was made and it was ordered, "Mr. Dondero shall not cause any related entity

to terminate any agreements with the Debtor." Okay? That was -- go back and look at the transcript. That was so meaningful to me.

We were facing a possible trustee. And that's what I did in the *Acis* case. Okay? I had a Chapter 11 trustee. And it was not a perfect fit, to be sure. But it is where we were heading in this case, had the lawyers and parties not negotiated what they did. That was a very important provision, convincing me that, you know what, I think the structure they've got will be better than a trustee. And it has, for the most part. But the fees have gone out the roof, and I lay that at the feet of Mr. Dondero, for the most part. Okay? We have a bomb thrown every five minutes by either him personally or the Dugaboy or the Get Good Trust or the Funds or the Advisors or I don't know who else. Okay?

So the train is leaving the station, unless you all come to me and say, okay, we've maybe got a -- Mr. Pomerantz's word -- grand solution here. Okay? If you get there in the next few days, wonderful. Okay? But I don't know what else to say except I'm tired of the carpet-bombing, and if I had to rule this minute, there would be a huge amount of fee-shifting for what we went through today, for what we went through in December, for the restriction motion that, after I called it frivolous, the lawyers were sending letters pretty much regurgitating the same arguments. All right. So, not a happy

camper.

But upload your order on the motion to seal the plan. And, again, it's not going to be unsealed absent a further order of the Court. And if you all come to me next week and say, hey, we've got something in the works here, okay, I'll consider unsealing it and letting you go down a different path. But I'm not naïve. I feel like this is just more burning the house down, maybe. I don't know. I hope I'm wrong. I hope I'm wrong. But all right. So I guess we'll see you next week.

MR. POMERANTZ: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

MR. RUKAVINA: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 6:08 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 **01/28/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

camper.

But upload your order on the motion to seal the plan. And, again, it's not going to be unsealed absent a further order of the Court. And if you all come to me next week and say, hey, we've got something in the works here, okay, I'll consider unsealing it and letting you go down a different path. But I'm not naïve. I feel like this is just more burning the house down, maybe. I don't know. I hope I'm wrong. I hope I'm wrong. But all right. So I guess we'll see you next week.

MR. POMERANTZ: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

MR. RUKAVINA: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 6:08 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 **01/28/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT M

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	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 PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For James Dondero:	D. Michael Lynn John Y. Bonds, III Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300

of evidence, considering testimony from five witnesses and thousands of pages of documentary evidence, in considering whether to confirm the Plan pursuant to Sections 1129(a) and (b) of the Bankruptcy Code.

The Court finds and concludes that the Plan meets all of the relevant requirements of Sections 1123, 1124, and 1129 of the Code, and other applicable provisions of the Bankruptcy Code, but is issuing this detailed ruling to address certain pending objections to the Plan, including but not limited to objections regarding certain Exculpations, Releases, Plan Injunctions, and Gatekeeping Provisions of the Plan.

The Court reserves the right to amend or supplement this oral ruling in more detailed findings of fact, conclusions of law, and an Order.

First, by way of introduction, this case is not your garden-variety Chapter 11 case. Highland Capital Management, LP is a multibillion dollar global investment advisor, registered with the SEC pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mr. Okada resigned from his role with Highland prior to the bankruptcy case being filed. Mr. Dondero was in control of the Debtor as of the day it filed bankruptcy, but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Official Unsecured Creditors' Committee, which will be described later.

Although Mr. Dondero remained on as an unpaid employee and portfolio manager with the Debtor after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and essentially control numerous nondebtor companies in the Highland complex of companies.

The Debtor is headquartered in Dallas, Texas. As of the October 2019 petition date, the Debtor employed approximately 76 employees.

Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including CLOs and other investments. Some of these assets are managed pursuant to shared services agreements with a variety of affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the Byzantine complex of companies under the Highland umbrella.

None of these affiliates of Highland filed for Chapter 11 protection. Most, but not all, of these entities are not subsidiaries, direct or indirect, of Highland. And certain parties in the case preferred not to use the term "affiliates" when referring to them. Thus, the Court will frequently refer loosely to the so-called, in air quotes, "Highland complex of companies" when referring to the Highland enterprise. That's a term many of the lawyers in the case use.

Many of the companies are offshore entities, organized in

such faraway jurisdictions as the Cayman Islands and Guernsey.

The Debtor is privately owned 99.5 percent by an entity called Hunter Mountain Investment Trust; 0.1866 percent by the Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; 0.0627 percent by Mark Okada, personally and through family trusts; and 0.25 percent by Strand Advisors, Inc., the general partner.

The Debtor's primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates.

For additional liquidity, the Debtor, prior to the petition date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at nondebtor subsidiaries and distribute those proceeds to the Debtor in the ordinary course of business.

The Debtor's current CEO, James Seery, credibly testified that the Debtor was "run at a deficient for a long time and then would sell assets or defer employee compensation to cover its deficits." This Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses that Highland was constantly incurring due to its culture of litigation, as further addressed hereafter.

Highland and this case are not garden-variety for so many

11 case is its postpetition corporate governance structure. Highland filed bankruptcy October 16, 2019. Contentiousness with the Creditors' Committee began immediately, with first the Committee's request for a change of venue from Delaware to Dallas, and then a desire by the Committee and the U.S. Trustee for a Chapter 11 or 7 trustee to be appointed due to concerns over and distrust of Mr. Dondero and his numerous conflicts of interest and alleged mismanagement or worse.

After many weeks of the threat of a trustee lingering, the Debtor and the Creditors' Committee negotiated and the Court approved a corporate governance settlement on January 9, 2020 that resulted in Mr. Dondero no longer being an officer or director of the Debtor or of its general partner, Strand.

As part of the court-approved settlement, three eminently-qualified Independent Directors were chosen by the Creditors' Committee and engaged to lead Highland through its Chapter 11 case. They were James Seery, John Dubel, and Retired Bankruptcy Judge Russell Nelms. They were technically the Independent Directors of Strand, the general partner of the Debtor. Mr. Dondero had previously been the sole director of Strand, and thus the sole person in ultimate control of the Debtor.

The three independent board members' resumes are in evidence. James Seery eventually was named CEO of the Debtor. Suffice it to say that this changed the entire trajectory of

the case. This saved the Debtor from a trustee. The Court trusted the new directors. The Creditors' Committee trusted them. They were the right solution at the right time.

Because of the unique character of the Debtor's business, the Court believed this solution was far better than a conventional Chapter 7 or 11 trustee. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large, complex businesses and serving on their boards of directors in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries.

By way of comparison, in the Chapter 11 case of Acis, the former affiliate of Highland that this Court presided over two or three years ago, which company was much smaller in size and scope than Highland, managing only five or six CLOs, a Chapter 11 trustee was elected by the creditors that was not on the normal rotation panel for trustees in this district, but rather was a nationally-known bankruptcy attorney with more than 45 years of large Chapter 11 case experience. This Chapter 11 trustee performed valiantly, but was sued by entities in the Highland complex shortly after he was appointed, which this Court had to address. The Acis trustee

could not get Highland and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of a plan over Highland and its affiliates' objections in his fourth attempted plan, which confirmation then was promptly appealed by Highland and its affiliates.

Suffice it to say it was not easy to get such highly-qualified persons to serve as independent board members and CEO of this Debtor. They were stepping into a morass of problems. Naturally, they were worried about getting sued, no matter how defensible their efforts might be, given the litigation culture that enveloped Highland historically. It seemed as though everything always ended in litigation at Highland.

The Court heard credible testimony that none of them would have taken on the role of Independent Director without a good D&O insurance policy protecting them, without indemnification from Strand, guaranteed by the Debtor; without exculpation for mere negligence claims; and without a gatekeeper provision, such that the Independent Directors could not be sued without the bankruptcy court, as a gatekeeper, giving a potential plaintiff permission to sue.

With regard to the gatekeeper provision, this was precisely analogous to what bankruptcy trustees have pursuant to the so-called "Barton Doctrine," which was first articulated in an old U.S. Supreme Court case.

The Bankruptcy Court approved all of these protections in a January 9, 2020 order. No one appealed that order. And Mr. Dondero signed the settlement agreement that was approved by that order.

An interesting fact about the D&O policy came out in credible testimony at the confirmation hearing. Mr. Dubel and an insurance broker from Aon, named Marc Tauber, both credibly testified that the gatekeeper provision was needed because of the so-called, and I quote, "Dondero Exclusion" in the insurance marketplace.

Specifically, the D&O insurers in the marketplace did not want to cover litigation claims that might be brought against the Independent Directors by Mr. Dondero because the marketplace of D&O insurers are aware of Mr. Dondero's litigiousness. The insurers would not have issued a D&O policy to the Independent Directors without either the gatekeeping provision or a "Dondero Exclusion" being in the policy.

Thus, the gatekeeper provision was part of the January 9, 2020 settlement. There was a sound business justification for it. It was reasonable and necessary. It was consistent with the Barton Doctrine in an extremely analogous situation -- *i.e.*, the independent board members were analogous to a three-headed trustee in this case, if you will. Mr. Dondero signed off on it. And, again, no one ever appealed the order

approving it.

The Court finds that, like the Creditors' Committee, the independent board members here have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and with good faith. As noted previously, they changed the entire trajectory of this case.

Still another reason why this was not your garden-variety case was the mediation effort. In summer of 2020, roughly nine months into the Chapter 11 case, this Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Court selected co-mediators, since this seemed like such a Herculean task, especially during COVID-19, where people could not all be in the same room. Those co-mediators were Retired Bankruptcy Judge Allan Gropper from the Southern District of New York, who had a distinguished career presiding over complex Chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner in a preeminent law firm working on complex Chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas.

As noted earlier, the Acis claim was settled during the mediation, which seemed nothing short of a miracle to this Court, and the UBS claim was settled many months later, and this Court believes the groundwork for that ultimate

settlement was laid, or at least helped, through the mediation. And as earlier noted, other enormous claims have been settled during this case, including that of the Redeemer Committee, who, again, had asserted approximately or close to a $200 million claim; HarbourVest, who asserted a $300 million claim; and Patrick Daugherty, who asserted close to a $40 million claim.

This Court cannot stress strongly enough that the resolution of these enormous claims and the acceptance of all of these creditors of the Plan that is now before the Court seems nothing short of a miracle. It was more than a year in the making.

Finally, a word about the current remaining Objectors to the Plan before the Court. Once again, the Court will use the phrase "not garden-variety." Originally, there were over one dozen objections filed to this Plan. The Debtor has made various amendments or modifications to the Plan to address some of these objections. The Court finds that none of these modifications require further solicitation, pursuant to Sections 1125, 1126, 1127 of the Code, or Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditor or interest holder who has not accepted in writing the modifications.

Among other things, there were changes to the projections

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

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

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

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

they have, and the Court believes that they have.

Now, to be specific about the remoteness of the objectors' interests, the Court will address them each separately. First, Mr. Dondero has a pending objection. Mr. Dondero's only economic interest with regard to the Debtor at this point is an unliquidated indemnification claim. And based on everything this Court has heard, his indemnification claim will be highly questionable at this juncture.

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

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

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

The witness who testified on these Objectors' behalves 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.

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

To be clear, 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.

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

time that this all came to light and the Court began setting hearings on the alleged interference, Mr. Dondero's company phone supplied to him by Highland, which he had been asked to turn in, mysteriously went missing. The Court merely mentions this in this context as one of many reasons that the Court has to question the good faith of Mr. Dondero and his affiliated objectors.

The only other pending objection besides these objections of the Dondero and Dondero-controlled entities is an objection of the United States Trustee pertaining to the release, exculpation, and injunction provisions in the Plan.

In juxtaposition to these pending objections, the Court notes that the Debtor has resolved earlier-filed objections to the Plan filed by the IRS, Patrick Daugherty, CLO Holdco, Ltd., numerous local taxing authorities, and certain current and former senior-level employees of the Debtor.

With that rather detailed factual background addressed, because certainly context matters here, the Court now addresses what it considers the only serious objections raised in connection with confirmation. Specifically, the Plan contain certain releases, exculpation, plan injunctions, and a gatekeeper provision which are obviously not fully consensual, since there are objections. Certainly, these provisions are mostly consensual when you consider that parties with hundreds of millions of dollars' worth of legitimate claims have not

Now, after all of that, this Court believes the following can be gleaned from *Pacific Lumber*. First, the Fifth Circuit hinted that consensual exculpations and/or consensual nondebtor third-party releases are permissible. The Court was, of course, dealing with nonconsensual exculpations in *Pacific Lumber*. In this regard, I note Page 252, where the Court cited various prior Fifth Circuit authority and then stated, "These cases seem broadly to foreclose nonconsensual nondebtor releases and permanent injunctions."

The second thing that can be gleaned from *Pacific Lumber*: The Fifth Circuit hinted that nondebtor releases may be permissible in cases involving global settlements of mass claims against the debtors and co-liable parties. The Court, of course, referred to 524(g), but various other cases which approved nondebtor releases where mass claims were channeled to a specific pool of assets.

Third, the Fifth Circuit outright held that exculpations from negligence for a Creditors' Committee and its members are permissible because the concept is both consistent with 1103(c), "which implies Committee members have qualified immunity for actions within the scope of their duties," and a good policy result, since "if members of the Committee can be sued by persons unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee."

Fourth, the Fifth Circuit recognized in *Pacific Lumber* that *res judicata* may bar complaints regarding an impermissible plan release, citing to its earlier *Republic Supply v. Shoaf* opinion.

Now, being ever-mindful of the Fifth Circuit's words in *Pacific Lumber*, this Court cannot help but wonder about at least three things.

First, did the Fifth Circuit leave open the door that facts/equities might sometimes justify approval of an exculpation for a person other than a Creditors' Committee and its members? For example, the Fifth Circuit stated, in referring to the plan proponents Marathon and MRC, that "Any costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either of these parties or the consummated reorganization." Here, this Court can easily expect the proposed exculpated parties to incur costs that could swamp them and the reorganization based on the past litigious conduct of Mr. Dondero and his controlled entities. Do these words of the Fifth Circuit hint that equities/economics might sometimes justify an exculpation?

Second, did the Fifth Circuit's rationale for permitted exculpations to Creditors' Committee and their members, which was clearly policy-based, based on their implied qualified immunity flowing from their duties in Section 1103 and their disinterestedness, and the importance of their role in a

Chapter 11 case, did this rationale leave open the door to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides Creditors' Committees and their members? For example, in a situation such as the Highland case, in which Independent Directors, brought in to avoid a trustee, are more like a Creditors' Committee than an incumbent board of directors.

Third, the Fifth Circuit's sole statutory basis was Section 524(e). This Court would humbly submit that this is a statute dealing with prepetition liability in which some nondebtor is liable with the Debtor. Exculpation is a concept dealing with postpetition liability.

The Ninth Circuit recently, in a case called *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), approved the validity of an exculpation clause incorporated into a confirmed Chapter 11 plan that purported to absolve certain nondebtor parties that were "closely involved" in drafting the plan. They were the largest secured creditor, a purchaser, and an individual who was an indirect owner of certain of the debtor companies. The exculpation was from any negligence, liability, for "any act or omission in connection with, related to, or arising out of the Chapter 11 cases."

By the time the appeal was before the Ninth Circuit, the only issue was the propriety of the exculpation clause as to the large secured creditor, which was also a plan proponent,

since all the other exculpated parties had settled with the appellant.

The Court, in determining that the exculpation clause was permissible as to the secured lender, concluded that Section 524(e) "does not bar a narrow exculpation clause of the kind here at issue -- that is, one focused on actions of various participants in the plan approval process and relating only to that process," Page 1082. Why? Because "Section 524(e) establishes that discharge of a debt of the debtor does not affect the liability of any other entity on such debt." In other words, the discharge in no way affects the liability of any other entity for the discharged debt. By its terms, 524(e) prevents a bankruptcy court from extinguishing claims of creditors against nondebtors over the very discharged debt through the bankruptcy proceedings.

The Court went on to explicitly disagree with *Pacific Lumber* in its analysis of 524(e), reiterating that an exculpation clause covers only liabilities arising from the bankruptcy proceedings and not of any of the debtor's discharged debt. Footnote 7, Page 1085.

Ultimately, the Court held that under Section 105(a), which empowers a bankruptcy court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of Chapter 11 and Section 1123, which establishes the appropriate content of the bankruptcy plan, under these

sections, the bankruptcy court had authority to approve an exculpation clause intended to trim subsequent litigation over acts taken during the bankruptcy proceedings and so render the plan viable.

This Court concludes that, just as the Fifth Circuit left open the door for consensual exculpations and releases in *Pacific Lumber*, just as it left open the door for consensual exculpations and releases in *Pacific Lumber*, its dicta suggests that an exculpation might be permissible if there is a showing that "costs that the released parties might incur defending against suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization." Again, that was a quote from the Fifth Circuit.

If ever there were a risk of that happening in a Chapter 11 reorganization, it is this one. The Debtor's current CEO credibly testified that Mr. Dondero has said outside the courtroom that if Mr. Dondero's own pot plan does not get approved, that he will "burn the place down." Here, this Court can easily expect the proposed exculpated parties might expect to incur costs that could swamp them and the reorganization process based on the past litigious conduct of Mr. Dondero and his controlled entities.

Additionally, this Court concludes that the Fifth Circuit's rationale in *Pacific Lumber* for permitted exculpations to Creditors' Committees and their members, which

was clearly policy-based based on their implied qualified immunity flowing from Section 1103 and their importance in a Chapter 11 case, leaves the door open to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides a UCC and its members.

Again, if there was ever such a case, the Court believes it is this one, in which Independent Directors were brought in to avoid a trustee and are much more like a Creditors' Committee than an incumbent board of directors. While, admittedly, there are a few exculpated parties here proposed beyond the independent board, such as certain employees, it would appear that no one is invulnerable to a lawsuit here if past is prologue in this Highland saga.

The Creditors' Committee was initially not keen on exculpations for certain employees. However, Mr. Seery credibly testified that there was a contentious arm's-length negotiation over this and that he needs these employees to preserve value implementing the Plan. Mr. Dondero has shown no hesitancy to litigate with former employees in the past, to the *nth* degree, and there is every reason to believe he would again in the future, if able.

Finally, in this situation, in the case at bar, we would appear to have a *Shoaf* reason to approve the exculpations. The January 9, 2020 order of this Court, Docket Entry 339, which approved the independent board and an ongoing corporate

appropriate. They are entirely consistent with and permissible under Bankruptcy Code Sections 1123(a)(5), 1123(a)(6), 1141(a) and (c), and 1142, as well as Bankruptcy Rule 3016(c), which articulates the form that a plan injunction must be set forth in a plan.

The Court finds the objections to the Plan Injunctions to be unfounded, and they are thus overruled without much discussion here.

Now, lastly, the Gatekeeper Provision. It appears at Paragraph 4 of Article IX.F of the Plan and provides, in pertinent part, "Subject in all respects to Article XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 case, the negotiation of the Plan, the administration of the Plan, or property to be distributed under the Plan, the wind-down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing, without the Bankruptcy Court (1) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including but not limited to negligence, bad faith, criminal misconduct and willful misconduct, fraud, or gross negligence against a Protected Party; and (2) specifically authorizing such

Enjoined Party to bring such claim or cause of action against such Protected Party, provided, however, that the foregoing will not apply to a claim or cause of action against Strand or against any employee other than with respect to actions taken, respectively, by Strand or any such employee from the date of appointment of the Independent Directors through the effective date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in Article XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action."

This gatekeeper provision appears necessary and reasonable in light of the litigiousness of Mr. Dondero and his controlled entities that has been described at length herein. Provisions similar to this have been approved in this district in the *Pilgrim's Pride* case and the *CHC Helicopter* case. The provision is within the spirit of the Supreme Court's Barton Doctrine. And it appears consistent with the notion of a pre-filing injunction to deter vexatious litigants that has been approved by the Fifth Circuit in such cases as *Baum v. Blue Moon Ventures*, 513 F.3d 181, and in the *In re Carroll* case, 850 F.3d 811, which arose out of a bankruptcy pre-filing injunction.

The Fifth Circuit, in fact, noted in the *Carroll* case that federal courts have authority to enjoin vexatious litigants

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

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

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

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

One of the Objectors' lawyers stated very eloquently in closing argument, in opposing the plan injunction and gatekeeping provisions, that "Even a serial killer has constitutional rights," suggesting that these provisions would deprive Mr. Dondero and his controlled entities of fundamental rights or due process somehow. But to paraphrase the district court in the *Carroll* case, no one, rich or poor, is entitled to abuse the judicial process. There exists no constitutional right of access to the courts to prosecute actions that are frivolous or malicious. The Plan injunction and gatekeeper provisions in Highland's plan simply set forth a way for this Court to use its tools, its inherent powers, to avoid abuse of the court system, protect the implementation of the Plan, and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.

Accordingly, the Objectors' objections to this provision are overruled.

As earlier stated, this Court reserves the right to alter or supplement this ruling in a written order. In this regard, the Court directs Debtor's counsel -- I hope you are still awake; it's been a long time -- the Court directs Debtor's counsel to submit a form of order. And specifically, I assume that you've already prepared or have been in the process of preparing a set of findings of fact, conclusions of law, and confirmation order that tracks the confirmation evidence and

to win, I turned it off.

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

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

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

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

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

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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 **02/09/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT N

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

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

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
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13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

really was just a termination of the agreement, in accordance with the terms. And I had put the provisions up before the Court during my opening and walked Mr. Seery through. That's the basis for the --

THE COURT: Okay.

MR. MORRIS: -- termination of the agreement. It's not rejection at all.

THE COURT: Fair point.

MR. RUKAVINA: And Your Honor, there's no -- there's no -- yeah, there's no problem. There's no problem on that. We do not disagree. We do not disagree with Mr. Morris.

THE COURT: Fair point. I made the mistake of belts and suspenders, trying to fill in any hole there might be. But yes, I had the evidence that there was a termination of both agreements on November 30th. One of them had a 60-day window before it became effective, the other a 30-day. So they are terminated.

All right. Mr. Morris, anything else from you?

MR. MORRIS: No. We'll prepare a form of order.

THE COURT: All right. Mr. Rukavina, anything further from you?

MR. RUKAVINA: Your Honor, obviously, I have questions. I have reservations. I need to look at whether the Court's findings are going to be binding in this adversary proceeding. So, at this point in time, I'm just not prepared

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. DONDERO: I'm on the line.

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

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

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

THE COURT: I am --

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

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

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

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

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

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Pause.)

THE COURT: Oh, Michael?

(Court confers with Clerk.)

THE CLERK: Hello? Hang on. Mr. Morris?

THE COURT: Is anyone still there?

THE CLERK: Mr. Rukavina is still there. Mr. Rukavina, Mr. Morris, are you all still there?

MR. RUKAVINA: Judge, this is Davor.

THE COURT: All right.

MR. RUKAVINA: I think we're all wondering whether we're going to have the contempt hearing.

THE COURT: Well, yes, that's why I came back in.

MR. RUKAVINA: I can't hear you, Judge. We can't hear you.

THE COURT: I realized I -- it's 4:19 Central time. We are not starting the contempt hearing.

Mr. Morris, are you there now?

MR. MORRIS: I am. I did have one suggestion.

THE COURT: All right. I neglected to mention our other setting, but we are not going to start at 4:19 Central time. Do we want to talk about scheduling on that?

MR. MORRIS: I did, Your Honor. And it's just an idea, and I understand we've had a long day. But I was going to suggest if there was any way to just get their motion *in limine* out of the way today, so that when we come back for the evidentiary hearing parties are fully prepared. If you don't want to do it, that's fine. Otherwise, I'm available at Your Honor's convenience.

THE CLERK: All rise.

(Proceedings concluded at 4:23 p.m.)

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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 Date
Certified Electronic Court Transcriber

EXHIBIT O

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	Monday, May 10, 2021
	)	1:30 p.m. Docket
Debtor.	)	
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	**Adversary Proceeding 20-3190-sgj**
	)	
Plaintiff,	)	- TRIAL DOCKET CALL
	)	- DEFENDANT'S EMERGENCY MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF DEFENDANT'S PETITION FOR WRIT OF MANDAMUS [154]
v.	)	
JAMES D. DONDERO,	)	
Defendant.	)	

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

WEBEX APPEARANCES:

For the Plaintiff: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Plaintiff: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

permanent. I mean, I understand the -- well, right, I mean, with respect to the relief being sought, but with respect to preliminary (garbled) in attendance at the preliminary injunction hearing.

THE COURT: Okay. Unfortunately, you have connectivity issues suddenly.

MR. WILSON: You know, I've got -- I've got a different view on those things. I mean, the contempt hearing has some things --

THE COURT: Mr. Wilson, I don't know if --

MR. WILSON: And I think we lost Mr. Morris on the screen. Can you hear --

THE COURT: -- you can hear me, but we suddenly have very bad connectivity.

MR. WILSON: Can you hear me?

THE COURT: Your screen is frozen, your video is frozen, and I really didn't get any of the last two minutes.

MR. WILSON: Is it better now, Your Honor?

THE COURT: Well, I heard you say, "Is it better now?"

MR. WILSON: I'm going to log off and log back on.

THE COURT: Okay. We're going to have to -- we're going to have to cut this --

MR. WILSON: I'm going to try to log off and log on.

THE COURT: No. I'm ready to be finished with this

hearing. You need to go back and look at this, because I am leaning towards what Mr. Morris is arguing, and that is that this is really bad faith. Okay? There is no change of issues. It's been the same issue at the TRO hearing, at the preliminary injunction hearing. Okay. The motion for contempt, we were looking backwards a little at behavior. But the issues are not expanded. Okay? It's just duration of the injunction. And now a slightly skinnied-down injunction.

So, of course, I am willing to consider evidence I've heard at the TRO hearing and the preliminary injunction hearing. And I would note that on many, many, many of these exhibits, you didn't object. Or if you did, you argued it and I overruled it.

So you need to go back and look at this and think hard whether you're really going to press these issues at the trial. Okay? This is -- again, *Dondi*, we require counsel to work in good faith to streamline trials and work with people. If you can agree, if you can stipulate to evidence, that's what you need to do. And this looks like -- I don't know what it looks like. But if this is any guidance to you, it should be, if I admitted it at the TRO hearing, if I admitted it at the preliminary injunction hearing, it's fair game to consider it now.

Here's the last thing I want to say, and this is very big-picture, not unique to this adversary proceeding.

Can everyone hear me okay? I don't know if we're having connectivity issues. Can everyone hear me?

MR. MORRIS: Yes, Your Honor.

THE COURT: Can you hear me, Mr. Wilson?

MR. MORRIS: Yes, Your Honor.

MR. WILSON: Yes, Your Honor.

THE COURT: Okay. I have been pondering something the past few days. And I haven't figured out how I want to address it, but maybe Mr. Dondero's counsel and counsel from some of the Dondero-controlled entities, maybe they can listen to what I'm about to say and figure out a solution.

As you all know, there are so many law firms, so many lawyers involved now that are basically singing the same tune at a lot of these hearings as far as objections, me too, me too, me too. And so just quickly eyeballing what we have, we obviously have Mr. Dondero represented by Bonds Ellis. There is another firm that represents Mr. Dondero that filed a motion asking that I recuse myself. I can't remember the name of that firm, but I think they appealed my denial of that motion. So, I can't remember who that was. Then we have the various affiliates. We have -- well, I'll just start chronologically. Highland CLO Funding, Ltd. has historically been represented by King & Spalding. I don't know if that's -- I know there were some changes there with the ownership of that entity, so maybe they're gone. But then we have NexPoint

Can we just have an hoc committee each time?

I don't even think I listed all the law firms. I know a new law firm filed a lawsuit in front of Judge Jane Boyle recently. We've got a hearing on that coming up in June. I mean, and now you're -- I'm hearing there are going to be more. Well, if you don't figure out a way to rein it in, then I'm just going to have to get that list of who are the stakeholders in these entities, under oath, because I don't understand it. I don't understand why we need these many lawyers filing position papers.

So, all right. Well, we're going to adjourn, and I guess I'll see you next Monday, right?

MR. MORRIS: Thank you, Your Honor. Yes.

THE COURT: Okay. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 3:07 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 **05/11/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT P

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Case No. 19-34054-sgj11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, Plaintiff, v. CLO HOLDCO, LTD., et al., Defendants.	Adv. Proc. No. 20-03195-sgj PLAINTIFF'S MOTION for CONTINUANCE
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, Defendant.	Adv. Proc. No. 21-03003-sgj DEFENDANT DONDERO'S MOTION to COMPEL DISCOVERY, the TESTIMONY of JAMES P. SEERY, JR. May 20, 2021 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
420 Throckmorton Street, Suite 1000
Forth Worth, Texas 76102

Appearances continued on next page.

We — it was more just a coordination thing. We intend that he will be at all hearings before, Your Honor, you know, Friday's hearing and substantive hearings. I just — I think this is more of a coordination issue, Your Honor, and I apologize.

THE COURT: Okay.

MR. ASSINK: There has been a lot going on.

THE COURT: Oh, don't I know. There's two of us, me and my Law Clerk working on this, and there are a bunch of y'all. So, yes, I feel — I feel absolutely what you feel and more as far as a lot going on.

So let me clarify. My language that ordered Mr. Dondero to be at every hearing was in the preliminary injunction that's now superseded by the agreed order y'all announced Tuesday. So are you telling me you thought now that mandate didn't apply? Is that one of the things —

MR. ASSINK: Not — not specifically, Your Honor, —

THE COURT: — I'm hearing?

MR. ASSINK: Not specifically, Your Honor. We thought perhaps the formal mandate in the order was no longer applying, but our understanding was you would want Mr. Dondero at substantive hearings going forward, and that has been our understanding. And we would expect him to be before Your Honor at all such hearings. Part of the basis, the reasoning he's not here today was perhaps as an oversight on my part due to the scheduling, and I had a lot of deadlines yesterday and I think

it just maybe fell through the cracks, and I apologize, Your Honor.

THE COURT: All right.

MR. ASSINK: You know, we — Your Honor, —

THE COURT: Well, I'm going to say a couple of things. You know this could have been raised Tuesday, when we were here on the adversary proceeding, in which the preliminary injunction was issued, okay, it would have been — it would have been wise, it would have been very wise to raise the issue.

Second, it screams irony, if nothing else, that at a time when I have under advisement a motion to hold Mr. Dondero in contempt of Court that there would be a trip-up, the second-recent trip-up, by the way, where he didn't appear at a hearing. There was a time a few weeks ago, two or three weeks ago, can't remember what hearing it was then, but he wasn't here.

Okay. The —

MR. ASSINK: Well, Your Honor, I just want to say —

THE COURT: — the third thing I'm going to say — the third thing I'm going to say is I guess I'll issue an order in the main case now, you know, a one- or two-sentence order in the main case saying repeating the sentence that was in the preliminary injunction, that he's going to show up at every hearing. I never said only at substantive hearings. The only thing I hesitated on at all, because I've done this in other

cases, is sometimes I'll say any hearing at which, you know, the person is taking a position, okay, an opposition, an objection, you know, even if you file a pleading taking a neutral stand, if he's going to file a pleading that requires the Court and all the lawyers' attention to some extent, he's going to need to be in court. So that's something I thought about doing, but then I was reminded, that I said, no, he's just going to be at all hearings in the future.

And procedural, substantive, I never made that distinction and I never would because — because it's taking up time, it's taking up time of the Court, lawyers, parties. And if he is going to use the offices of this Court or, you know, take up the time of any lawyers, then he needs to be a part of it, okay?

MR. ASSINK: Your Honor, yes, I —

THE COURT: So I thought I made that very clear the last time he didn't show up, but I think —

MR. ASSINK: Your Honor, I apologize. You know that's certainly not our intention here. We've been rushing around. I think this is more — this is more on — on me and just the fast pace with everything. We would intend that he would be here at all hearings. We're not trying to make any exception. We're not trying to say that the preliminary injunction got rid of his obligation to be before, Your Honor. You know, we weren't clear exactly what the directive was for these kinds of hearings, or

at least perhaps I wasn't fully, and — but, nevertheless, Your Honor, we would — we would have had him be here. I think the fast pace with the hearing settings and just everything going on, it might have slipped through the cracks. It's not — there was no ill will with him not being here, Your Honor. I apologize. It's just an oversight on our part. We would anticipate that he will be here for all future hearings. You know it's no disrespect to the Court. It was not an intentional thing. We apologize, Your Honor. So I understand the Court's comments. It's — but I just want to make clear it's we're not trying to be cute, we're not trying to say that, oh, the preliminary injunction is gone, he doesn't have to be here. That's not our intention, Your Honor. It was I think just an oversight and a scheduling issue this time, but Mr. Dondero will of course appear before Your Honor in all matters going forward, so I apologize.

THE COURT: All right. Well, again, you're scheduling. You sought the scheduling, you sought the emergency hearing, and this is the second time we've had this discussion in less than a month.

All right. So, Mr. Morris, back to you. I think —

MR. MORRIS: Yeah.

THE COURT: — you were about to answer the question of if Mr. Seery is going to be produced and talk about 13 different topics, why is it a big deal to talk about these other seven

that condition subsequent was, it was the liquidation of certain assets. Since the liquidation of those assets has not been completed, by definition, no other maker could have had a note or an oral agreement or an agreement of any kind of the type that Mr. Dondero has. So yet another reason why it fails to meet the burden, they fail to meet the burden under Rule 26. Nobody could have ever had the same note forgiven or agreement, because the condition subsequent hasn't been met yet.

THE COURT'S RULING ON THE MOTION TO COMPEL

THE COURT: All right. Well, I'm going to deny the motion to compel. I don't think that the burden has been met to establish the relevance of these, I guess it's — one, two, three, four, five — six topics that are now at issue, topics 9, 14 through 17, or 20, and, you know, I don't think the proportionality standard is met here.

I do think it would be not proportionate to the needs of the case for the CEO, who came in place in 2020, postpetition, two years after these notes were executed, to have to go do research about any loans made by Highland to any officers and employees over the years and, you know, I don't know who he's going to question, what policy he is going to look into that might be some substance or evidence as to oral agreements or forgiveness. I don't think he should have any obligation to search files and interview people to figure out what the affirmative defenses and Mr. Dondero are all about or

based in. And, again, no one would have better information about his own compensation than Mr. Dondero himself.

I mean I want to stress that this comes against a backdrop of — well, it seems like some antagonism, to say the least, on the part of Mr. Dondero where Mr. Seery's concerned. It seems like it's always a fight with Mr. Seery. And you say, well, we didn't handpick him as the 30(b)(6) witness, but, you know, the motion to compel names him by name. It just — it feels like another antagonistic move.

You've got him for a deposition next Monday on 13 or so different topics. I think it is appropriate to draw the line on these six or so topics that again just don't seem relevant or proportional to the needs of the case.

All right. So, Mr. Morris, would you please upload just a simple order reflecting the Court's ruling?

MR. MORRIS: I would be happy to, Your Honor.

THE COURT: Okay. Actually I'm going to ask Mr. Aigen to do it. I'm sorry. I need to be thinking about attorney's fees and who should bear the costs of what.

So, Mr. Aigen, would you please electronically submit an order?

MR. AIGEN: Yes.

THE COURT: All right. Thank you.

All right. Well, if there's nothing else on this particular adversary, let me just double check. Any

housekeeping matters before I move onto the other adversary?

MR. AIGEN: Not from the debtor, Your Honor.

MR. CLUBOK: Your Honor, —

THE COURT: All right.

MR. CLUBOK: I don't know if you're about to move on. Your Honor, can you hear me?

THE COURT: I'm sorry, Mr. Clubok?

MR. CLUBOK: Your Honor, —

THE COURT: Were you weighing in on —

MR. CLUBOK: Yeah, I'm — I'm sorry. It's not about that proceeding, but are you about to move on beyond — beyond the Highland matters?

THE COURT: No, no, no.

MR. CLUBOK: There was another Highland matter —

THE COURT: I was next — I was next going to go to the other adversary, the dispute between the committee and seven or so defendants. And, yes, I know we have UBS I guess all day tomorrow unless anything has changed. So we'll — we'll hear before we're done any previews about tomorrow.

All right, so moving on —

MR. CLUBOK: Thank you.

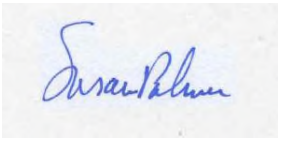
THE COURT: — the Committee versus CLO Holdco, 20-3195. We have a committee motion to basically stay the adversary proceeding for 90 days. So I will get lawyer appearances on that.

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services

Dated May 22, 2021

EXHIBIT Q

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

In Re:	**Case No. 19-34054-sgj-11** Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Dallas, Texas Tuesday, June 8, 2021 9:30 a.m. Docket - SHOW CAUSE HEARING (2255) - MOTION TO MODIFY ORDER AUTHORIZING RETENTION OF JAMES SEERY (2248) - MOTION FOR ORDER FURTHER EXTENDING THE PERIOD WITHIN WHICH DEBTOR MAY REMOVE ACTIONS (2304)

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

APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Debtor:	Zachery Z. Annable HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104

the Committee maintaining a two-person membership at this point.

In terms of whether the MGM transaction is a game-changer, we've not yet seen, to Your Honor's point, how all of that rolls up through the various interests that the Debtor may or -- you know, may have --

THE COURT: Okay.

MR. CLEMENTE: -- that would be implicated by the MGM transaction. If ultimately the MGM transaction has to actually occur, right? I mean, so, you know, just based on what I read in the public documents, we're not sure when that transaction may actually happen. But obviously it's a good thing for the Debtor's estate because it's going to recognize value for the estate.

In terms of whether it ultimately changes how Mr. Dondero, you know, wishes to proceed, that's entirely up to him, Your Honor. But we don't see it as something at this point that would suggest that there's an overall back to let's talk about a pot plan because of where the MGM transaction might ultimately come out.

So I don't know if that's helpful to Your Honor, but those are -- that's my perspective.

THE COURT: Well, and I'm not trying to, you know, push a pot plan on anyone.

MR. CLEMENTE: No, I understand.

THE COURT: I'm just saying it looked like an economic windfall. I just -- I don't know how much is Highland versus other entities in the so-called byzantine complex, but, gosh, I just hoped that there might be something there to change the dynamic of, you know, lawsuit, lawsuit, lawsuit, lawsuit, motion for contempt, motion for contempt.

MR. CLEMENTE: Agreed, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: And like I said, it was a very positive development obviously for the creditors for the Debtor. But whether it's the game-changer that Your Honor would envision, I'm not sure that I can suggest at this point that it is.

I think that, you know, obviously, we don't like to see these lawsuits continue to be filed. That's the whole point of the gatekeeper order, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: I didn't say anything during the hearing, but obviously the January 9th order, as Your Honor has said many times, was in the context of a trustee being appointed.

THE COURT: Right. Right.

MR. CLEMENTE: Right? So, and the July 16th order, very similar vein, it's an outshoot of that. In fact, it was contemplated in the January 9th settlement that a CEO could be

appointed.

So I think, again, it's just -- it's important, the context in which that January 9th order came into play, for this very reason, so we could avoid this type of litigation, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: And so again, I didn't -- I obviously didn't rise to mention that during the hearing, but Your Honor is already aware of that. I didn't need to remind Your Honor of that.

THE COURT: Uh-huh. Okay.

MR. CLEMENTE: Anything else for me, Your Honor?

THE COURT: No. Thank you.

MR. CLEMENTE: Okay, then, Your Honor.

THE COURT: Sorry I picked on you. But, all right. Well, again, I hope the message has landed in the way I hope will matter, and that is I'm going to look at your documents but I feel very strongly that, unless there's something in there that, whoa, is somehow eye-opening, I'm going to find contempt of court. It's just a matter of who and what the damages are. There's just not a thing in the world ambiguous about Paragraph 5 of the July 9th, 2020 order. So I'll get to it as soon as we humanly can get to it.

Mr. Morris, anything else?

MR. MORRIS: Nothing. No, thank you.

THE COURT: I guess I'll see you Thursday on the WebEx. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 6:00 p.m.)

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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 **06/09/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT R

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Thursday, June 10, 2021
	9:30 a.m. Docket
Debtor.	
	MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3 FILED BY GET GOOD TRUST AND THE DUGABOY INVESTMENT TRUST (2256)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3006-sgj**
Plaintiff,	DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND BRIEF IN SUPPORT [15]
v.	
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.,	
Defendant.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3007-sgj**
Plaintiff,	DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER TO PLAINTIFF'S COMPLAINT [16]
TO v.	
HCRE PARTNERS, LLC N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC,	
Defendant.	

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

MS. DRAWHORN: Uh-huh. Yes. And I understand that, Your Honor. And the issue, I think, with you -- we need to have this motion resolved, because it -- unless the Court is going to continue discovery or stay. You know, one of the reasons why we had initially requested the expedited hearing was because of the discovery is continued -- continuing to -- discovery deadlines are continuing to move. And obviously whatever the Court decides on this motion for leave to amend will determine what the scope of that discovery is.

Similarly, if the Debtor decides to amend, that could change the scope of discovery as well.

So we are open to continuing deadlines, and I think, you know, might end up filing a motion to continue. I haven't conferred with Mr. Morris yet. I suspect he's opposed, based on our prior conversations. But that's something that might be helpful, especially if the Court is concerned on how it will affect the motion to withdraw the reference, to -- maybe we continue some of these upcoming deadlines, and that might appease, you know, solve some of your concerns.

THE COURT: All right. Well, Rule 15(a), of course, is the governing rule here, and the case law is abundant that courts "should freely give leave when justice so requires." And the law is also abundantly clear that the rule "evinces a bias in favor of granting leave to amend." And again and again, cases say that leave should be granted unless there's

substantial reason to deny leave, and courts may consider factors such as delay or prejudice to the non-movant, bad faith or dilatory motives on the part of the movant, repeated failure to cure deficiencies, or futility of the amendment.

While the Debtor has presented arguments that there might be bad faith here on the part of the Movants and there might be futility in allowing the amendments because of various strong arguments and defenses the Debtor believes it has to this issue of agreements with regard to the notes that allegedly provide affirmative defenses, the Court believes the rule requires me to allow leave to amend the answer.

Now, a couple of things. I am going to require, though, that the amended answer be more specific than has been suggested. I am going to agree that if new affirmative defenses are made that there was this agreement to forgive when certain conditions happened, then there does need to be identification of who the human beings were that were involved in making the agreement, the date of any agreement or agreements, and disclose what documents substantiate the agreement or reflect the agreement. All right? So if that could --

MR. MORRIS: Your Honor?

THE COURT: Yes?

MR. MORRIS: John Morris. I apologize for interrupting, but just a fourth thing is what is the

agreement? I mean, what is the agreement?

THE COURT: Well, okay. That's fair enough. What is the agreement? I guess --

MR. MORRIS: And -- and --

THE COURT: -- that needs to be spelled out. I mean, I guess I was assuming that that would be spelled out in -- but maybe it's not. So we'll go ahead and add that.

As far as extension of the discovery, Ms. Drawhorn has offered that. I think it would be reasonable if the Debtor or Plaintiff wants that. Do you want an extension of discovery?

MR. MORRIS: What I really want, Your Honor, is a direction for them to serve this amended answer within 24 or 48 hours and grant leave to the Debtor to promptly file written discovery. We've got Nancy Dondero -- if it turns out -- and maybe Ms. Drawhorn can just answer the question right now. Who entered the agreement on behalf of the Debtor? Because I'm already taking Nancy Dondero's deposition on the 28th. And it seems to me, if they would just answer the question of whether Ms. Dondero is the person who did that, I could just add a notice of deposition and take the deposition on that date, too, and it would be, really, more efficient for everybody.

THE COURT: Ms. Drawhorn, who was the human being?

MS. DRAWHORN: Yes. It was -- yes, Nancy Dondero entered into the -- the subsequent agreement.

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

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

MR. MORRIS: Yes, Your Honor.

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

THE CLERK: All rise.

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

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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 **06/12/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT S

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Friday, June 25, 2021
	9:30 a.m. Docket
Debtor.	
	EXCERPT: MOTION FOR MODIFICATION OF ORDER AUTHORIZING RETENTION OF JAMES P. SEERY, JR. DUE TO LACK OF SUBJECT MATTER JURISDICTION (2248)

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For CLO Holdco, Ltd. and The Charitable DAF Fund, LP:	Jonathan E. Bridges Mazin Ahmad Sbaiti SBAITI & COMPANY, PLLC JP Morgan Chase Tower 2200 Ross Avenue, Suite 4900 W Dallas, TX 75201 (214) 432-2899
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300

any exceptional circumstances to declare the order or any of its provisions void. The Movants have put on no evidence that constitutes surprise or constitutes newly-disputed evidence. So why are there no exceptional circumstances here such that the Court might find, you know, a void order or void provisions of an order?

First, this Court concludes that there's no credible argument that the Court overreached its jurisdiction with the gatekeeping provisions in the order. Gatekeeping provisions are not only very common in the bankruptcy world -- in retention orders and in plan confirmation orders, for example -- but they are wholly consistent with the *Barton* case, the U.S. Supreme Court's *Barton's* case, and its progeny that has become known collectively as the *Barton* doctrine. Gatekeeping provisions are wholly consistent with 28 U.S.C. Section 959(a)'s complete language.

The Fifth Circuit has blessed gatekeeping provisions in all sorts of contexts. It has blessed them in the situation of when *Stern* claims are involved in the *Villegas* case. It even blessed Bankruptcy Courts' gatekeeping functions a long time ago, in 1988, in a case that I don't think anyone mentioned in the briefing, but as I've said, my brain sometimes goes down trails, and I'm thinking of the *Louisiana World Exposition* case in 1988, when the Fifth Circuit blessed there a procedure where an unsecured creditors' committee can

bring causes of action against persons, such as officers and directors or other third parties, if they first come to the Bankruptcy Court and show a colorable claim. They have to come to the Bankruptcy Court, show they have a colorable claim and they're the ones that should be able to pursue them. Not exactly on point, but it's just one of many cases that one could cite that certainly approve gatekeeper functions of various sorts of Bankruptcy Courts.

It doesn't matter which court might ultimately adjudicate the claims; the Bankruptcy Court can be the gatekeeper.

And the Court agrees with the many cases cited from outside this circuit, such as the case in Alabama, in the Eleventh Circuit, and there was another circuit-level case, at least one other, that have held that the *Barton* doctrine should be extended to other types of case fiduciaries, such as debtor-in-possession management, among others.

Finally, as I pointed out in my confirmation ruling in this case, gatekeeping provisions are commonplace for all types of courts, not just Bankruptcy Courts, when vexatious litigants are involved. I have commented before that we seem to have vexatious litigation behavior with regard to Mr. Dondero and his many controlled entities.

Now, as far as the Movants' argument that there was not just improper gatekeeping provisions but actually an improper discharge in the Seery retention order of negligence claims or

other claims that don't rise to the level of gross negligence or willful misconduct, again, I reiterate there's nothing exceptional in the bankruptcy world about exculpation provisions like this. They absolutely are a term of employment very often. Just like compensation, they're frequently requested, negotiated, and approved. They are normal in the corporate governance world, generally. They are normal in corporate contracts between sophisticated parties. And most importantly of all, even if this Court overreached with the exculpation provisions in the Seery retention order, even if it did, res judicata bars the attack of these provisions at this late stage, under cases such as *Shoaf*, *Republic Supply v. Shoaf* from the Fifth Circuit, the *Espinosa* case from the U.S. Supreme Court, and even *Applewood*, since the Court finds the language in this order was clear, specific, and unambiguous with regard to the gatekeeping provisions and the exculpation provisions.

Last, and this is the part where I said I'm going to get to this agreement that has been submitted, the Second Amended and Restated Investment Advisor Agreement or whatever the title is. I am more than a little disturbed that so much of the theme of the Movants' pleadings and arguments, and I think even representations to the District Court, have been they have these sacred jury trial rights, these inviolate jury trial rights, and an Article I Court like this Court should

annoyance or anything like that. I guess what I'm trying to do is I don't want anyone to mistake the delay in ruling on the contempt motion to mean I'm just not that -- you know, I'm not prioritizing it, other things are more serious to me or important to me, or I'm going to take two months to get to it. It's literally been I've been in trial almost all day long every day since you were here. But trust me, I'm about as upset as upset can be about what I heard on June 8th, and I'm going to get to that ruling, and I know what I'm going to do. And, well, like I said, it's just a matter of figuring out dollars and whom, okay? There's going to be contempt. I just haven't put it on paper because I've been in court all day and I haven't come up with a dollar figure. Okay?

So I hope -- I don't know if that matters very much, but it should.

All right. We stand adjourned.

(Proceedings concluded at 3:35 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 **06/29/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT T

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

In Re:	**Case No. 19-34054-sgj-11** Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., Reorganized Debtor.	Dallas, Texas March 1, 2022 1:30 p.m. Docket - REORGANIZED DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH PATRICK DAUGHERTY [3088] - REORGANIZED DEBTOR'S MOTION FOR ENTRY OF AN ORDER FURTHER EXTENDING THE PERIOD WITHIN WHICH IT MAY REMOVE ACTIONS [3199]
ELLINGTON, Plaintiff, v. DAUGHERTY, Defendant.	**Adversary Proceeding 22-3003-sgj** STATUS CONFERENCE (NOTICE OF REMOVAL)

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

APPEARANCES:

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For Scott Ellington: Debra A. Dandeneau
Laura R. Zimmerman
BAKER & MCKENZIE, LLP
452 Fifth Avenue
New York, NY 10018
(212) 626-4875

consent to Bankruptcy Court adjudication or are we going to have a motion for remand.

So I don't know what we're going to attempt to accomplish here because later in this month we have set a hearing on Mr. Ellington's motion for remand and abstention. So I'll ask counsel, did you all view this setting as something that, you know, we needed to address issues on, or is it premature before we have the hearing on the motion for remand and abstention?

MR. YORK: Your Honor, this is Drew York from Gray Reed. I represent Mr. Daugherty in the adversary action. And I agree with the Court that it is, based upon the motion to abstain and remand that was filed, it's premature. We set the status conference at the Court's request immediately after we filed the removal notice. I think we can address all of the issues at the hearing at the end of the month.

THE COURT: All right. Ms. --

MS. DANDENEAU: Your Honor?

THE COURT: Go ahead.

MS. DANDENEAU: We agree with Mr. York and the Court, Your Honor.

THE COURT: Okay. Well, so I guess we will see you at the end of the month. I think, what is it, maybe March 28th, something like that? March 29th?

MS. DANDENEAU: I believe it's March 29th.

THE COURT: Okay. And you know that I tend to sometimes share my views just to see if it will spur a fit of reasonableness or encourage people to settle or walk away. I'm pretty exasperated with that attempt in this case. But this litigation is -- I'm going to call it the stalking lawsuit. Okay? Every time -- I don't know how much longer it will be in my court, but as long as it's in my court I'm going to call it what it is, a stalking lawsuit. It is one grown man accusing another grown man of stalking. You know, it's just embarrassing to me, and it should be embarrassing to those involved.

Now, I have read the lawsuit and I have read that Mr. Ellington accuses Mr. Daugherty of driving by his house, driving by his father's house, driving by his sister's house, driving by his office, 143 sightings, he's taking pictures. And you know, if that's true, again, that's embarrassing. If -- I don't even know what to say except this is embarrassing. One grown man accusing another grown man of stalking. Okay? A statute, by the way, that was designed to protect, you know, ex-wives, girlfriends, battered women, from abusive men. You know, gender doesn't matter, but wow. It's just -- I don't know what to say except people should be embarrassed, and so that's what I'm going to say.

I don't know if it's going to make a whit of difference in anyone's litigation posture. But we'll come back on March

29th and we'll do what we need to do on the motions before the Court.

(Proceedings concluded at 3:41 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 **03/07/2022**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

29th and we'll do what we need to do on the motions before the Court.

(Proceedings concluded at 3:41 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 **03/07/2022**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT U

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	August 31, 2022
	9:30 a.m. Docket
Reorganized Debtor.	
	STATUS CONFERENCE RE: MOTION FOR FINAL APPEALABLE ORDER FILED BY JAMES DONDERO [3406]

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

APPEARANCES:

For the Reorganized Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 11th Floor Los Angeles, CA 90067 (310) 277-6910
For the Reorganized Debtor:	Melissa S. Hayward HAYWARD, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104
For James Dondero, Movant:	Michael Justin Lang CRAWFORD WISHNEW & LANG, PLLC 1700 Pacific Avenue, Suite 2390 Dallas, TX 75201 (214) 817-4500
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062

And when he, being Judge Kinkeade, after the briefs were filed, he obviously was looking at it, he questioned his jurisdiction, he requested briefing on the jurisdiction, because in that order that he sent out requesting the briefing, he pointed out -- you know, one of the issues he pointed out was the Court's language, the reservation language in the order. And, again, Highland argued that because of that language, among other things, that language made the order not final.

So all we're saying, all we're asking is just remove that language so when we file the writ of mandamus that argument isn't there. The Court is done dealing with the issue. Nobody can disagree with it.

You know, nobody -- Highland is not agreeing that we, you know, can seek mandamus, so I'm not saying that. And I'm not asking the Court to agree to that. Mandamus is a -- we believe is an option. It's still on the table. And we're just dealing with one issue that came up before and just trying to head it off before -- so that we don't have to come back down and ask the Court to remove it later.

THE COURT: All right. Mr. Pomerantz, what do you want to say about this?

MR. POMERANTZ: So, Your Honor, this is extremely frustrating. I know Your Honor had said you didn't want to waste Court time. There has already been a tremendous amount

of Court time that's wasted.

When we got this motion, it was a head-scratcher. We read it as seeking way more things than what Mr. Lang is saying now. If he had called up and asked us if we had any issue, subject to Your Honor's agreement, to remove that last sentence, we would have said we don't, because the briefing before the District Court and the District Court's decision have really nothing to do with that last sentence. Maybe the -- Judge Kinkeade mentioned it in his December order, but it's clear, as Your Honor mentions, from the reading of the District Court opinion that it is irrelevant.

And the argument that the Court, the District Court which denied interlocutory appeal is somehow, once that sentence is eliminated, going to entertain and grant a writ of mandamus is farcical. It's just not going to happen. And unfortunately, what's going to happen is we're going to have to spend more time, more money, and more effort.

And Your Honor, I know the motion to strike has been resolved, but I'd just like to mention it, because this is -- continues to be frustrating from the Highland side. They filed an appendix that sought to slip in three letters written by attorneys for various Dondero entities that were essentially a smear campaign, a smear campaign on Mr. Seery, a smear campaign on the Independent Directors, incidentally, which may be actionable in its own right.

That had nothing to do with bias. They wanted to slip that in, somehow it would get into the appellate record, if and when they ever got to an appeals court.

So what do we do, Your Honor? We called them up, called Mr. Lang up and said, will you withdraw the letters? There's no basis for those to be included in the appendix. He said no. Said, okay, will you make the deponents -- the people who wrote the letters available for deposition? Wouldn't agree to that, either.

And then we go to the time and the money, we file our motion to strike, and lo and behold, which has become a considerable pattern in this case, Your Honor, what does Mr. Lang do? He calls up and says, I will withdraw the letters. Okay? That's aside. We got what we wanted. There's nothing we can do. But it is kind of frustrating, how that -- how that played out.

Your Honor, this motion, to the extent it asks for that sentence to be removed, that's fine. Again, we think it's a legal nullity. What Mr. Lang asked for in his motion is for Your Honor to issue a final order. Your Honor can't determine whether your order is final. We've made that point in our opposition. It seems maybe now Mr. Lang is walking back on that. There's nothing you can do. Your Honor can issue an order; it'll be up to the District Court.

With respect to the supplement, Your Honor, as we put in

the record, we think all the quote/unquote evidence that was submitted just is a severe mischaracterization of the record. And it's important, Your Honor, that not only does the -- we agree that the evidence can come in, but we think Your Honor has to make a determination whether those additional allegations of bias and evidence do in fact demonstrate bias. What we think Mr. Lang wanted to do, or the Appellants wanted to do, or the Movants, they wanted to have that information come in and argue at first blush to the Appellate Court that that is bias, without having had Your Honor make the initial determination, as you would have if there was a motion to reconsider, as you would have if there was a new motion.

And so we think it's very important that Your Honor consider those additional allegations. We think categorically they do not demonstrate any bias, and our Exhibit A goes through each item and points out the severe mischaracterizations.

So, Your Honor, we've wasted a lot of time. We've wasted a lot of money. But if all they want is to remove that sentence, supplement the record, have Your Honor deny the motion yet again after considering the additional evidence, we do not have an opposition to that. But it was -- kind of took a long time and a lot of money to get to this place.

Thank you, Your Honor.

THE COURT: All right. And Mr. Lang, on the subject

of it took a lot of time and a lot of money, estate resources, to get to this place, I just want to note a couple of things. And I guess I'm happy to hear any response to these things that I feel very frustrated about.

Again, my focus at this point is judicial resources as well as estate resources. And no judge, no judge looks lightly on a motion to recuse. Okay? Any judge, I would think, is going to have some self-introspection. Like, oh my goodness, what would motivate someone to think this needs to be urged?

But, so on the topic of -- again, I want you to respond to this, Mr. Lang -- my concern about judicial resources and estate resources.

The timeline here -- and I always talk about timelines, I know -- but this Court signed the confirmation order in this case February 22, 2021, and your motion to recuse was filed about a month later, March 18, 2021. Now, here's the first thing I'll mention about judicial resources and estate resources. Your motion and brief to recuse included an appendix that was 200 -- no, excuse me, 2,722 pages long. Okay?

So any judge, again, has to take it seriously when a motion to recuse is filed. And the standard is I have to stand back and look at would a reasonable person have concerns here. So I can't just say, I know I'm not biased, I don't

think I'm biased; I have to look at what a reasonable person might think.

So you presented to me a 2,722-page appendix for me to do my job and look at what would a reasonable person think. So, then would it raise a doubt in the mind of a reasonable observer as to the judge's impartiality?

So I think here's another point that goes to judicial resources. I had my law clerk, just out of curiosity, count up for me how many orders that I had signed as of the day that the motion to recuse was filed, March 18, 2021, and I had presided over the bankruptcy case for 15 months at that point, but it had been in Delaware for two months before Dallas. On the day you had filed your motion to recuse, March 18, 2021, I had signed 263 orders in the Highland bankruptcy case and the adversary proceedings. It's a lot more now, of course. But so I suppose, if I was really to do my job thoroughly, I might look not merely at your 2,722 pages of appendix attached to your motion to recuse, but all 263 orders I had entered to see, hmm, would a reasonable observer question my impartiality?

So, anyway, this is all about judicial resources and estate resources. So, going down the timeline, March 23, 2021, five days after you filed the motion to recuse -- after, I will tell you, I won't say I dropped everything to pore through this, but spent a lot of time -- I issued an order

denying the motion to recuse.

Now, here's inside baseball, okay, if there ever was: The last sentence, reserving the right to supplement or amend, here's why I did it. I didn't know it would cause a brouhaha. Maybe I didn't give it enough thought. But in reading the case law during those many days and hours I spent focusing on your motion to recuse, I realized that most of the case law says you don't have to have a hearing, okay, the statute doesn't require a hearing, the case law says you don't have to have a hearing. And I cited some of that my order. But I thought, these Movants, after seeing this order, they may come back and say, you didn't give us our day in court. We wanted a hearing. We weren't just going to rely on our 2,722-page appendix. We wanted to put on witnesses.

So I didn't have to stick that sentence in there, but I was just sort of anticipating what the Movants might do.

Okay. So, live and learn. I guess I won't, if I'm ever confronted with the situation again, do that. But that's what that was about.

So, my law clerk went and looked at the appellate record in the past few days, because, I mean, again, head-scratcher. We were trying to get a feel for how big a deal was this sentence, okay, to the District Court, if at all. But anyway, we happened to note that in July, July 20, 2021, the District Court record on appeal was supplemented with 1,001 more pages

of record. So I guess, goodness gracious, poor Judge Kinkeade and his staff, they had 3,723 pages of appendix. I don't even know if that's all. You know, I don't know.

But so Judge Kinkeade dismissed the appeal because he said my order was interlocutory on February 9, 2022, and then we didn't see a motion for rehearing or an appeal to the Fifth Circuit or a petition for writ of mandamus to the Fifth Circuit. Five and half months later, this new motion for final appealable order and supplement to the motion to recuse is filed, containing 365 more pages. And then I see that, Mr. Lang, you filed an amended motion to take out certain of the items, with the agreement, the stipulation that was reached with Debtor's counsel, so it's now a 154-page appendix.

But I should add that, in Highland's objection to your latest motion, they attached 86 exhibits, and I couldn't count all those exhibits, but it was more than 5,500 pages. And it was, as I understood it, sort of almost like a rule of optional completeness. If you're going to submit these 154 pages to supplement the record, we think you need to attach more than snippets of a transcript here and there. You need to have the whole context.

So, anyway, I -- you know, look at what you're doing. I'm just -- and I guess I could totally appreciate and understand if there had been a brief order from Judge Kinkeade saying, because of that one sentence, this is an interlocutory order,

no leave to appeal an interlocutory order is warranted, end of order. And, frankly, when you filed your motion, this latest motion, having not seen Judge Kinkeade's order, I thought that's what it was going to say.

So, from the tone of your motion, it sounded like that's all his order was about, just: I have a problem with this last sentence, it makes the whole order interlocutory. And then I go back and read it and he gives four or five different reasons why an order denying a motion to recuse is interlocutory until the end of the case. I know that's a bizarre concept in the world of bankruptcy, but he considered this is even the rule in the world of bankruptcy.

So, anyway, help me to understand why this isn't unnecessary carpet-bombing the Court, me and whoever might hear your petition for writ of mandamus, and the Debtor estate, carpet-bombing us with paper and causing us to expend resources. And, again, we've got this backdrop of the original motion to recuse being filed 15 months after I started presiding over the case and after I had signed 263 orders.

Please, Mr. Lang, please help me to understand if this is warranted. Why, I mean, help me to understand why this is not wasting resources in your view and why this isn't just some strategy. Again, I'm trying to not play psychologist, I'm really trying to understand why you think this is fine.

MR. LANG: Well, Your Honor, we've moved to recuse, and we've stated the grounds, and we have put in documents from the record that we think support those grounds. We have not unnecessarily carpet-bombed. We've cited to the various transcripts. The length of the record is directly related to the length of the transcripts mostly, the various transcripts throughout the proceeding. And so, you know, with respect to the 2,722 pages of appendix, most of those are just complete copies of transcripts.

But again, we're just creating our record to support our position on our motion. And the current motion is eight pages. It's got reference to the additional grounds that we've set forth that we think support our motion. And we attached the various documents and transcripts that, again, support -- we think support our position. And we're making our record for appeal.

And as far as Mr. Pomerantz and the withdrawing of the letters, you know, I was getting ready for trial when Mr. Morris called. And he said, they're hearsay. We had a brief conversation. I disagreed. They filed their motion. When I got the time to look at it, I read through it, and Mr. Morris and I had a conversation, and we decided, you know what, we don't need them, we'll pull them out. Let's just do away with this issue. It's not worth the time to deal with it.

I'm sorry they had to file their motion. But, you know, I

couldn't drop everything at that moment to look through. And again, the reason that he gave was hearsay. So, you know, it's not gamesmanship. It was just, look, you know, when we got down to looking at it, when I looked at it, I decided it wasn't worth the effort and the hassle, and we agreed to pull them down and withdraw them. And that's why I filed the amended motion.

As far as the current appendix, Your Honor, we're just making a record. You know, we're trying to get this thing reviewed. We're making sure the Court is aware of all the grounds and having considered all the grounds and all the actions that we think support our motion. We're giving the Court the opportunity to look at it, and then just enter the order without that language and we'll deal with the mandamus.

Again, the issue is ultimately going to be reviewed. We're trying to get it reviewed. And you're right, you know, we don't have to, you know, you didn't have to have a hearing on the first deal, you don't have to have a hearing on this one.

THE COURT: Okay.

MR. POMERANTZ: Your Honor, this is -- this is just one more match in furtherance of Mr. Dondero's stated desire, as you've heard many times, to burn the place down. We would have hoped, and I guess it would have been naïve to hope, as I know Your Honor has hoped throughout the case, that at some

point in time the Dondero side would stop blaming Your Honor, blaming Mr. Seery, blaming the estate, and actually look at what he can do to put an end to this. Pay his notes, stop raising frivolous claims, so everyone can go on with his life. That's what the estate wanted to do and wants to do. That's what Mr. Seery wants to do. Unfortunately, Mr. Dondero doesn't seem capable of it, and this is just one more match on the flames. And Mr. Lang, doing his job, following his client's wishes, is just one more player in that. But it is extremely frustrating.

THE COURT: Okay. All right. Here's what I'm going to do. First, I'm simply going to deny the pending amended motion for final appealable order and supplement to motion to recuse, as it is procedurally improper as framed. Okay? It was kind of like a Rule 54 motion. It was kind of like a new motion to recuse. It was kind of like a Rule 59 motion for, you know, new -- to put in new evidence, have a new trial, but way untimely for that.

So I'm just denying the motion that's before me. Okay? And by doing that, I mean, I guess, I guess the stipulation and order that's before me on the motion to strike and the motion to compel, I guess I'll -- it's in my queue, I'll sign it, unless someone tells me there is a reason it doesn't make sense to sign it.

But I'm denying the motion before me. But just so it's

clear, Mr. Lang, it's without prejudice to you either filing a simple Rule 54 motion, without attachments, that simply asks me to strike the last sentence of my original order denying your motion to recuse from March 2021.

If you give me a simple Rule 54-based motion simply asking me to strike that sentence, I'll sign it. Without a waiting period. Without a hearing. And I assume Mr. Pomerantz doesn't have a problem with that.

MR. POMERANTZ: That is correct, Your Honor. If all that motion asks for, we would not oppose that.

THE COURT: Okay. It's also, my ruling today denying your motion, is without prejudice to you filing a new motion to recuse, if that's what you want to do, to start this over and supplement the record.

But, you know, proceed as you will. This Court is going to do its duty. And, well, if you want to do that, you do that, but I'll have a more elaborate order if I have to rule on a new motion to recuse. Among other things, I'm going to point out to the Court above, whoever hears this, that because I think timeliness was always an issue I raised in your original order, you know, filing a motion to recuse after confirmation, 15 months after this judge was assigned to the case, and after the judge had signed 263 orders.

You know, we have case authority, as I'm sure you researched and know, that talk about timeliness. Even though

it's not baked into the statute, 28 U.S.C. Section 455, it is a factor. And so this is not *A v. B* litigation. This is a case affecting many, many people. And at some point, don't we have to wonder why a motion would be filed after 263 orders? If your clients legitimately think there was bias, I don't know why they didn't raise the issue way, way earlier in the case.

And that's why these appendices are so huge, right? It dovetails with the timeliness. Okay? Fifteen months. There's a huge, huge, huge, huge record.

So, anyway, do you have any questions, Mr. Lang?

Again, I will say it for at least the third time this morning: I'm worried about judicial resources and estate resources. Okay? And, you know, I have to worry about I'll loosely call my bosses, okay, you know, the courts that grade my papers. The District Court who hears appeals and hears petitions for writ of mandamus. The Fifth Circuit. They're going to get frustrated with me if -- well, you know, if, for example, I had ruled on this motion before me today, a clearly procedurally defective motion. And if I just willy-nilly let people put things in the record without a procedurally proper basis, it just makes more work for the Court of Appeals, right?

So it's not just about the lawyers here. It's not just about me and my staff. It's about the people who grade my

papers. If I granted your motion as it's pending here before me today, I have every reason to think, whether it's Judge Kinkeade or the Fifth Circuit, they would think, what is this judge doing? Okay? So it's just procedurally defective, what you filed. Okay? But, again, you've got the ruling. Do you have any questions?

MR. LANG: I don't.

THE COURT: We're adjourned.

THE CLERK: All rise.

(Proceedings concluded at 10:25 a.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 **08/31/2022**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT V

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
	.	
HIGHLAND CAPITAL	.	Earle Cabell Federal Building
MANAGEMENT, L.P.,	.	1100 Commerce Street
	.	Dallas, TX 75242-1496
	.	
Debtor.	.	Monday, September 12, 2022
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC (3443) AND REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

TELEPHONIC APPEARANCES:

For Highland Capital Management, L.P.:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, New York 10017
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Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

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we've already said the Court should allow us to withdraw the proof of claim and condition it with prejudice.

There is no other lawsuit out there. There is no other position being taken anywhere. Frankly, Your Honor, the reason why I said admit the exhibits and I question their relevance is because none of them go to actual legal prejudice. Can't show it, hasn't shown it, hasn't demonstrated it. It says they did a lot of work, gave you the greatest hits of some email, but quite frankly, Your Honor, that goes to merit, not legal prejudice. That goes to, I believe, part of their story as to what happened.

The story that matters to me is we think things were going to happen during the estate, he's right. We didn't move for them. We looked back at it and said we don't need the proof of claim anymore, we should withdraw it. That's the only thing that's happened, and that's why we're here. We don't think he's entitled to discovery as to why we withdrew the proof of claim.

It's his burden to show legal prejudice. He can show it or he can't. He hasn't.

THE COURT: Okay.

MR. GAMEROS: The estate hasn't.

THE COURT: Mr. Gameros?

MR. GAMEROS: (Indiscernible) Mr. Dondero.

THE COURT: I have a question. I mean I'm looking at

your pleading, your motion to withdraw the proof of claim, and I'm looking at this wonderful chart you have on Page 7 saying here are the standards under Bankruptcy Rule 3006, you, Court, should consider. They were articulated in the Manchester case.

And it's not merely about is there any prejudice to the estate. I mean you set forth five factors. One is "reason for dismissal." One is diligence in bringing the motion to withdraw. One is undue vexatiousness. One is the matter's progression including trial preparation. One is duplication of expense of relitigation.

This is your own authority, which I believe actually is correctly articulating the standards. It's not just about prejudice. Yes, I agree that some of the case law has zeroed in on that one in particular. But I mean you say yourself reason for dismissal is a factor the Court must consider.

MR. GAMEROS: That's correct, Your Honor. Those are the factors, and I think our analysis on them is correct.

If we go all the way to trial and the result is that our proof of claim is denied, we're in the same position we are right now. So why should the parties, the estate, and the Court go through that exercise?

THE COURT: Okay. Well, that's another issue, I think, other than the reason for dismissal. But a follow-up question to what you just said is this.

Would you agree to a condition on the withdrawal of

your proof of claim that your client agrees that Highland has a 46-point whatever it was percent interest in SE Multifamily Holdings and your client waives any right in the future to challenge that interest?

MR. GAMEROS: Your Honor, if that's what the Court wants to put in an order and I have a chance to confer with my client on it, I'm pretty sure that would be agreeable.

THE COURT: Today's the day. I'm not going to continue. I've got, you know, the whole day booked if I needed it because I wasn't sure what you all were going to want to put on.

MR. GAMEROS: Your Honor, we'd agree with that.

MR. MORRIS: Your Honor, I'm sorry to interrupt, but a waiver of any appeal, too. I just hard that if that's what you want to put in the order, that's okay. But this case has to end, and that's what we're looking for.

We're a post-confirmation estate that will not go forward with the possibility hanging over its head that it may be divested of this asset. That is what this proof of claim and this dispute is about.

And what the debtor needs in order to avoid legal prejudice is the complete elimination of any uncertainty that it owns 46.06 percent of SE Multifamily. And if HCRE is not willing to give that comfort today, we again renew our request for a direction that the three HCRE witnesses appear for

substantive depositions and we get this on the trial calendar.

MR. GAMEROS: Your Honor, we'll agree to it.

THE COURT: Well, you know what, this is such a big deal I really need a client representative to say that. It would be that --

MR. GAMEROS: I don't have one here today, but I can get you one.

THE COURT: How soon --

MR. GAMEROS: Do you want me to file a stipulation or an affidavit?

THE COURT: Pardon?

MR. GAMEROS: Do you want me to file an affidavit?

THE COURT: Well, let's be a hundred percent clear. Your client would state that with the granting of the motion to withdraw proof of claim number 146, HCRE is irrevocably waiving the right to ever challenge Highland Capital Management's 46 percent interest -- and I know it's 46-point something -- 46 percent interest in SE Multifamily Holdings, LLC and is, likewise, waiving the right to appeal or challenge the order to this effect.

MR. MORRIS: Your Honor, if I may, perhaps we can take a ten-minute recess and allow him to consult with his client and perhaps get a client representative on the phone who can make that representation?

THE COURT: All right. Mr. Gameros, you think you

can get a client rep on the WebEx?

MR. GAMEROS: I'm pretty sure I can, Your Honor.

THE COURT: All right. Well, how about we take a 15-minute recess. Does that sound a reasonable amount of time? We've got, you know, two dozen people --

MR. GAMEROS: It does, Your Honor.

THE COURT: Two dozen people on the WebEx. I don't know if maybe one is a client representative, but we'll take a 15-minute break and I'll come back. Okay.

THE CLERK: All rise.

(Recess at 10:33 a.m./Reconvened at 10:50 a.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

We're back on the record in Highland.

Mr. Gameros, how did you want to proceed now?

MR. GAMEROS: Your Honor wanted me to get a representative of NexPoint Real Estate Partners to state that they agree that the estate has its 46 percent interest in the company agreement subject to the company agreement. And I've got Mr. Sauter here who has authority to speak on behalf of NexPoint Real Estate Partners.

THE COURT: All right. Well, so what is his position with HCRE?

MR. SAUTER: Your Honor, I don't have -- this is DC Sauter. I don't have an official position with HCRE, but I

have spoken with Mr. Dondero and he has authorized me to appear here today and agree to the conditions that Mr. Gameros just outlined.

THE COURT: All right. Well, it sounds like hearsay to me. I don't know -- Counsel, let me have you both respond. You know, I worry about this will fall apart the minute Mr. Dondero is instructing a lawyer, I never agreed to that. I mean I just don't know. This is highly unusual.

First --

MR. GAMEROS: Your Honor, if I might?

THE COURT: Please.

MR. GAMEROS: Mr. Sauter is an officer of the Court. He works, you know, with Mr. Dondero at his business at NexPoint; certainly an authorized agent on behalf of NexPoint Real Estate Partners to make this agreement on behalf of NexPoint Real Estate Partners.

To the extent that the condition that you originally described as a conclusory matter, in other words, how to end the withdrawal, we already agreed to that, that we also can agree on the record to waive any appeal. Mr. Sauter is authorized to agree to that, as well.

So I think as an agent and a lawyer on behalf of NexPoint Real Estate Partners, he's fully able to do that.

THE COURT: How do I know he's able to do that?

And, by the way, if Mr. Dondero is in I guess the

last 15 minutes given him authority to testify before the Court, why couldn't Dondero just get on the WebEx himself?

MR. SAUTER: Your Honor, I think he felt more comfortable with me being a lawyer agreeing to those terms so that he wouldn't misstate something. He has been listening. I believe he's still on, although I'm not certain.

THE COURT: Mr. Morris, do you want to respond? I mean I'm not sure, frankly, I care what you say, no offense. I don't think I have a person with clear authority here.

MR. MORRIS: I'll just be quick and say I agree.

THE COURT: Okay. Mr. Gameros --

MR. GAMEROS: As an attorney for NexPoint Real Estate Partners, I have the authority to make that agreement on the record and it be binding. Mr. Sauter is confirming that authority having spoken with Mr. Dondero about it.

I think that the Court is fully --

THE COURT: Mr. Gameros --

MR. GAMEROS: -- capable of doing that --

THE COURT: Mr. Gameros, come on. You know this is the client's decision to make. Okay. I don't have a client representative. I don't have an officer or controlling equityholder as evidence here of --

MR. MORRIS: Mr. Dondero --

THE COURT: -- the willingness to make the agreement.

Pardon?

MR. MORRIS: Can Mr. Dondero make the representation on the record to the Court that he is authorizing Mr. Sauter to waive any claim that HCRE has to Highland's 46.06 percent interest in SE Multifamily along with any appeal? This is just step one. But if Mr. Dondero was on the phone, let him speak up and make it crystal clear that he is delegating the full authority to Mr. Sauter to negotiate and enter into this consensual order on behalf of HCRE.

THE COURT: All right. Mr. Gameros, do you want to give your client authority to speak up? Your client representative, someone who's actually an officer or a controller or equity owner?

MR. GAMEROS: Your Honor, if Mr. Dondero can do that, that would be great. I don't know if he's in a place where he can do that.

THE COURT: All right. Mr. Dondero, if you can hear us, are you willing to give some quick testimony in that regard?

(No audible response)

MR. DONDERO: I can't see the box --

UNIDENTIFIED SPEAKER: Surprising that -- surprising he was on the phone before, but now he's not after delegating. Just I'm not --

MR. SAUTER: Your Honor, he's on the phone. I'm just -- if you will give me a minute, I got to run around the corner

and try to make sure he knows how to unmute himself.

THE COURT: Star 6. If he's on a phone, star 6 is the way to unmute himself. But I want to see video, too.

THE OPERATOR: There we go. Try again.

MR. DONDERO: Hello?

THE COURT: All right.

MR. DONDERO: Hello?

THE COURT: Mr. Dondero, is that you?

MR. DONDERO: It's me. I've been on the entire time.

THE COURT: All right. Can you turn your video on, please?

MR. DONDERO: I am on my cell phone.

THE COURT: Okay. Well, so I guess you just called in on your cell phone, you don't have a WebEx connection on your cell phone?

MR. DONDERO: I don't have a WebEx.

THE COURT: Okay. Well -- yeah, it sounded like you were in the same office as Mr. Sauter. Is that -- did I misunderstand?

MR. DONDERO: We work in the same office. I'm in my car. I just stepped out of my car.

THE COURT: All right. Well, this is not ideal, you know, without us seeing you. But I'll go ahead and swear you in. All right. Can you hear me okay? I need to swear you in.

MR. DONDERO: Yes.

THE COURT: All right.

JAMES DONDERO, HCRE'S WITNESS, SWORN

THE COURT: All right.

Mr. Gameros, do you want to ask him the questions we need to hear answers on, please?

MR. GAMEROS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, on behalf of HCRE, do you agree as a condition for withdrawing the proof of claim that HCRE will not challenge the estate's ownership or equity interest in SE Multifamily subject to the company agreement?

A Yes.

Q Do you agree that you will not appeal and that, therefore, HCRE is waiving any appeal right to that determination as a condition of withdrawing the proof of claim?

A Yes.

MR. GAMEROS: Those are the questions for Mr. Dondero.

MR. MORRIS: Your Honor, if I may?

THE COURT: Mr. Morris, you may.

MR. MORRIS: I'm very uncomfortable. I'm very uncomfortable with the inclusion of the language subject to the company agreement. It sounds like a very conditional waiver. We need an irrevocable unconditional admission by HCRE that

Highland owns 46.06 percent of SE Multifamily, period, full stop. If they want to keep conditions in there and make it conditional and make it subject to other things, let's please deny the motion and proceed to trial.

THE COURT: All right. Well, Mr. --

MR. GAMEROS: The equity that they own is part of the company agreement. It's not modifying the company agreement by saying.

THE COURT: Well --

MR. MORRIS: Our ownership is not subject to the agreement. We either have an ownership interest or we don't. Our rights and obligations as a member of SE Multifamily are subject to the agreement, but our ownership interest is not. And that's the ambiguity that we need to remove.

THE COURT: Okay. Well, Mr. Gameros, do you want to rephrase the question or are you not willing to make the agreement as specific as Mr. Morris says he needs it?

MR. GAMEROS: That's what I'm -- I guess I don't understand what his complaint is. If the estate owns 46 percent of the equity of SE Multifamily, it owns that subject to the company agreement. It's not a separate ownership interest. So I don't know what the problem is.

THE COURT: Okay. Let me try to phrase it as I understand it.

What I understand has been asserted in the proof of

claim is that what was set forth in the agreement was a mistake, okay. A mistake. And it sounds like you're using language that says we'll agree the agreement, you know, they have a 46 percent interest pursuant to the agreement. But that doesn't change -- that does not really zero in on the argument made in the proof of claim that there was a mistake in the agreement, right?

So you'd have to go broader to completely resolve the issues raised in your proof of claim and say we agree, Highland has a 46.06 interest in SE Multifamily and we agree that is correct and we waive any right to challenge it in the future and we waive any right to appeal this order.

MR. GAMEROS: And, Your Honor, if that's the condition, I guess my concern is that the 46 percent is still part of the company agreement. We agree not to challenge it on the basis of anything asserted in the proof of claim, that being mistake, lack of consideration, or failure of consideration. Their 46 percent is their ownership interest in SE Multifamily and HCRE won't challenge that.

Is that sufficient?

THE COURT: Well, I need to hear from your client. I mean he needs to be asked every which way from Sunday whether he is waiving the right to challenge Highland's 46.06 interest from now until eternity, okay. That's basically, you know, we either have that agreement or we'll just have a trial.

CONTINUED DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, do you agree that NexPoint Real Estate Partners will not challenge in any way the estate's interest in SE Multifamily, its 46-point whatever percent interest that is?

A I think the nuance is that agreement is okay in current as of today. But it's part of an operating agreement, and that percentage ownership can change due to capital calls and other things. And it could change over time. It's never in a partnership agreement fixed into perpetuity. And so no businessman can agree to that.

If the Court wants it fixed into perpetuity, that would be very odd.

MR. MORRIS: Can we go to trial, Your Honor? Can we just deny the motion and go to trial? Let me have my depositions and go to trial. This is -- if Mr. Dondero wants to take that position, he's welcome to do that. But I'm entitled to finality, and I'd like to get there.

THE COURT: All right. Well, Mr. Gameros, anything else you want to ask your client that you think might be helpful?

BY MR. GAMEROS:

Q Mr. Dondero, you desire to withdraw the proof of claim. Correct?

A Yes.

Q And you agree to an order denying the proof of claim with prejudice. Correct?
A Yes.
Q And can you agree that HCRE will not challenge the equity ownership of its member in SE Multifamily of the estate?
A Yes.
MR. GAMEROS: Your Honor, I think there it is.
THE COURT: Mr. Morris, do you have any --
MR. GAMEROS: He agrees.
THE COURT: -- do you have any follow-up questions --
MR. MORRIS: The waiver of the right to --
THE COURT: -- Mr. Dondero?
MR. MORRIS: The waiver of the right to any appeal whatsoever. And I do have -- you know, there are the other conditions that we mentioned earlier, right? Either they have to also agree that Mr. Seery's deposition transcript shall never be used for any purpose at any time or they need to level the playing field and submit their witnesses to examination.
The playing field needs to be level here. Either if they want to use that deposition transcript for some purpose, I have no problem with that. Just let me take my depositions. If they don't want to submit their witnesses to depositions, then they also have to agree that that transcript will never be used for any other purpose. It's as if this proof of claim has never been filed, right, for that purpose, right. Because

that's just not fair. That's the legal prejudice.

How do you take my client's deposition on Wednesday and file this motion on Friday knowing your client's supposed to be deposed on Tuesday? Level the playing field. That's conditional number two.

And condition number three, frankly, Your Honor, this proof of claim was fraudulent. I mean my client has been damaged. My client has spent an enormous amount of money on this, and I'd like them to agree to if not make us whole, you know, do something because it's wrong. It's just wrong that Mr. Dondero files proofs of claim under penalty of perjury that have absolutely no basis in fact.

It's distressing. I'd like those two last issues addressed, as well.

MR. GAMEROS: Your Honor, in terms of the Court's questions in terms of finality with respect to the membership interest in SE Multifamily, Mr. Dondero agrees with the Court. He's already said that he won't waive -- that he waives, rather -- I'm sorry, let me start again.

He has said very clearly that he has waived appeal of this order allowing the withdrawal of the proof of claim with the conditions that you asked for. I think you should grant the motion to withdraw and we can put an end to all of this.

THE COURT: Okay.

MR. MORRIS: Here's the thing, Your Honor. We know

but it's also a big deal because we want to make sure only parties with legitimate claims are given a seat at the table, so to speak, in bankruptcy as far as, you know, their right to a distribution, their right to be heard in a case.

So, you know, that's the reason for the rule. We don't see it come into play very often, but it's there because we want to make sure that we protect the integrity of the bankruptcy process. And if someone files a proof of claim and it's pending and, you know, activity happens in the bankruptcy case as a result of it, that we don't just let a party say never mind.

So the Manchester case, which you both cited in your pleadings, has set forth fact-intensive factors -- fact-intensive inquiry. And, again, I'm just looking at HCRE's motion, Page 7. There was a chart and it sets forth the Manchester factors. Factor number one, diligence in bringing the motion to withdraw the proof of claim.

In Mr. Gameros' chart, his response to that factor is that HCRE brought its motion to withdraw immediately after conferring with debtor's counsel. I don't even know what that means, okay. But what I do know is in looking at diligence of bringing the motion, the proof of claim was filed April 8th, 2020. It was objected to, the proof of claim, July 30th, 2020. And then on August 12th, 2022, this motion to withdraw the proof of claim was filed.

So two years and one month after the objection was filed to the proof of claim HCRE withdraws it. So that doesn't seem very diligent. It's not diligent at all, to be honest.

Your second factor, you cited, Mr. Gameros, undue vexatiousness, and you say HCRE has not been vexatious in pursuing its proof of claim. And outside the motion to disqualify previous counsel, which is not substantive, everything in the matter has proceeded by agreement and there have been no hearings set or held.

Okay. Well, debtor has represented in its pleadings and today through counsel on the record that it has spent hundreds of thousands of dollars litigating this. It has mentioned that four depositions have been taken. It was Mr. Mark Patrick. It was the tax accounting firm. We had the B -- the entity -- BH Equities, LLC, their representative. And then Mr. Seery. So four depositions, and I'm told a lot of written discovery.

And on the day before the -- well, the day after, day or two after the Seery deposition, the motion to withdraw the proof of claim was filed after 5:00 in the evening on a Friday, August 12th, and I guess a couple of business days before the depositions were to occur of Mr. Dondero and the fellow, Mr. McGraner, and I feel like there was one other deposition. I'm losing track of those.

But --

THE CLERK: The 30(b)(6).

THE COURT: Oh, the 30(b)(6). The 30(b)(6) representative.

So on top of all of that, you know, Highland argues there was just simply no good-faith basis for the proof of claim. Proof of claim asserted the membership interest, Highland's 46.06 interest, set forth in the Multifamily LLC agreement were the result of mistake.

Mr. Dondero signed the agreement for both parties, HCRE and Highland. And then now the motion to withdraw says something to the effect of the anticipated issues have not materialized. So anyway, the undue vexatiousness factor I think weighs -- because of these factors I've mentioned, weighs in favor of there has been undue vexatiousness.

Factor number three, according to HCRE's motion to withdraw the proof of claim, is matter's progression including trial preparation. Again, four depositions, thousands of pages of written discovery. We were days away from the last depositions occurring, those of HCRE's potential witnesses and we have trials set. We have a trial set in November. So that factor, again, seems to weigh heavily in favor of Highland's objection here.

Duplication of expense of relitigation, here's why we got Mr. Dondero on the phone or wanted to have a witness with authority. Highland is saying we are concerned about

relitigation of this ownership interest issue. And as part of its argument, Highland has said we've got claims, we've got our own claims for breach of agreement and different things that are going to cause us to have to drill down on terms of the LLC agreement.

And we can't -- we don't want to face exposure on this issue of, well, you don't have the ownership interest or the rights you say you do, Highland. So, you know, if we could get ironclad language here of, you know, we waive the right, we agree that Highland has the 46.06 interest and we waive the right to challenge that, then I don't think we'd have to worry about relitigation of the issues in the proof of claim. But it feels like we had a little bit of reluctance to say it as forcefully as we would need to have it said to avoid relitigation.

Reason for dismissal, I don't know. I don't know what the reason for dismissal. Again, to quote HCRE's pleading on Page 7, the reason for dismissal is, "The operation of the company" -- I think that means SE Multifamily -- "during the case and the anticipated issues therewith have not materialized and NREP no longer desires to proceed in the matters raised in the proof of claim."

I mean that's just not in sync with the theory espoused in the proof of claim that we think there was a mistake made in the LLC agreement. So, again, looking at these

legal factors, I do not think that the correct result is to grant the motion to withdraw the proof of claim under Rule 3006 under the Manchester factors. I will throw in that I think there is potential for prejudice here of the debtor.

I mean not even considering that hundreds of thousands of dollars have been spent over two-plus years on this issue, you know, I remember very well the disqualifying motion. And I said Wick Phillips should be disqualified. I didn't shift fees because I just wasn't sure at the time that, frankly, HCRE should be imposed with the fees attributable to its lawyers, not recognizing the conflict of interest when they saw one. It was just a little fuzzy in my mind.

But I'm just letting you know that now that we are here many years later, many months later and we have all the sudden, okay, never mind, this is just a situation where I have some regrets I didn't shift fees, to be honest. But -- so the motion is denied. The depositions shall go forward. I'm not sure, you know, if the dates that have been proposed are still workable, but if someone wants to speak up now about those deposition dates to avoid an emergency hearing, I'm willing to hear that.

I think what I heard was, well, I don't know what -- have you talked about dates at all? Probably not, Mr. Morris, in light of this hearing today.

MR. MORRIS: We have not, Your Honor. But I do think

that Counsel and I can work that out. I'm not available until the week of the 26th. So it won't be early that week but sometime between let's say the 28th of September and the 7th of October, I'll be prepared to take these depositions. And I would respectfully request, and we can work with Ms. Ellison to try to find a trial date sometime the last week of October, first week of November so we can get this finished.

THE COURT: Okay. Did I dream up that there was a trial set already in November?

MR. MORRIS: You know what?

You know what, let's just keep that date, Your Honor. Let's just keep that date.

THE COURT: All right. Traci, are you still on the line? Can you confirm my memory? I thought we had a two-day trial set aside for this in November.

MS. ELLISON: Is this on the merits of HCRE's claims, Judge Jernigan? I have a note holding November 1 and 2.

THE COURT: Okay.

MR. MORRIS: Yeah.

THE COURT: So we'll go ahead and mark that down.

Now the last -- so you'll work on an a mutually agreeable date for these three remaining depositions sometime, you know, late September, early October. And I trust you will --

MR. MORRIS: Yeah. I would respectfully request that

Counsel just propose dates for the depositions. I'll wait to hear from him. But I think -- I'm representing to the Court that any time between September 28th and let's just give it two full weeks, October 12th. That's plenty of time in advance of the trial.

THE COURT: All right. Mr. Gameros, anything you want to add on that?

MR. GAMEROS: No, Your Honor. I'm sure we can work with Mr. Morris to get those scheduled.

THE COURT: All right. And here's actually the last thing I wanted to say.

You know, I had thought about, you know, waiting 24 hours to give you a ruling on this motion to withdraw the proof of claim and directing you all to kind of talk and see if maybe you could work out language, you know, without the pressure of the Court hovering over you that could make both of your clients satisfied.

I still encourage you to do that, but I'm going to pick on our U.S. Trustee. I see she's observing today, and I'm not going to ask you to say anything, Ms. Lambert. But if you all do agree, if you all in the next, you know, 24 hours come to some sort of agreement, I don't mean to be alarming, but I want it run by the U.S. Trustee because, you know, I've heard some things that have troubled me about the, you know, lack of good faith with regard to the proof of claim and, you know,

alleged gamesmanship.

And, you know, I talked earlier about this goes to the integrity of the system, you know, filing a proof of claim under penalty of perjury. Anyway, I'm feeling a little bit uncomfortable about signing off on an agreed order where there may be quid pro quos that went back and forth in connection with withdrawing a proof of claim. I mean at some point -- well, that's why we have scrutiny of these things under Rule 3006, right?

Again, there are integrity issues. And so I just -- you know, if you were to work out language, I want you to run it by Ms. Lambert and I want to hear that either she was okay with it or she wasn't okay with it or maybe she declines to comment. You know, I'm not going to tell her how to do her job, but I feel like that needs to happen, okay?

It's just something uncomfortable going on in my brain about, you know, again a proof of claim being on file two, almost two and a half years and then, you know, okay, never mind, okay, I agree to never mind as long as you agree to XYZ.

And I have no idea what's in the Seery transcript. I don't have it before me. But, you know, I don't even know what that's all about. I don't even know if I care what that's all about. I just know if there are quid pro quos I feel like, you know, maybe I need to have the U.S. Trustee, you know, not per

se signing off on any agreed order but at least kind of looking at it and telling me either U.S. Trustee's fine with it, U.S. Trustee is not fine with it, or U.S. Trustee declines to comment. Just I know that I've gone through the drill, okay?

So just letting you know I am still, you know, all open to an agreed resolution of this, okay. But we're going forward as if you can't get there, okay?

All right. I'll look for -- what am I going to look for? I'm going to look for an order denying the motion to withdraw proof of claim. I'm going to look for an order granting the -- well, an order resolving the objection to motion to quash and cross-motion for subpoenas saying that these three witnesses are going to appear at a mutually agreeable time either late September or early October.

All right. We're adjourned.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Proceedings concluded at 11:35 a.m.)

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

I, DIPTI PATEL, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

LIBERTY TRANSCRIPTS DATE: September 13, 2022

EXHIBIT W

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Wednesday, August 4, 2021
	9:30 a.m. Docket
Debtor.	
	- STATUS CONFERENCE RE: APPLICATION FOR ADMINISTRATIVE EXPENSES (1888)
	- MOTION FOR ORDER AUTHORIZING SALE OF CERTAIN PROPERTY (2535)
	- MOTION FOR ORDER AUTHORIZING SALE OF CERTAIN LIMITED PARTNERSHIP INTERESTS (2537)

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

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motions.

THE COURT: All right. Anything else before I give a ruling?

All right. Well, the Court, of course, has jurisdiction over these two motions. I'll call them the Maple Avenue Motion and the PetroCap III Motion. The Court will specifically note for the record that notice has been proper under the Rules and sufficient. I'd note that July 8th these motions were filed.

The Court will also note for the record that the only objections that were lodged to these motions were withdrawn during the hearing before the evidence, as were separate bids that had been submitted. Thus, there are no pending objections, no pending bids at this juncture.

363(b) of the Bankruptcy Code applies to these proposed transactions.

With regard to Maple Holdings, this is, of course, technically a motion under 363(b) for approval for the Debtor to exercise its management rights in Maple Avenue Holdings, LLC to cause Maple Avenue Holdings, LLC to sell the real property at 2817 Maple Avenue, Dallas, Texas. So it's a usage, I guess you could say, of property outside the ordinary course of business.

And then with regard to the PetroCap III transaction, once again, 363(b) is the governing authority. The transaction is

either in the nature of a sale or usage in the form of a forfeiture of certain of the limited partnership interests and other rights in the agreements described in the motion.

The Court finds that the evidence very well demonstrated a sound business justification for both of these transactions and a reasonable business judgment has been exercised and these transactions are in the best interests of the estate.

First, with regard to the Maple Avenue transaction, the evidence showed that the purchase price, $9.75 million, is certainly within the range of market values that expert brokers and the Debtor's informal marketing process revealed. The Court believes that the Debtor and its professionals marketed the property appropriately, and this appears to be a sale process that has been undertaken in good faith without conclusion -- without collusion, I should say. The purchaser, Stonelake Capital Holdings, LP, is not an insider, and again appears to be a participant in an arm's length, good faith, and fair transaction.

The Court is not in the least troubled that we didn't have an auction. While auctions in the universe of Chapter 11 are a very common protocol, there's nothing in the Bankruptcy Code or Bankruptcy Rules that requires a public auction. And when we're talking about real estate, it's very common not to have an auction.

But in any event, the Court reiterates that the marketing

of this property and the sale process appear to be in all ways adequate and in good faith and have yielded fair value for the property. In any event, this is the highest and best offer the Debtor received.

So the Court approves the Maple Avenue Holdings, LLC transaction. The Court reserves the right to supplement this ruling in a written form of order.

Turning now specifically to PetroCap III, the Court likewise believes that there has been a reasonable effort on the part of the Debtor to maximize the value of these interests and rights. The Court believes that this transaction is the highest and best transaction that can be achieved by the estate. The Court believes this was arm's length and that all parties, including PetroCap, have acted in good faith. And so I should add both of these transactions are going to be free and clear of any interests, with those interests to attach to the proceeds.

The Court once again reserves the right to supplement in a more fulsome written ruling, but the Court hereby approves the PetroCap transaction.

To the extent these parties have asked for waiver of the 14 days under 6004, I can't remember if that request was made on both transactions or just the real estate transaction. Is that a request for both transactions, Mr. --

MR. POMERANTZ: Your Honor, I'm not sure it's even a

request for the Maple, because I think the closing is not expected to occur until after that 14-day period.

THE COURT: Okay.

MR. POMERANTZ: With respect to PetroCap, I'll ask Mr. Demo. Since he was going to present the specific facts, he may know the answer to whether we asked for the 14-day stay waiver there.

MR. DEMO: We did ask, Your Honor. Again, this is Greg Demo from Pachulski Stand Ziehl & Jones. So if we could have the 14-day waiver, that would be wonderful.

THE COURT: All right. Well, given that we have no objection and so no concern for an appeal, and otherwise given the circumstances of this transaction, I think that it is a reasonable request -- I see it right now -- to waive 6004(h). And so that request is granted. All right.

MR. DEMO: Thank you.

THE COURT: Well, is there any more business before we adjourn?

MR. POMERANTZ: Nothing from the Debtor, Your Honor.

THE COURT: All right. Well, I thank you all. You know, I'm --

MR. POMERANTZ: Your Honor, I just may point out that we do expect to be going effective either the end of this week or sometime beginning to middle of next week. So there'll obviously be a watershed event in the case that has been --

pretty much gone with these contempt motions.

And, again, read my last paragraph. I can understand getting bored reading that thing, but please read the last paragraph to know that it's going to get worse if we have another one of these hearings and I do find contempt.

So, all right. Well, we will see you all I guess on the 19th is my next -- I think that's where we have our next hearing.

(Proceedings concluded at 11:31 a.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 **08/05/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT 6

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

HIGHLAND'S OBJECTION TO RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455 AND BRIEF IN SUPPORT

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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Highland Capital Management, L.P. ("Highland"), by and through its undersigned counsel, hereby files this objection (the "Objection")[1] to *James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company's Renewed Motion to Recuse* [Docket Nos. 3541, 3542] (the "First Renewed Motion"),[2] as amended by Docket Nos. 3570 and 3571 (as amended, the "Renewed Motion").[3] In support of its Objection, Highland states as follows:

PRELIMINARY STATEMENT[4]

1. Under Mr. Dondero's direction, Highland was forced to file bankruptcy in October 2019 to protect itself from an avalanche of adverse rulings that had either been entered against it and its Dondero-controlled affiliates or were about to be entered. For nearly a decade, courts and arbitration panels in Texas, Delaware, New York, and in foreign jurisdictions such as the Cayman Islands, Bermuda, and Guernsey, have issued a series of rulings against Mr. Dondero and his enterprise, some with stinging rebukes.

2. Now, Mr. Dondero has filed the Renewed Motion to recuse this Court in the misguided belief that he might have more success with a different judge. But the lengthy record proves that Mr. Dondero's problem is not judicial bias. It is the never-ending, meritless, vindictive, and vexatious litigation strategy that Mr. Dondero stubbornly clings to regardless of the burdens

[1] Concurrently herewith, Highland is filing its *Appendix in Support of Highland's Objection to Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455 and Brief in Support* (the "Appendix"). Citations to the Appendix are annotated as follows: Ex. #, Appx. #.

[2] Citations to the First Renewed Motion refer to *Movants' Memorandum of Law in Support of Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455* [Docket No. 3542].

[3] Citations to the Renewed Motion refer to *Movants' Amended Memorandum of Law in Support of Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455* [Docket No. 3571].

[4] All capitalized terms used but not defined in this Preliminary Statement have the meanings given to them below.

imposed on the judicial system, the havoc wrought, and the damage inflicted on himself, Highland's creditors, and even his own steadfast loyalists.

3. The Renewed Motion is Movants'[5] third attempt to recuse this Court from all matters relating to Highland's bankruptcy. Like Movants' Initial and Supplemental Motions to recuse, it is untimely, replete with factual misstatements and omissions, premised on final orders or orders upheld on appeal, and must be denied.

4. The Initial Motion was filed on March 18, 2021—(a) sixteen months after the Petition Date, (b) fourteen months after venue was transferred to this Court, (c) one month after entry of the Confirmation Order, (d) just before the first contempt hearing, and (e) after more than 2,000 documents were filed on the main docket.[6] The Supplemental Motion was filed on July 19, 2022—(a) twenty-two months after the Petition Date, (b) twenty months after venue was transferred, (c) eleven months after entry of the Confirmation Order, (d) five months after the District Court denied Movants' appeal of the Initial Motion, and (e) after more than 3,400 documents were filed on the main docket, all in an effort to prevent this Court from adjudicating the Kirschner Adversary. Now, nearly three years after Highland's bankruptcy proceeding was transferred to this Court, Movants—for the third time—complain that this Court is biased against Mr. Dondero—as if no other judge or fact-finder had previously ruled against him and the entities he controls.

5. Movants' Renewed Motion largely regurgitates the "evidence" in the untimely Initial Motion; namely, snippets of out-of-context quotes and eight rulings out of the hundreds

[5] "Movants" means, collectively, James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P. ("NexPoint"), The Dugaboy Investment Trust ("Dugaboy"), Get Good Trust ("Get Good"), and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC ("HCRE").

[6] This does not include hundreds of docket entries in adversary proceedings in which Mr. Dondero and/or his affiliates were parties.

entered by this Court (some of which have now been affirmed by the appellate courts). However, Movants do cite to five additional orders as "new" evidence of this Court's alleged bias. Like the old evidence, the "new" evidence is untimely[7] and fails to support any credible claim of bias or prejudice.

6. Movants thus failed to seek disqualification "at the earliest possible moment." They instead sat on their hands for almost a year and a half before filing the Initial Motion (and substantially longer before filing the Supplemental and Renewed Motions) after supposedly concluding that this Court was biased. As this Court previously ruled, Movants' indefensible delay in seeking recusal is fatal, and the Renewed Motion, like the Initial Motion, must be denied as untimely. The Renewed Motion also fails on the merits—largely for the same reasons the Initial Motion did. Movants have not, and cannot, meet their heavy burden of proving this Court is biased or somehow prejudiced against Movants. Seen in context, the record demonstrates that (a) numerous courts and tribunals have consistently ruled against Mr. Dondero and his enterprise, thereby demonstrating that this Court does not stand alone, (b) this Court's rulings and orders are sound (and have largely been upheld on appeal), (c) there is no evidence presented of extrajudicial bias or prejudice, and (d) no objective person would find that Mr. Dondero and his enterprise are the victims of improper judicial conduct rising to the extraordinary remedy of recusal. Mr. Dondero's desire to re-litigate the record using the Renewed Motion is both unavailing and procedurally improper.

7. Further, this Court, respectfully, cannot grant Movants' alternative request to "make clear that any order denying recusal is final so that Movants may appeal the Court's order to the Northern District of Texas." This request is precluded by the District Court's February

[7] One order was entered before the Initial Motion was filed and three were entered in mid-2021, over a year ago.

Order dismissing Movants' appeal of the denial of the Initial Motion; as Movants concede, this Court simply lacks the authority to unilaterally determine that its orders are final and appealable. And, while this Court could remove the reservation of rights from its Recusal Order, it cannot force the District Court to hear an appeal of that interlocutory order.

PROCEDURAL BACKGROUND

I. General Background to the Bankruptcy Case

8. On October 16, 2019 (the "Petition Date"), Mr. Dondero caused Highland to file a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court"). The Delaware Court entered an order transferring venue of Highland's bankruptcy case to this Court [Docket No. 186][8] on December 4, 2019.

9. On February 22, 2021, this Court, over the objections of Mr. Dondero and his controlled affiliates, entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] (the "Confirmation Order"), which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Docket No. 1808] (the "Plan"). The Plan became effective on August 11, 2021 [Docket No. 2700].

10. On September 8, 2022, the U.S. Court of Appeals for the Fifth Circuit (the "Fifth Circuit") affirmed, in material part, the Confirmation Order's factual findings and legal conclusions. *NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P.*, 2022 U.S. App. LEXIS 25107 (5th Cir. Sept. 7, 2022).

[8] Unless otherwise indicated, all docket numbers refer to the main docket maintained by this Court.

II. Movants' Initial Motion Is Denied

11. On March 18, 2021, Movants—Mr. Dondero and entities he controls[9]—filed their motion to recuse this Court [Docket Nos. 2060, 2061, 2062] (the "Initial Motion").[10] The Initial Motion asked this Court to recuse itself from any adversary proceedings and future contested matters involving Movants or any entity connected to Mr. Dondero.

12. On March 23, 2021, this Court denied the Initial Motion [Docket No. 2083] (the "Recusal Order") finding that "the timing does not seem to pass muster." The Initial Motion (a) "was filed more than 15 months after" this case was transferred to this Court; (b) "comes after many dozens of orders have been issued by the [Bankruptcy] Court," and (c) "comes on the eve of a contempt hearing."[11] Recusal Order at 7. This Court further found that, even if the Initial Motion had been timely, recusal was not warranted on the merits.[12] Accordingly, this Court determined, in an exercise of its discretion, that Movants' assertions did not "rise to the threshold standard of

[9] Confirmation Order ¶ 19; *see also NexPoint Advisors, L.P.*, 2022 U.S. App. LEXIS 25107, at *24-26.

[10] Citations to the Initial Motion refer to *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 f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company's Brief in Support of Their Motion to Recuse 28 U.S.C. § 455* [Docket No. 2061].

[11] On June 7, 2021, Mr. Dondero was held in contempt for violating this Court's injunction. *Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Cap. Mgmt., L.P.)*, 2021 Bankr. LEXIS 1533 (Bankr. N.D. Tex. Jun. 7, 2021). Mr. Dondero subsequently appealed this Court's ruling. On August 17, 2022, the District Court affirmed this Court's findings in all material respects. *Order*, Case No. 3:21-cv-01590-N, Docket No. 42 (N.D. Tex. Aug. 17, 2021). Ex. 1, Appx. 1-14. Notably, Movants do not contend that this Court's contempt order is evidence of its bias.

[12] This Court noted that Movants' allegations of "extrajudicial" bias resulting from the Acis Bankruptcy (defined below) were "at the heart of the" Initial Motion (Recusal Order at 7) but explained it did not form any animus or bias toward Movants during the Acis Bankruptcy and concluded that any knowledge learned from the Acis Bankruptcy did not constitute "extrajudicial" knowledge warranting recusal. *Id.* This Court also found that "more generally," it did not harbor, and has not shown, any "personal bias or prejudice" against Movants. Recusal Order at 10. This Court explained that it "has merely addressed motions, objections and other pleadings as they have been presented," and "has issued and enforced orders where requested and warranted." *Id.* "This court and all courts sometimes use strong words as part of managing a complex and contentious case. None of this should be interpreted as 'bias" or 'prejudice … clashes between a court and counsel for a party [are] an insufficient basis for disqualification under Section 455." *Id.* (citations omitted). This Court stated it has "the utmost respect for [Movants]" and has "no disrespect for Mr. Dondero on a personal level or any of the [Movants]." *Id.*

raising a doubt in the mind of a reasonable observer as to" this Court's impartiality.[13] (*Id.* at 10).

III. Movants' Appeal of the Recusal Order Is Dismissed

13. Movants appealed the Recusal Order to the U.S. District Court for the Northern District of Texas (the "District Court") on April 1, 2021.[14] On June 28, 2021, Movants filed their appellate brief[15] (a) arguing the Initial Motion was "timely" and (b) otherwise restating their baseless arguments that this Court is prejudiced and biased and exhibits antagonism towards Movants. On July 28, 2021, Highland filed its appellate brief (the "Highland Brief").[16] Exs. 5-6, Appx. 184-2048.

14. On December 10, 2021, the District Court, *sua sponte*, issued an order questioning the finality of the Recusal Order, directing supplemental briefing, and observing that this Court "expressly 'reserve[d] the right to supplement or amend'" the Recusal Order. Ex. 9, Appx. 2069-2073. On December 15, 2021, Movants filed their supplemental brief. Ex. 10, Appx. 2074-2084. Highland filed its supplemental brief on December 20, 2021. Ex. 11, Appx. 2085-2097).

15. On February 9, 2022, the District Court denied Movants' appeal finding that under clear Fifth Circuit precedent, the Recusal Order was *per se* interlocutory, could only be reviewed upon final judgment, and was not subject to the collateral order doctrine (the "February Order").[17]

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[13] Movants contend that "the Court … applied a subjective standard [in the Recusal Order], based entirely on self-assessment." Renewed Motion at 1. This contention is spurious and belied by this Court's explicit statements to the contrary. *See, e.g.,* Ex. 2, Appx. 31-32 ("And the standard is I have to stand back and look at would a reasonable person have concerns here. So I can't just say, I know I'm not biased, I don't think I'm biased; I have to look at what a reasonable person might think. So you presented to me a 2,722-page appendix for me to do my job and look at what a reasonable person would think. So, then would it raise a doubt in the mind of a reasonable observer as to the judge's impartiality?").

[14] Case No. 3:21-cv-00879-K (N.D. Tex.).

[15] Case No. 3:21-cv-00879-K, Docket Nos. 16, 17 (N.D. Tex.).

[16] The District Court granted Highland's motion to intervene over Movants' objection. Exs. 7-8, Appx. 2049-2064.

[17] The February Order did not rely on this Court's reservation of rights in its analysis but simply held that the Recusal Order, like all orders denying recusal, was interlocutory and could not be appealed until a final judgment in this case, which the record reflected had not—and still has not—occurred. *See* Ex. 36, Appx. 4165-4169.

The District Court also rejected Movants' arguments that (a) a different standard of finality applied in bankruptcy proceedings and (b) the Recusal Order was appealable under the "collateral order doctrine." *Id.* Appx. 2105-2106.[18]

16. Movants did not appeal the February Order or file a petition for rehearing.

IV. Movants File the Supplemental Motion

17. On July 20, 2022, more than five months after the District Court entered the February Order, Movants filed their supplemental motion to recuse this Court [Docket No. 3406] (the "Supplemental Motion") asking this Court to enter a final, appealable version of the Recusal Order (implying this Court could dictate to the District Court that its orders are appealable and could do so by deleting the reservation of rights from the Recusal Order).[19] Movants also sought to introduce new "examples" of this Court's bias "to preserve their record for appeal and to ensure that all potential grounds for recusal may be considered by an appellate court." Supplemental Motion ¶ 8.

18. On August 15, 2022, Highland objected [Docket No. 3444] (the "Highland Objection") arguing that (a) this Court lacked the authority to determine whether the Recusal Order was final; (b) the Supplemental Motion was procedurally improper as it required (i) a motion under Federal Rule of Civil Procedure ("FRCP") 54(b) or (ii) an entirely new motion predicated solely on Movants' "new" examples of bias; and (c) Movants' new "examples" of bias were meritless. The Highland Objection included an extensive, annotated chart [Docket No. 3444-1] proving that Movants' new "examples" (a) were premised on material distortions or omissions of (i) fact, (ii)

[18] The District Court also ruled on Movants' request for leave to appeal an interlocutory order (*i.e.*, the Recusal Order) under 28 U.S.C. § 158(a)(3). After a lengthy analysis, the District Court held that Movants "failed to satisfy any of the three § 1292(b) criteria" and denied Movants' request to appeal the Recusal Order. Ex. 12, Appx. 2106-2110.

[19] Supplemental Motion ¶ 6 ("On appeal of the [Recusal Order] … Judge Kinkeade dismissed the appeal, holding that the [Recusal Order] was non-final and non-appealable. In doing so, Judge Kinkeade pointed to language in the [Recusal Order] in which the Court expressly 'reserve[d] the right to amend or supplement' its ruling.")

this Court's rulings, and/or (iii) statements on the record and (b) viewed fairly, were not the product of bias, prejudice, or lack of impartiality.

19. On August 22, 2022, Movants filed their reply seeking to have their Supplemental Motion treated as a motion to supplement the record pursuant to FRCP 54 and, again, reiterating their procedurally and substantively improper request that this Court "amend the [Recusal Order] to make it final." [Docket No. 3463].

V. The Court Holds a Status Conference

20. On August 31, 2022, this Court held a status conference on the Supplemental Motion during which it asked Movants to clarify their position, the relief requested, and the procedural basis for that relief.[20] Movants responded that, notwithstanding the confusion caused by their procedurally and substantively deficient Supplemental Motion, they were seeking two things: (a) removal of the reservation of rights from the Recusal Order and (b) supplementation of the appellate record. At the Status Conference, Highland stated that it was not opposed to Movants' requested relief *per se* but would *not* consent to Movants' procedurally improper request to have this Court designate the Recusal Order "final." Ex. 2, Appx. 29.

21. Ultimately, on September 1, 2022, this Court denied the Supplemental Motion as "procedurally improper" but allowed Movants to file "(1) a simple motion … seeking only a revised and amended Recusal Order that removes" the reservation of rights or "(2) a new motion to recuse … based on any alleged new evidence or grounds for recusal that were not considered … at the time of [this Court's] consideration of the original Recusal Order" [Docket No. 3479] (the "September Order").

[20] On August 19, 2022, this Court entered an order [Docket No. 3462] converting the hearing on the Supplemental Motion to a status conference and requiring Movants to clarify the legal and procedural basis for the Supplemental Motion.

VI. Movants File the Renewed Motion

22. On September 27, 2022, Movants filed the First Renewed Motion—their third motion to recuse—and amended it on October 17, 2022. In the Renewed Motion, Movants incorporate the entirety of the Initial Motion by reference (Renewed Motion at n. 11)[21] and ask this Court to recuse itself. In the alternative, Movants reiterate their improper request that this Court "make clear that any order denying recusal is final so that Movants may appeal the Court's order to the Northern District of Texas." *Id.* at 24.

23. The Renewed Motion, and the relief it requests, thus violates this Court's September Order.[22]

24. Moreover, like the Initial and Supplemental Motions, the Renewed Motion is untimely and is, again, premised on material distortions or omissions of fact, this Court's rulings, and/or statements on the record. In the Renewed Motion, Movants argue the following are a basis to recuse this Court:

- This Court's knowledge gained during the 2019 Acis Bankruptcy (defined below);
- The February 2020 hearing on Highland's retention of Foley Gardere, Foley & Lardner LLP ("Foley");
- The June 2020 hearing regarding the release of approximately $2.5 million from the court registry;

[21] In contrast, the Renewed Motion does *not* incorporate the Supplemental Motion or cite to the "examples" of this Court's bias included therein nor does it include certain of the "examples" of bias raised in the appeal of the Recusal Order. Consequently, Movants have waived their right to rely on those un-cited "examples" of alleged bias and Highland will not address them here. Movants' First Renewed Motion also referenced an Appendix A which allegedly "list[ed] many other, similar examples" of this Court's bias. First Renewed Motion at 6 n.27. However, Movants amended the First Renewed Motion to eliminate footnote 27 and the reference to Appendix A. Docket No. 3571. Highland reserves all rights to object if Movants ever seek to rely on any alleged "examples" of bias not specifically identified or incorporated in the Renewed Motion.

[22] On August 31, 2022, this Court stated from the bench that Movants could file (a) a simple motion to remove the reservation of rights under FRCP 54 or (b) "a new motion to recuse … to start this over and supplement the record." Ex. 2, Appx. 39. Based on the entirety of the August 31, 2022, transcript and the clear language of the September Order, however, it is clear that this Court did not intend Movants to re-argue the entirety of the Initial Motion.

- The July 2020 hearing at which this Court inquired as to whether Highland had received PPP loans;
- The December 2020 hearing on the Dondero Parties' (defined below) attempt to halt Highland's trading in the CLOs;
- The January 2021 injunction prohibiting the Dondero Parties from interfering with Highland's management of the CLOs;
- The January 2021 motion to appoint an examiner filed by Dugaboy and Get Good, Mr. Dondero's family trusts, and joined by Mr. Dondero;
- The February 2021 confirmation hearing and Confirmation Order;
- The January 2021, May 2021, and July 2021 orders requiring Mr. Dondero and Dugaboy, respectively, to appear at certain hearings;
- The May 2021 denial, in part, of Mr. Dondero's motion to compel the deposition testimony of James P. Seery, Jr.;
- The August 2021 order finding certain Movants and others in contempt for violation of this Court's orders; and
- The September 2022 hearing denying HCRE's motion to withdraw its proof of claim.

Of the foregoing "examples," twelve are orders entered by this Court. Movants appealed only two of those orders; the appellate courts denied both appeals and affirmed this Court's orders. All Movants' "examples" (other than the August 2021 contempt order and the September 2022 denial of claim withdrawal) were previously asserted by Movants in either the Initial Motion or Supplemental Motion and debunked as false by Highland at great expense.[23] Yet, Movants double down on these "examples" as if they were true and ignore Highland's detailed factual corrections.

25. Ultimately, the Renewed Motion, like Movants' prior attempts to recuse, provides no credible evidence of this Court's bias, prejudice, or lack of impartiality and, like the Initial Motion which it largely duplicates, should be summarily denied.

[23] Highland Objection, Exhibit A; Highland Brief, Ex. 5, Appx. 196-219.

ADDITIONAL BACKGROUND

I. Multiple Courts Have Questioned Mr. Dondero's Conduct or Sanctioned Him and His Controlled Entities

26. Between 2008 and the Petition Date, courts and arbitration panels in multiple domestic and foreign jurisdictions issued a plethora of judgments and orders against Mr. Dondero, Highland, and other entities then under Mr. Dondero's control.[24]

27. For example, in March 2019, a blue-ribbon arbitration panel issued a 56-page decision in which it (a) rejected nearly every argument advanced by Highland and made highly critical assessments of the credibility of Highland's witnesses; (b) found Highland had breached its fiduciary duties to its investors, breached certain agreements, and engaged in other wrongful conduct; and (c) rendered an award against Highland in excess of $150 million.[25] Just two months later, in an unrelated case, the Delaware Chancery Court found that the Dondero-related defendants improperly withheld dozens of documents in discovery on privilege grounds and ruled that there was "a reasonable basis to believe that a fraud has been perpetrated" such that the Chancery Court applied the "crime-fraud exception" to the attorney-client privilege.[26]

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[24] An overview of some of the prepetition litigation involving Highland and other Dondero-related parties is set forth in the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, Docket No. 1473 at 20-24.

[25] *See Partial Final Award* rendered in the arbitration captioned *Redeemer Comm. of the Highland Crusader Fund v. Highland Capital Management, L.P.*, Case No. 01-16-0002-6927. Ex. 13, Appx. 2113-2175. The Partial Final Award was incorporated into the arbitration panel's final award (Ex. 14, Appx. 2176-2199), and a hearing in the Delaware Chancery Court to have the award confirmed was about to begin when Mr. Dondero caused Highland to file for bankruptcy protection for the purpose of gaining the protection of the automatic stay.

[26] *Daugherty v. Highland Cap. Mgmt., L.P.*, C.A. No. 2018-0488-MTZ, May 17, 2019 transcript (bench ruling on motion to compel production of documents) at 10-15. Ex. 15, Appx. 2210-2215. The Dondero-related defendants made three desperate but unsuccessful attempts to overturn or stay the Chancery Court's rulings. *See Order Denying Application to Certify Interlocutory Appeal*, entered in C.A. No. 2018-0488-MTZ on July 8, 2019 ¶ K-L. Ex. 16, Appx. 2303-2304.

28. The adverse rulings against Mr. Dondero and his controlled entities are legion[27]—and have resulted in the imposition of judgments and awards totaling more than $1 billion (inclusive of interest). This Court had no involvement in any of these cases (except, in certain cases, to adjudicate proposed claim settlements under Bankruptcy Rule 9019).

29. This Court's experience with Mr. Dondero and Highland began in January 2018, when it was assigned a case captioned *In re Acis Capital Management, L.P.* (the "Acis Bankruptcy").[28] The Acis Bankruptcy was involuntarily commenced by Joshua Terry, a former Highland executive who had obtained an $8 million arbitration award against the Acis entities then under Mr. Dondero's control, but who could not collect on the judgment because Mr. Dondero allegedly orchestrated a fraudulent transfer of assets that left the Acis debtors judgment proof. Mr. Dondero and Mr. Terry were the chief antagonists in the highly contested Acis Bankruptcy, and this Court made numerous credibility findings against Mr. Dondero and his associates before confirming a plan of reorganization that effectively transferred control of a valuable business from Mr. Dondero and Highland to Mr. Terry.[29] Mr. Dondero and entities controlled by him appealed

[27] Movants argue that, prior to the bankruptcy, Mr. Dondero and his controlled entities were merely defendants in litigation (Renewed Motion at 2) and that Mr. Dondero had never been held personally "liable for any misconduct in relation to his management of [Highland's] business" (*Id.*). Movants ignore that each Movant is controlled by Mr. Dondero and Mr. Dondero's controlled entities have incurred significant liability to third parties at Mr. Dondero's direction and under his oversight. In any event, as relevant here, there is no dispute that—regardless of whether he or an entity he controlled was the plaintiff or the defendant—numerous tribunals entered a string of adverse orders and judgments just as this Court has. Again, the problem is not this Court; it is that Mr. Dondero and his loyalists advance meritless positions and therefore lack credibility.

[28] Case No. 18-30264-sgj11 (Bankr. N.D. Tex.).

[29] *See*, *e.g.*, (a) *Order Denying Alleged Debtors' Joint Motion to Dismiss the Involuntary Petitions Filed by Joshua N. Terry for Lack of Subject Matter Jurisdiction or, Alternatively, to Compel Arbitration*, Case No. 18-30264-sgj11, Docket No. 75 (Bankr. N.D. Tex. Mar. 20, 2018) (Ex. 17, Appx. 2312-2316); and (b) *Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Disclosure Statement and Confirming the Third Amended Joint Plan for Acis Capital* Management*, L.P. and Acis Capital Management GP, LLC, as Modified,* Case No. 18-30264-sgj11, Docket No. 829 (Bankr. N.D. Tex. Jan. 31, 2019) (Ex. 18, Appx. 2317-2546).

the Acis confirmation order, but the appeals were denied by the District Court and the Fifth Circuit.[30]

II. Highland Files Bankruptcy; the Case Is Transferred to this Court

30. With various judgment creditors bearing down, on October 16, 2019, Mr. Dondero caused Highland to file this case in the Delaware Court hoping it would be a more hospitable forum. Less than two weeks later, on November 1, 2019, the Committee sought to transfer the case to this Court [Docket No. 86] (the "Transfer Motion"). Ex. 21, Appx. 2637-2796. The Committee set out its intentions in filing the Transfer Motion:

> [T]he Dallas Bankruptcy Court is already intimately familiar with the Debtor's principals and complex organizational structure [because the Acis Bankruptcy is pending in that Court]. Specifically, the Dallas Bankruptcy Court has (a) heard multiple days' worth of material testimony from the Debtor's principal owner (James Dondero), the Debtor's minority owner (Mark Okada), the Debtor's general counsel, at least two assistant general counsels, and numerous other employees of the Debtor and other witnesses; and (b) issued at least six published opinions . . . [This Court is] intimately familiar with the Debtor's business, principal owner, and key executives. For these reasons, the Dallas Bankruptcy Court is uniquely positioned to oversee this chapter 11 case.

Id. Appx. 2639.

31. The Delaware Court agreed. At a December 2, 2019 hearing, the Delaware Court stated that it would grant the Transfer Motion, reasoning:

> This is a unique case … [T]his case is very focused on responding to existing [Acis] litigation. And that existing litigation of a former affiliate, as of a few months ago, and a pending appeal that could make it a current affiliate, is located in the Northern District of Texas. The [Bankruptcy Court] has done a tremendous amount of work and has … issued a number of opinions, had a number of trials. That work creates a familiarity with the facts, issues, and players in a case ….

[30] *See* (a) *Opinion* affirming Confirmation Order Case, No. 3:19-cv-00291-D, Docket No. 75 (N.D. Tex. July 18, 2019), Ex. 19, Appx. 2547-2631; (b) *Opinion* affirming Confirmation Order, Case No. 19-10847 (5th Cir. June 17, 2021), Ex. 20, Appx. 2632-2636.

See Ex. 22, Appx. 2905-2906. Mr. Dondero and Movants knew ***on December 2, 2019*** they were being sent back to the very Court that took a serious and informed view of Mr. Dondero and his associates. Indeed, that is exactly why Highland (then under Mr. Dondero's control) opposed the Transfer Motion. [Docket No. 122].

32. Fully cognizant that he would soon face this Court, which had substantial knowledge of (some of) his business practices, Mr. Dondero never caused Highland to appeal the Delaware Court's order granting the Transfer Motion or seek this Court's recusal on the basis of bias or prejudice (at least not until March 2021, more than fourteen months after he was forced to relinquish control of Highland).

III. The Basis for Recusal Asserted in the Renewed Motion

33. As set forth above, on September 27, 2022—nearly three years after this case was transferred to this Court and seven months after the District Court entered the February Order—Movants filed the Renewed Motion restating the request that this Court recuse itself relying on much of the same "evidence" set forth in the Initial Motion. Like the Initial Motion, the Renewed Motion is untimely and premised on a mischaracterization of facts, cherry-picked and out-of-context quotations, and a willful ignorance of the considerable evidence supporting each of the orders at issue.

A. The December 2019 Transfer Motion

34. Movants argue that the risk of prejudice to Mr. Dondero was first noted when this case was filed in the Delaware Court, citing comments made during the hearing on the Transfer Motion by Highland's counsel about this Court's pre-existing, negative view of Mr. Dondero from the Acis Bankruptcy and resulting "baggage." Renewed Motion at 5-6; Initial Motion ¶¶ 4-5. As noted *supra*, Mr. Dondero controlled Highland and directed its counsel to oppose the Transfer Motion on this basis during the December 2, 2019 hearing. The Delaware Court rejected this

argument and in fact relied on this Court's extensive familiarity with the parties as one of the bases for transferring venue of this case to this Court. Ex. 22, Appx. 2905.

35. No party appealed the order transferring venue to this Court.

B. The January 2020 Settlement Hearing

36. Movants cite to this Court's comments made during a January 9, 2020, hearing as evidence of this Court's alleged bias toward Mr. Dondero resulting from the Acis Bankruptcy. Renewed Motion at 6; Initial Motion ¶¶ 9-13. This hearing occurred fourteen months prior to the Initial Motion and thirty-three months prior to the Renewed Motion.

37. On January 9, 2020, this Court held an evidentiary hearing on a motion to approve a settlement [Docket No. 281] (the "Settlement Motion") between Highland and its Official Committee of Unsecured Creditors (the "Committee"), which was necessitated by (a) the Committee's and the Office of the U.S. Trustee's (the "UST") concerns about the integrity of Highland's management (under Mr. Dondero's stewardship) due to its history of self-dealing, creditor-avoidance asset transfers, and other breaches of fiduciary duty and (b) the possibility that the Committee and the UST might seek the appointment of a trustee.

38. Following the hearing, this Court entered an order granting the Settlement Motion [Docket No. 339] (the "Settlement Order").[31] Pursuant to the Settlement Order, Mr. Dondero, Highland's founder and former Chief Executive Officer, voluntarily surrendered control of Highland to an independent board of three directors, Russell Nelms, John Dubel, and James P. Seery, Jr. (the "Independent Board"). The Settlement Order directed Mr. Dondero not to "cause any Related Entity to terminate any agreements with the Debtor." *Id*. at ¶ 9. In finding that this "language is very important" to protect Highland, this Court noted that in the Acis Bankruptcy,

[31] Notwithstanding the Settlement Order, the UST still sought to appoint a chapter 11 trustee [Docket No. 271].

Mr. Dondero was "surreptitiously liquidating funds" and "doing things behind the scenes that were impacting the value of Highland in a bad way." Ex. 23, Appx. 3015. Notwithstanding Movants' implications that this language unfairly targeted Mr. Dondero, Mr. Dondero did not object to the inclusion of this language in the Settlement Order and, in fact, affirmatively approved and signed off on the Settlement Order and the documents which effectuated it.

39. No party appealed the Settlement Order.

C. The February 19, 2020 Application-to-Employ Hearing

40. Movants cite to the February 19, 2020 hearing on Highland's application to retain Foley as special Texas counsel [Docket No. 68] (the "Foley Application") as another manifestation of this Court's "early distrust" of and "predisposition against" Mr. Dondero. Renewed Motion at 6-8; Initial Motion ¶¶ 14-15. This hearing occurred thirteen months prior to filing the Initial Motion and thirty-one months prior to filing the Renewed Motion.

41. Movants argue that this Court discounted the testimony of Russell Nelms—an Independent Board member—concerning Highland's business judgment and the need to retain Foley and "*sua sponte* expressed a belief (untethered to evidence) that Mr. Dondero may have used his 'powers of persuasion' to unduly influence the Independent Board's business judgment." Renewed Motion at 7; *see also* Initial Motion ¶¶ 14-16. Movants' further note this Court's "unsolicited commentary" regarding Highland's litigiousness—not Mr. Dondero's—and that of its past officers and directors as further evidence of this Court's predisposition against Mr. Dondero. Renewed Motion at 7. Movants mischaracterize the facts of this hearing.

42. ***First***, as set forth above, Highland had a history and culture of litigiousness while under Mr. Dondero's control.[32] That culture was necessarily propagated by human beings, not corporate entities, and the suggestion that Mr. Dondero—the person with sole authority over Highland and its employees—can shift the blame for Highland's litigiousness from himself to those employees is extremely disingenuous. This Court's observations were accurate.

43. ***Second***, Movants are wrong about the Foley Application. Through the Foley Application, Highland sought to retain Foley on behalf of both Highland ***and*** a non-Debtor entity, Neutra Ltd. ("Neutra"), in the appeal of the Acis confirmation order and related matters (the "Acis Appeal"). In support of the Foley Application, Highland disclosed that: (a) Neutra was owned by Mr. Dondero and his partner, Mark Okada, and (b) Highland intended to pay for Foley's representation of Neutra in the Acis Appeal.[33] The Committee and Acis objected to the Foley Application on the ground that Highland should not be permitted to use estate assets to support Neutra, a Dondero-controlled entity. [Docket No. 120]

44. Mr. Nelms testified in support of the Foley Application but was subject to a lengthy cross-examination which undermined Highland's arguments. Ex. 24, Appx. 3086-3142. This Court approved Highland's retention of Foley but determined that the evidence was insufficient to justify expending estate assets to pay Neutra's legal fees, a non-Debtor entity in which Highland

[32] In light of the substantial orders and judgments entered against Highland and other entities controlled by Mr. Dondero in other forums, Movants' attempt "to play the victim" is absurd. Renewed Motion at 7 n.30. Movants also imply that Highland, while under the control of the Independent Board, was equally litigious as it had objected to proofs of claim filed in this bankruptcy. Again, Movants ignore the facts, including that, postpetition, Highland *actually settled* the claims against its estate.

[33] Highland justified its payment of Neutra's fees under 11 U.S.C. § 330 (which does not allow the payment of non-debtor legal fees) by arguing, *inter alia*, that if Neutra were successful in its appeal of the involuntary petition entered in the Acis Bankruptcy (a) the Acis Bankruptcy would be unwound, (b) the equity in Acis would return to Highland, (c) Highland would regain the benefit of certain management fees that were otherwise being paid to Acis for the benefit of its new owner, Mr. Terry, and (d) Highland would have negotiating leverage with respect to Acis' $75 million claim against Highland's estate. Ex. 24, Appx. 3180-3181; Docket Nos. 69, 165.

held no interest. *Id.* Appx. 3204-3209. This Court's ruling on the Foley Application was not, as Movants contend, a magnification of this Court's "early distrust" of Mr. Dondero or evidence of bias towards him. Renewed Motion at 7. Rather, it was based on its determination that Highland failed to prove that the estate would benefit by paying a non-Debtor's legal fees, as required by applicable law.

45. No party appealed this Court's denial of the Foley Application.

D. The June 2020 CLO HoldCo, Ltd., Hearing

46. Movants argue this Court's animus towards Mr. Dondero is evidenced by its rulings with respect to CLO HoldCo, Ltd. ("CLOH"), a wholly owned subsidiary of the "Charitable" Donor Advised Fund, Ltd. (the "DAF"), and its questioning CLOH's good faith in filing its motion in April 2020 [Docket No. 590] seeking release of $2.5 million from the court registry. Again, Movants' arguments are premised on factual inaccuracies.[34]

47. ***First***, neither CLOH nor the DAF are Movants, and Movants make no effort to explain how alleged bias towards CLOH or the DAF constitutes bias towards Movants. This is perplexing. Movants argue at length (*see* ¶¶ 81-87 *infra*) that this Court's factual findings regarding Mr. Dondero's control over CLOH and the DAF are baseless and are themselves examples of bias. Movants cannot have it both ways. Either CLOH and the DAF are controlled by Mr. Dondero or they are not.[35]

48. ***Second***, Movants ignore that the $2.5 million was deposited into the court registry *at CLOH's request*. The Settlement Order implemented certain operating protocols [Docket Nos.

[34] Movants had initially argued that this Court was biased because it "has not released [the $2.5 million] to CLO HoldCo." First Renewed Motion at 8. That statement is not true. Movants amended the First Renewed Motion to correct this error but elected not to correct any of the myriad other factual errors.

[35] This statement is rhetorical; there is clear evidence that Mr. Dondero controls the DAF and CLOH. Movants' attempt to hide behind corporate forms is a further example of Mr. Dondero's misuse of his controlled entities and abuse of the judicial process.

354, 466], which prohibited distributions (a) from Highland or entities managed by Highland (b) to certain "Related Entities," such as CLOH. On February 24, 2020, Highland filed a motion seeking authority to cause two of its managed funds to make distributions to CLOH and Mark Okada—both "Related Entities." The Committee objected, arguing, among other things, the distributions to CLOH should be offset against amounts CLOH owed to Highland. [Docket No. 624] At the March 4, 2020, hearing on the motion, *CLOH's counsel* asked this Court to resolve Highland's motion by depositing the funds directly into the court's registry.[36] This Court, with the consent of the Committee, adopted CLOH's proposal and entered an order requiring the $2.5 million be deposited into the court's registry. Despite its conduct in March, CLOH filed a motion with this Court seeking the release of the $2.5 million from the registry in April 2020—less than one month later. [Docket No. 590] CLOH's April motion to release the funds was vigorously opposed by the Committee. [Docket No. 624]

49. Consequently, there was evidence of CLOH's bad faith—CLOH entered into a settlement in open court and then attempted to unwind that settlement a month later. But despite CLOH's conduct, this Court, again, did not leave it without a remedy or deny its motion outright. Instead, this Court entered an order that provided for the release of the $2.5 million to CLOH

[36] Ex. 25, Appx. 3260-3261:

> We'd like to suggest the following should the Court determine that the motion should be denied. And that is that instead of the debtor retaining the funds, that the debtor distribute the funds into the registry of the Court. That way, they lose control over the funds and they can say that they've distributed them in accordance with their agreements and applicable law.
>
> The funds would remain there until either a recipient or prospective recipient posts a bond or other suitable collateral or the Creditors Committee agrees to the distribution to the insider or there is a Court entered for another reason after a showing made before Your Honor. The debtor and the Creditors Committee would, of course, retain all rights to seek the funds they would have had, which rights they would have had immediately before the distribution to the registry, plus any rights that would be gained by reason of the distribution itself.
>
> The debtor thus distributes, the Creditors Committee retains its rights, the Court retains control, and this can all be done, we believe, by a Court order and we hope this may give the Court a suitable alternative.

See also id. Appx. 3262.

unless the Committee fixed the procedural deficiencies in its objection by filing an adversary proceeding to enjoin the release of the money from the registry. [Docket No. 825] CLOH and the Committee subsequently resolved the Committee's objection,[37] and the $2.5 million was released to CLOH pursuant to this Court's order in October 2021. [Docket No. 2946]

E. The July 2020 Exclusivity Hearing

50. Movants bizarrely contend that this Court's inquiries into COVID-related "PPP loans" at a July 8, 2020, hearing was evidence of bias against Mr. Dondero. Renewed Motion at 8-9; Initial Motion ¶ 52. That hearing occurred nine months prior to the Initial Motion and twenty-eight months prior to the Renewed Motion. As fully disclosed by this Court, the inquiries were prompted by an extrajudicial source (a newspaper article) that purportedly noted that "Mr. Dondero or affiliates" received PPP loans. Because of the vagueness of the article, this Court sought information about *Highland*—not Movants—and ordered Highland to disclose any PPP loans it had received. Highland responded to the Court at a subsequent hearing that Highland had not obtained any PPP loans. Neither Mr. Dondero nor any of his affiliated entities were directed to provide any information, no action was taken against them, and the issue was never raised again. Movants' attempt to falsely recast this event is emblematic of the lack of merit—and candor—in the Renewed Motion.

F. The December 2020 Restriction Motion

51. Movants cite this Court's comments and rulings at the conclusion of an evidentiary hearing held on December 16, 2020 (the "December Hearing") on Movants' motion to restrict Highland's contractual right to manage its CLOs [Docket No. 1522] (the "Restriction Motion") as evidence of bias. Movants argue this Court improperly (a) denied their Restriction Motion as

[37] *Stipulation and [Proposed] Order Regarding Registry Funds and Dismissal of Motion for Preliminary Injunction*, Adv. Pro. No. 20-03195-sgj, Docket No. 89.

"frivolous," despite it being filed in "good faith" and (b) found that Mr. Dondero was behind the filing of the Restriction Motion. Renewed Motion at 9-10; Initial Motion ¶¶ 18-26.

52. The December Hearing occurred four months prior to the Initial Motion and twenty-two months prior to the Renewed Motion.

53. In their Restriction Motion, the movants (*i.e.*, the Advisors and certain investment funds managed by the Advisors (the "Retail Funds," and with the Advisors, the ("Dondero Parties")) asked this Court to "impose a temporary restriction on Highland's ability, as portfolio manager, to cause CLOs to sell assets." Restriction Motion ¶ 17. The Dondero Parties called as their only witness Dustin Norris, the Executive Vice President of each of the Dondero Parties. During the December Hearing, Mr. Norris made the following admissions:

i Highland Had the Exclusive Contractual Right to Buy and Sell CLO Assets

- Highland is the portfolio manager for each of the CLOs in which the Advisors caused the Retail Funds to invest (Ex. 26, Appx. 3380);
- Highland's management of the CLOs is governed by written agreements (*id.* Appx. 3380-3381);
- None of the Dondero Parties is a party to Highland's CLO management agreements (*id.* Appx. 3381);
- Highland, as the CLO Portfolio Manager, has the responsibility to buy and sell assets on behalf of the CLOs (*id.* Appx. 3381);
- Nobody other than Highland has any right or authority to buy and sell assets in the CLOs in which the Retails Funds invested (*id.* Appx. 3381-3382); and
- Holders of preferred CLO shares, such as the Retail Funds, "do not make investment decisions on behalf of the CLOs" and the Advisors knew that when they caused the Retail Funds to make their investments (*id.* Appx. 3382).

ii The Dondero Parties Did Not Accuse Highland of Any Wrongdoing

- The Dondero Parties did not allege or contend that Highland (a) engaged in fraudulent conduct; (b) breached any agreement by effectuating any transactions; or (c) violated any CLO management agreement (*id.* Appx. 3388-3389); and

- The Dondero Parties did not question Highland's business judgment nor could they since they did not know why Highland executed the transactions and never even asked (*id.* Appx. 3389-3390).

iii **Mr. Dondero Controls the Dondero Parties and Caused the Restriction Motion to Be Filed**

- Mr. Dondero owns and controls the Advisors (*id.* Appx. 3367; Appx. 3374-3375);

- The Advisors manage the Retail Funds; Mr. Dondero serves as the Portfolio Manager of each of the Retail Funds and caused the Retail Funds to invest in the CLOs managed by Highland (*id.* Appx. 3367-3368; Appx. 3375);

- The "whole idea" for the Restriction Motion began with Mr. Dondero (*id.* Appx. 3368; Appx. 3380); and

- The Retail Funds' Boards did not authorize the filing of the Restriction Motion (*id.* Appx. 3376-3377).

iv **Mr. Norris Was Not a Competent Witness and Had No Credibility**

- Mr. Norris admitted that he does not make investment decisions, is not an investment manager, and has never worked for a CLO (*id.* Appx. 3378);

- Mr. Norris (a) did not write his Declaration filed in support of the Restriction Motion, (b) did not provide any substantive comments to his Declaration, and (c) relied on the Advisors' "management" (including Mr. Dondero) for all "key information" in his Declaration (*id.* Appx. 3379); and

- Mr. Norris did not bother to review the very CLO management agreements the Dondero Parties were seeking to interfere with (*id.* Appx. 3381).

v **Movants Did Not Notify Any Other CLO Investors of the Restriction Motion**

- The Dondero Parties hold (a) less than 50% of the preferred interests in 12 of the 15 CLOs at issue, and (b) less than 70% of the preferred interests in the other three CLOs at issue (*id.* Appx. 3383-3384);

- Yet, the Restriction Motion was pursued solely on behalf of the Dondero Parties and no other holder of interests in the CLOs (*id.* Appx. 3385);

- The Dondero Parties did not notify any other holder of CLO interests of the Restriction Motion and made no attempt to do so (*id.* Appx. 3386);

- The Dondero Parties made no attempt to obtain the consent of all of the holders of the preferred shares to seek the relief sought in the Restriction Motion (*id.* Appx. 3386);

- Mr. Norris did not know whether any other holder of CLO preferred shares wanted the relief sought in the Restriction Motion (*id.* Appx. 3386);

- Mr. Norris did not know whether Highland's counterparties in the CLO management agreements (*i.e.*, the CLOs) wanted the relief sought in the Restriction Motion (*id.* Appx. 3386-3387); and

- Mr. Norris had no personal knowledge of the two transactions described in his Declaration; he testified that he was "very remote" and he didn't have "much knowledge." (*id.* Appx. 3392-3394).

54. Based considerably on Mr. Norris's testimony, this Court (a) found that there was no factual or legal basis for the Restriction Motion, (b) declared the Restriction Motion "frivolous," and (c) granted Highland's motion for a directed verdict. *Id.* Appx. 3403. While Movants contend this Court improperly "opined that Mr. Dondero was behind the [Restriction Motion] notwithstanding that it was filed by separate and distinct legal entities represented by independent counsel (Renewed Motion at 9), Mr. Norris provided all the evidence the Court needed to reach its conclusion:

> Q: The whole idea for this motion initiated with Mr. Dondero; isn't that right?
>
> A: The concern, yes, the concern originated, and his concern was voiced to our legal and compliance team.

Id. Appx. 3380.[38]

55. The Restriction Motion was a misguided effort by Mr. Dondero and his associates to exert control over Highland and its estate and was frivolous.[39]

56. No party appealed the denial of the Restriction Motion.

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[38] *See also id.* Appx. 3368 ("the initial cause for concern was raised by Mr. Dondero himself"); Appx. 3367 (Mr. Dondero has a control relationship with the Advisors); Appx. 3365 (responsibility for the Retail Funds' portfolio management and investment decisions are delegated to the Advisors); Appx. 3374-3375 (Mr. Dondero owns and controls the Advisors); Appx. 3376-3377 (the Retail Funds' Boards did not authorize the filing of the Restriction Motion).

[39] The Restriction Motion largely focused on Mr. Dondero's efforts to prevent Highland's managed entities from selling certain securities, including Avaya Holdings Corp. common equity (TICKER: AVYA). Ultimately, and notwithstanding Mr. Dondero's efforts, more than 2 million shares of AVYA were sold at an average price of $23.26. Since then, AVYA has traded as low as $0.61 and closed on October 28, 2022 at $1.46.

G. The January 2021 Hearing on Highland's Motion for Injunctive Relief

57. Not chastened by the debacle of the December Hearing, Mr. Dondero caused the Advisors and Retails Funds to continue interfering with, and unjustifiably threatening, Highland. Consequently, on January 6, 2021, Highland filed its *Verified Original Complaint for Declaratory and Injunctive Relief* against the Advisors and Retail Funds (Adv. Pro. No. 21-03000-sgj, Docket No. 1) seeking injunctive relief after they interfered with Highland's trading activities and sent Highland a flurry of written correspondence (the "K&L Gates Letters") (Exs. 27-28, Appx. 3406-3413) threatening to terminate Highland's CLO management agreements and asserting spurious claims. This Court held an exhaustive evidentiary hearing on the TRO Motion on January 26, 2021 (the "TRO Hearing"), during which it admitted voluminous documentary evidence and assessed the credibility of multiple witnesses, including that of Mr. Dondero. Ex. 29, Appx. 3430-3433; 3456-3613. At the conclusion of the TRO Hearing, this Court determined that the TRO was necessary to protect Highland's interests pending a hearing on the preliminary injunction. *See generally id.*

58. The TRO Hearing occurred two months prior to the Initial Motion and twenty-one months prior to the Renewed Motion.

59. Movants cite to two aspects of the TRO Hearing as evidence of this Court's alleged bias against Mr. Dondero, while ignoring their own misconduct: (a) singling Mr. Dondero out for criticism when, according to Movants, the "evidence was undisputed that Mr. Dondero did not influence or cause the advisors or retail funds to take any action" and (b) approving the TRO when "[i]t was abundantly clear … that [Highland] could not make the requisite showing for injunctive relief." Renewed Motion at 10; Initial Motion ¶¶ 27-35. Consistent with much of the Renewed Motion, Movants misrepresent the record by failing to disclose keys facts.

60. ***First***, Movants now admit the K&L Gates Letters were sent for an improper purpose—to procure the same relief sought in the Restriction Motion, relief this Court denied less than a month earlier.[40] That conduct—seeking previously denied relief through alternative means—is quintessentially vexatious and sanctionable conduct. *See, e.g., Nix v. Major League Baseball*, 2022 U.S. Dist. LEXIS 104770, at *58-65 (S.D. Tex. Jun. 13, 2022).

61. ***Second***, the Settlement Order, which Mr. Dondero agreed to, expressly prohibited Mr. Dondero from "caus[ing] any Related Entity to terminate any agreements with the Debtor." Settlement Order ¶ 9. The evidence established that the Dondero Entities were "Related Entities" for purposes of the Settlement Order,[41] yet the K&L Gates Letters improperly threatened to seek to terminate Highland's CLO management agreements.

62. ***Third***, Mr. Dondero's TRO enjoined him from, among other things, "causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf, from, directly or indirectly" making express or implied threats against Highland or interfering with Highland's business. *See Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero*, Adversary Pro. No. 20-03190-sgj, Docket No. 10. Yet, that is precisely what the evidence showed he did. Ex. 29, Appx. 3456-3521.

63. Given the evidence and the clear and unambiguous orders in effect, it would have been shocking if this Court ignored Mr. Dondero and instead treated the Dondero Parties as if they

[40] Initial Motion ¶ 27 ("In December of 2020, due to the Court's denial of the Restriction Motion, K&L Gates … exchanged correspondence with counsel for Debtor … for the following reasons: to reiterate the Advisors' and the Retail Funds' objection to the Debtor's handing of the Retail Funds' investments; to request, again, that Debtor not liquidate the CLOs; to reserve any rights that the Advisors and the Retail Funds might have against Debtor for failure to maximize the value of the investment as required under the [CLO] Portfolio Management Agreements; and to notify Debtor that the Retail Funds … intended to initiate the procedure to remove Debtor as fund manager of the CLOs.")

[41] This fact was (a) first established during the December Hearing (*see* ¶¶ 53-54 *supra*), (b) was confirmed at the TRO Hearing, and (c) was subsequently admitted to by the Advisors as part of the resolution of the adversary proceeding. *See* Docket No. 2590, Ex. A ¶ 2(c) (settlement agreement in which each of the Advisors represents and warrants that it (a) is controlled by Mr. Dondero and (b) is a "Related Party" for purposes of paragraph 9 of the Settlement Order).

were independent third-party actors. Mr. Dondero controlled (and controls) the Dondero Parties. He clearly "caused" or "encouraged" or "conspired" with them to improperly attempt to re-assert control over Highland. The Court's focus on Mr. Dondero was entirely justified—particularly when seen in the context of this Court's pertinent orders which Movants pretend did not exist.

64. No party appealed the TRO.

H. January 2021 Examiner Motion

65. Movants allege this Court's bias is manifested in its "repeated disenfranchisement of Movants from [sic] judicial process" and how it has "wielded its scheduling powers … often preventing any real consideration of legitimate motions filed by Movants." Renewed Motion at 10-11. Despite Movants' extremely strong language about the consistency with which this Court has disenfranchised them and abused its powers, Movants only cite to a single alleged example of that conduct: Dugaboy and Get Good's motion to appoint an examiner [Docket No. 1752] (the "Examiner Motion") filed on January 14, 2021. Renewed Motion at 10-11. This, again, misstates the facts and is belied by Movants' own admissions.

66. ***First***, Movants' allegations about disenfranchisement are false. Movants have been heard multiple times by this Court and appealed a significant number of this Court's orders. This Court has never prohibited them from doing so or prevented them from being heard notwithstanding their tenuous standing. Confirmation Order ¶¶ 18-19.

67. ***Second***, Movants admit the Examiner Motion, which was not supported by any non-Dondero party,[42] was filed for improper purposes—to force a delay of the long-scheduled Confirmation Hearing (defined below), to collaterally attack this Court's final orders, and to have Movants' Plan objections adjudicated away from this Court in a forum deemed more hospitable to

[42] The only party to support the Examiner Motion was Mr. Dondero. [Docket No. 1756].

Movants. Initial Motion ¶ 37 ("[W]hen the Trusts made the Examiner Motion, they believed that the motion would cause delay or a continuance of the confirmation hearing on the Plan …."); Renewed Motion at 11 ("The Trustees sought the appointment of an examiner to address … (i) the issues raised … in the Restriction Motion [*i.e.*, a motion this Court had denied a month earlier], [and] (ii) various objections to the proposed [Plan] raised by the advisors, the retail funds, and the [UST].") Again, quintessentially vexatious.

68. Accordingly, Movants' claim of prejudice because this Court did not accede to their demands to delay confirmation (contrary to the interests of creditors), collaterally attack its orders, and forum shop is ridiculous, particularly in light of Movants' unequivocal admission of their actual intent.

69. No party appealed the denial of the Examiner Motion.

I. February 2021 Confirmation Hearing

70. Movants cite to the February 2021 confirmation hearing on the Plan (the "Confirmation Hearing") to support their argument that this Court was biased. Renewed Motion at 11-13; Initial Motion ¶¶ 38-50. Movants principally contend that during the Confirmation Hearing, this Court: (a) "summarily rejected all of the Plan objections lodged by Movants, decreeing them as filed in bad faith" (Renewed Motion at 12) when such objections were no different than those raised by the UST whose good faith was "not questioned;" (b) found the objections were not asserted in good faith; (c) concluded, "without basis," that the entity Movants were "controlled by Mr. Dondero"; (d) disregarded witness testimony of Mr. Jason Post on the ground that the witness had left Highland's employ to work for one of the Advisors; and (e) wrongfully accused of Movants of being "vexatious litigants." *See* Initial Motion ¶¶ 38-50.

71. As a threshold matter, Movants simply ignore the Fifth Circuit's opinion affirming the Confirmation Order in relevant part. In its opinion, the Fifth Circuit expressly upheld this

Court's factual findings, including some of the very findings Movants' complain of here, *e.g.*, Mr. Dondero's control of the Funds and Advisors, Mr. Post's credibility, and Mr. Dondero's penchant for litigation. *NexPoint Advisors, L.P.,* 2022 U.S. App. LEXIS 25107 at *20-24, 27-37.[43]

72. Substantively, and contrary to Movants' suggestion, this Court provided Movants with a full and fair opportunity to present and pursue their objections, notwithstanding their tenuous standing. Confirmation Order ¶¶ 18-19. Rather than being "summarily" overruled, this Court conducted a two-day evidentiary hearing during which Movants' counsel made their arguments and cross-examined witnesses unimpeded. The Court subsequently made detailed findings of fact and conclusions of law in the Confirmation Order supporting the overruling of all the objections, including those of Movants. Movants are obviously unhappy with the Court's findings and conclusions—which were, again, upheld in material part by the Fifth Circuit—but fail to present any evidence of bias or prejudice arising in connection with confirmation.

73. Finally, Movants' contention that they were treated differently than the UST disingenuously equates the objectors and is also meritless. Movants asserted spurious objections to (a) plan provisions that had no impact on them as they held no claims in the subject classes (the absolute priority rule); (b) the assumption of certain executory contracts to which they were not party (the actual contract counterparties had consented to assumption of the contracts); and (c) common plan provisions like debtor releases, plan supplements, and a plan injunction. In contrast,

[43] Movants' allegation that this Court found them to be "vexatious litigants" is contrary to the record. This Court did *not* find or conclude that Movants are "vexatious litigants." Rather, this Court determined that Mr. Dondero's litigation history supported the inclusion of a gatekeeper provision in the Plan. *See* Confirmation Order ¶¶ 80-81; Ex. 30, Appx. 3717-3719. Significantly, the Fifth Circuit affirmed this Court's findings and concluded that the gatekeeper provision was justified and "sound." *NexPoint Advisors, L.P.,* 2022 U.S. App. LEXIS 25107 at *5-6.

the UST filed a six-page "limited objection" that addressed only the scope of the Plan's exculpation clause—ironically, the only issue reversed on appeal.[44]

74. In sum, Movants' stubborn instance that this Court's findings or conduct of the confirmation hearing reflect bias and prejudice ***after*** those same issues have been affirmed by the Fifth Circuit demonstrates the bad-faith nature of the Renewed Motion.

J. January and July 2021 Orders Requiring Mr. Dondero's Appearance

75. In the Renewed Motion, Movants assert a new "example" of this Court's bias: Its orders—entered in January 2021, May 2021, and June 2021—"target[ing] Mr. Dondero (as well as his sister Nancy Dondero) by requiring their presence at all hearings, regardless of whether their presence is needed." Renewed Motion at 16. Again, Movants misstate the facts.

76. During the January 8, 2021, proceeding to determine whether to grant a preliminary injunction against Mr. Dondero, Mr. Dondero admitted that he had not attended the earlier TRO hearing or read the transcript and had "never bothered to read the TRO."[45] Concerned that his failure to fully participate would create an opportunity for "plausible deniability," this Court ordered Mr. Dondero—*two months before the Initial Motion was filed*—to appear at all hearings to ensure his compliance with this Court's orders.[46] Incredibly, Mr. Dondero subsequently failed to appear at a hearing thereby validating the Court's concerns. Consequently, this Court entered an order on May 24, 2021—sixteen months before the Renewed Motion—clarifying that Mr.

[44] *Compare* Docket Nos. 1661 (Dondero), 1667 (Trusts), 1670 (Funds and Advisors), and 1673 (HCRE) *with Limited Objection of the U.S. Trustee* [Docket No. 1671].

[45] Ex. 31, Appx. 3755 ("Q … At least as of today, you never bothered to read the TRO that was entered against you, correct? A Correct.").

[46] *Order Granting Debtor's Motion for a Preliminary Injunction Against James Dondero*, Adv. Proc. No. 20-03190-sgj, Docket No. 59. Members of the Independent Board and/or Highland's Chief Executive Officer have been present at virtually every hearing in this case.

Dondero was required to appear at all hearings in the bankruptcy case. [Docket No. 2362] Mr. Dondero did not appeal the preliminary injunction or the May 2021 order.

77. This Court has *never* ordered Nancy Dondero to appear at any hearings. Instead, on June 17, 2021—fifteen months before the Initial Motion—the Court ordered the trustee of Dugaboy and Get Good to appear at all hearings and proceedings but only "where either of the Trusts are a party or take a position." [Docket No. 2458] The Court provided a detailed rationale for its order and it was never appealed. Nevertheless, Movants now falsely assert that Ms. Dondero was required to appear at all hearings "regardless of whether [her] presence [was] needed."

K. May 2021 Denial of Mr. Dondero's Motion to Compel Testimony

78. In the Renewed Motion, Movants assert as another "new" example of bias this Court's denial of a "routine litigation step[]" to compel Mr. Seery's deposition testimony and thereby indicating that it "will treat such [routine actions] as nefarious 'antagonistic move[s]' rather than ordinary invocation of legal process." Renewed Motion at 16. This is not what happened.

79. On May 24, 2021—sixteen months before the Renewed Motion—this Court denied Mr. Dondero's motion to compel deposition testimony[47] concerning six (out of twenty) Rule 30(b)(6) topics on the grounds that the topics were either irrelevant or sought information in Mr. Dondero's possession. Ex. 32, Appx. 3963-3964. Despite referencing the "antagonism" between Mr. Dondero and Mr. Seery, this Court did not prevent Mr. Dondero from deposing Mr. Seery on fourteen other deposition topics.

80. Mr. Dondero did not appeal this ruling.

[47] Adv. Proc. No. 21-03003, Docket No. 49.

L. August 2021 Order Finding Certain Movants in Contempt of this Court

81. In the Renewed Motion, Movants cite an order entered on August 4, 2021—thirteen months before the Renewed Motion—holding Mr. Dondero and various non-Movants in civil contempt [Docket No. 2660] (the "Contempt Order")[48] as "[p]erhaps one of the most telling" examples of this Court's bias. Renewed Motion at 14-15. Movants, again, misstate the facts and the record and—most importantly—ignore the District Court's order affirming this Court's factual and legal findings in the Contempt Order in all material respects.[49]

82. ***First,*** Movants materially misstate the facts of the April 12, 2021, complaint (the "HV Complaint").[50] Movants allege the HV Complaint addressed Highland's "brokering the sale of CLO interests held by HarbourVest … without prior notice to other CLO investors and without respecting those investors' right of first refusal" in violation of some undisclosed duty. Renewed Motion at 14. That is wrong, and Movants should know that. They drafted the HV Complaint.

83. As this Court knows, the facts are as follows: Prior to Highland's bankruptcy, HarbourVest[51] purchased certain of CLOH's interests in Highland CLO Funding, Ltd. ("HCLOF"), a Guernsey-based investment vehicle,[52] for approximately $80 million ultimately owning 49.98% of HCLOF's interests. After Highland's bankruptcy, HarbourVest filed claims against Highland in excess of $300 million and sought rescission of its investment in HCLOF

[48] The Contempt Order is the second time that Mr. Dondero has been held in contempt for violating this Court's orders. *See* n.11 *supra*.

[49] *Charitable DAF Fund L.P. v. Highland Cap. Mgmt., L.P.*, 2022 U.S. Dist. LEXIS 175778 (N.D. Tex. Sept. 28, 2022). The only finding not affirmed was the payment of $100,000 if an appeal was filed. Movants only mention of the District Court order is a one line footnote. Renewed Motion at 15 n.72.

[50] Adv. Proc. No. 21-03067-sgj, Docket No. 1.

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

[52] HCLOF is managed by its Guernsey-based board of directors and is not controlled by Highland.

alleging it was fraudulently induced by factual misrepresentations and omissions made by Mr. Dondero and certain of Highland's employees prior to the bankruptcy.

84. Highland and HarbourVest settled HarbourVest's claims, and Highland filed a motion [Docket No. 1625] seeking Court approval. Under the settlement, HarbourVest received allowed claims totaling $80 million in aggregate and transferred its interests in HCLOF to a Highland subsidiary, effectively rescinding HarbourVest's investment in HCLOF. All aspects of the settlement were publicly disclosed in Highland's motion. Mr. Dondero, Dugaboy, Get Good, and CLOH all objected. CLOH argued it had a right of first refusal to HarbourVest's HCLOF interests. However, after reviewing Highland's pleadings, HCLOF's governing documents, and applicable law, CLOH determined it had no such right and knowingly and intentionally withdrew its objection. This Court approved the settlement, including the transfer of HarbourVest's interests in HCLOF.

85. Three months later, CLOH, among others (collectively, the "Dondero Plaintiffs"), filed the HV Complaint seeking, among other things, to enforce their alleged right of first refusal—a right CLOH had conceded did not exist.[53] Shortly thereafter, the Dondero Plaintiffs sought to add Mr. Seery as a defendant in clear violation of the Settlement Order and the order appointing Mr. Seery as Highland's chief executive officer and chief restructuring officer [Docket No. 854].

[53] The District Court referred the HV Complaint to this Court for adjudication under the standing order reference, and, on March 11, 2022, this Court dismissed the HV Complaint on the basis of collateral and judicial estoppel. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 659 (Bankr. N.D. Tex. Mar. 11, 2022). The Dondero Plaintiffs appealed, and the District Court reversed and remanded. Ex. 33, Appx. 4017-4038. Contrary to Movants' statements, the District Court did not find, in any way, that the HV Complaint "had merit." Renewed Motion at 15 n.72. Instead, it found that this Court appropriately applied collateral estoppel *sua sponte* and that all of the elements of collateral estoppel were met except one—"actually litigated"—because a settlement under Rule 9019 has a different legal standard. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 173 (N.D. Tex. 2022). The District Court also found that the first two elements of judicial estoppel—"inconsistency" and "court's acceptance"—were met but that this Court failed to assess the third element—"inadvertence." *Id.* at 175. The District Court remanded to this Court to determine if CLOH's withdrawal of its objection was "inadvertent." On October 14, 2022, Highland filed a renewed motion to dismiss the HV Complaint. Adv. Proc. No. 21-03067-sgj, Docket No. 122 (Bankr. N.D. Tex. Oct. 14, 2022).

Accordingly, this Court, after an evidentiary hearing, issued the Contempt Order finding Mr. Dondero and others in contempt.

86. ***Second,*** Movants falsely allege Mr. Dondero credibly testified "he was not involved at all in authorizing or preparing the motion to add Mr. Seery" and there was no evidence to the contrary. Renewed Motion at 15. This is directly contradicted by the actual record. As the District Court explained:

> Ample evidence supports the bankruptcy court's factual findings. Dondero has had a significant role in DAF for over a decade. DAF's assets come in part from Dondero and his "family trusts." Dondero "was DAF's managing member until 2012," and he remains "DAF's informal investment advisor." After Dondero stepped down as managing member, that role went to Grant Scott, "Dondero's long-time friend, college housemate, and best man at his wedding." Scott ultimately resigned due to "disagreements with … Dondero."
>
> Patrick replaced Scott as "DAF's general manager on March 24, 2021"—19 days before the Seery Motion. Patrick initially had "no reason to believe that Mr. Seery had done anything wrong with respect to the HarbourVest transaction." Only once "Dondero told [him] that an investment opportunity was essentially usurped" did Patrick "engage[] the Sbaiti firm to launch an investigation" and ask "Mr. Dondero to work with the Sbaiti firm with respect to their investigation of the underlying facts." After that, Dondero "communicated directly with the Sbaiti firm"—Patrick did not. Dondero "saw versions of the complaint before it was filed" and had "conversations with attorneys" about the complaint pre-filing. That complaint focused on "Seery's allegedly deceitful conduct" and "mention[ed] Mr. Seery 50 times." Further, when listing the parties, the complaint listed each party named in the caption along with "[p]otential party James P. Seery, Jr.," providing his citizenship and domicile.
>
> Further, although Dondero averred that he did not direct the Sbaiti firm to add Seery to the complaint, Dondero also contradicted himself, first claiming that he did not know that "the Sbaiti firm intended to file a motion for leave to amend their complaint to add Mr. Seery," but then agreeing during the hearing that he "[p]robably" was "aware that that motion was going to be filed prior to the time that it actually was filed." He also testified to conversations about the Seery Motion, noting that it involved a "very complicated legal preservation" issue.
>
> Based on all that evidence, the Court is not left with a definite and firm conviction that the bankruptcy court erred. After being stymied in the bankruptcy court, Dondero manufactured the exigency for the lawsuit that challenged Seery's conduct. Dondero's claim that he "did not suggest that Mr. Seery should be added as a defendant" is not credible. Dondero gave Patrick the idea of challenging

> Seery's conduct, and he worked with the Sbaiti firm to bring that idea to fruition in the complaint—a complaint that clearly contemplated adding Seery to the lawsuit. Likewise, his plea that he "had no involvement with the Seery Motion" is not credible. Dondero himself testified to the contents of attorney communications concerning the Seery Motion, eventually admitting that he "probably" had knowledge of the Motion before it was filed. In short, the bankruptcy court did not err, after considering the "totality of the evidence," in finding that Dondero had "the idea of" suing to "challenge Mr. Seery's … conduct," that he "encouraged Mr. Patrick to do something wrong," and that Patrick "abdicated responsibility to Mr. Dondero with regard to . . . executing the litigation strategy."

Charitable DAF Fund, L.P., 2022 U.S. Dist. LEXIS 175778, at *18-21. The District Court, like this Court, included ample citations to the record, including the direct testimony of both Mr. Dondero and Mr. Patrick, to support its factual findings.[54] It is inconceivable this Court and the District Court both erred in assessing the evidence concerning Mr. Dondero's direct involvement in violating this Court's orders, yet Movants ignore the District Court.

87. ***Third,*** Movants allegations about this Court's sanctions are false. Movants falsely allege Highland submitted invoices showing it had incurred just $38,796.50 defending against Mr. Dondero's contemptuous actions. Not true. Highland submitted invoices for $187,795. [Docket Nos. 2421-1, 2421-2; Ex. 34, Appx. 4048-4102]. Although this Court added to that amount to compensate for additional costs, this Court's sanction of $239,655 was affirmed by the District Court. *Charitable DAF Fund, L.P.*, 2022 U.S. Dist. LEXIS 175778, at *13-17. Again, Movants ignore the facts and the District Court.

M. September 2022 Denial of HCRE's Motion to Withdraw Its Proof of Claim.

88. Finally, Movants cite to the September 12, 2022, hearing on the withdrawal of HCRE's proof of claim as an example of this Court's bias. Renewed Motion at 16-19. This

[54] Mr. Patrick was a long-time employee of Highland and, on information and belief, works for Skyview—an entity created to service Mr. Dondero and his controlled entities. Mr. Patrick has exclusively worked for Mr. Dondero and/or his controlled entities as a tax attorney for almost fifteen years.

example, like the others, is premised on a material distortion of the record and requires a complete factual reset before Movants' baseless allegations can be addressed.

89. On April 8, 2020, HCRE filed a proof of claim with this Court (Claim No. 146) (the "HCRE Claim") that was signed by Mr. Dondero, HCRE's manager, and filed under penalty of perjury. The HCRE Claim challenged Highland's interest in SE Multifamily Holdings, LLC ("SEMF"):

> HCRE … contends that all or a portion of Debtor's equity, ownership, economic rights, equitable or beneficial interests in SE Multifamily does [not] belong to the Debtor or may be the property of [HCRE]. Accordingly, [HCRE] may have a claim against the Debtor.

HCRE Claim, Ex. A. On July 30, 2020, Highland objected to the HCRE Claim [Docket No. 906].

90. On October 16, 2020, HCRE responded [Docket No. 1197] (the "HCRE Response") asserting, among other things, that it believed the SEMF governing documents "improperly allocate[] the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or failure of consideration." HCRE Response ¶ 5. The HCRE Response was filed by the law firm of Wick Phillips Gould & Martin LLP ("Wick Phillips").

91. During initial discovery, Highland discovered that Wick Phillips had represented Highland with respect to SEMF. Wick Phillips refused to withdraw despite the conflict, and Highland moved to disqualify them on April 14, 2021 (the "Motion to Disqualify").[55] The Motion to Disqualify was fully briefed[56] and heavily contested with significant pre-trial discovery. On November 30, 2021, this Court held a lengthy hearing on the Motion to Disqualify and ultimately disqualified Wick Phillips from representing HCRE in connection with the HCRE Claim.

[55] Docket Nos. 2196, 2197, 2198.

[56] Docket Nos. 2278, 2279, 2294, 2893, 2894, 2895, 2927, 2928, 2952.

92. In January 2022, HCRE retained replacement counsel. After six months of HCRE's silence, the parties agreed to an amended scheduling order on June 9, 2022 [Docket Nos. 3356, 3368] and restarted discovery. Discovery included significant document production and depositions of Mark Patrick, BH Equities (a third-party investor in HCRE), Barker Viggato LLP (HCRE's accountant), and James P. Seery, Jr., as Highland's 30(b)(6) witness.

93. Mr. Dondero and Matthew McGraner (a SEMF equity holder) were scheduled to be deposed, and trial was set for early November 2022.

94. However, on August 12, 2022, two days after Mr. Seery's deposition, HCRE filed its motion to withdraw the HCRE Claim [Docket No. 3443] (the "Motion to Withdraw") pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 3006 and unilaterally canceled the previously scheduled depositions of Mr. Dondero and Mr. McGraner.

95. The Motion to Withdraw (correctly) cited *Manchester, Inc. v. Lyle (In re Manchester, Inc.)* for the test to determine whether a claim could be withdrawn under FRBP 3006. 2008 Bankr. LEXIS, at *11-12 (Bankr. N.D. Tex. Dec. 19, 2008) (weighing (1) movant's diligence in bringing the motion; (2) movant's "undue vexatiousness;" (3) extent to which the suit has progressed and the costs and expenses incurred by the non-party in preparing for trial; (4) duplicative expense of re-litigation; and (5) adequacy of movant's explanation for withdrawal).

96. On September 2, 2022, Highland filed its opposition to the Motion to Withdraw [Docket No. 3487] (the "Objection to Withdraw") asking this Court to deny the Motion to Withdraw and require Mr. Dondero and Mr. McGraner to sit for the previously agreed depositions or, in the alternative, to condition the withdrawal of the HCRE Claim pursuant to FRBP 3006. Objection to Withdraw ¶¶ 4, 76-80.

97. On September 12, 2022, this Court held a hearing on the Motion to Withdraw. Contrary to Movants' allegations, this Court did not show bias towards Movants at that hearing. Instead, the following is clear from the record:

- HCRE presented *no* evidence regarding the *Manchester* factors and only addressed one *Manchester* factor—legal prejudice—in argument.[57]
- HCRE's only explanation for withdrawing the HCRE Claim was that HCRE "[didn't] need the proof of claim anymore."[58] HCRE did not address why it believed there was a mutual mistake when it filed the HCRE Claim in April 2020 or provide any other explanation for the withdrawal of the HCRE Claim on the eve of trial.
- Highland, in distinction, introduced significant evidence with respect to each of the *Manchester* factors. Specifically, Highland showed that:

  1) HCRE was not diligent in filing the Motion to Withdraw having filed it twenty-eight months after filing the HCRE Claim;

  2) HCRE was "unduly vexatious" as it (a) had no good faith basis for filing the HCRE Claim in the first instance, (b) forced Highland to spend hundreds of thousands of dollars on discovery, depositions, and the Motion to Disqualify, and (c) withdrew the HCRE Claim only after it had completed its discovery while denying Highland the opportunity to depose Messrs. Dondero and McGraner;

  3) The HCRE Claim had been litigated for two years and was, with the exception of the depositions of Mr. Dondero and Mr. McGraner, trial-ready;

  4) There was a material risk of duplicative litigation. HCRE (and Mr. Dondero) consistently declined to answer whether withdrawal of the HCRE Claim would preclude future challenges to Highland's ownership interest in SEMF—the subject matter of the HCRE Claim; and

  5) HCRE had no adequate explanation for withdrawing the HCRE Claim. HCRE provided no evidence justifying its concern about Highland's interference in SEMF's management and no articulated basis for no longer asserting mutual mistake.

Ex. 35, Appx. 4112-4132.

98. Notwithstanding HCRE's complete lack of evidence, at the hearing, Highland stated, on the record, it would consent to the withdrawal of the HCRE Claim if HCRE (a) made

[57] Ex. 35, Appx. 4109-4110.

[58] *Id.* Appx. 4109-4110; Appx. 4134.

"an ironclad commitment that HCRE is irrevocably waiving its right to challenge Highland's interest in [SEMF];" (b) waived its right to appeal; (c) agreed not to rely on its deposition of Mr. Seery for any purpose; and (d) reimbursed Highland's costs incurred in the two years of litigation on the HCRE Claim. *Id.* Appx. 4114-4115; Appx. 4129; Appx. 4136-4137.

99. HCRE, however, was unable to satisfy even the first requested condition—waiver of its right to challenge Highland's interest in SEMF.

- First, HCRE's counsel, Bill Gameros,[59] attempted to enter into an agreement on behalf of his client; however, it was clear from the record that Mr. Gameros had not spoken with his client about the proposed resolution, that he needed "to confer with [his] client" before he could agree, and he had no authority to bind his client.

- Second, after a fifteen minute recess to allow Mr. Gameros to produce a client representative, D.C. Sauter appeared before this Court. This Court asked Mr. Gameros "what is [Mr. Sauter's] position with HCRE." Mr. Sauter replied: "I don't have an official position with HCRE" but alleged, without evidence or support, that Mr. Dondero had authorized him to speak on HCRE's behalf despite his not being an officer, director, employee, interest holder, or even counsel of HCRE. Mr. Sauter clearly had no legal capacity to bind HCRE.[60]

- Third, Mr. Dondero, HCRE's manager, appeared before this Court by telephone.[61] Mr. Dondero, however, refused to give an unconditional response to his counsel's question: "Mr. Dondero, do you agree that [HCRE] will not challenge in any way the estate's interest in [SEMF], its 46-point whatever percent interest it is" Instead, Mr. Dondero stated Highland's ownership interest in SEMF "could change over time" and that "no business man can agree" to Mr. Gameros' question.

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[59] Highland and this Court were both justifiably concerned about Mr. Gameros' ability to make a binding deal based on their experience with, among other things, the HV Complaint. In early 2021, CLOH, through counsel, conceded on the record that it had no right of first refusal to HarbourVest's interests in HCLOF. Three months later, CLOH, through new counsel, filed the HV Complaint arguing it did have a right of first refusal. *See* ¶ 84 *infra*.

[60] Movants allege this Court chastised Mr. Sauter. Renewed Motion at 17 ("[T]he Court responded [to Mr. Sauter]: 'I mean I'm not sure I care what you say, no offense. I don't think I have a person with clear authority here.'") The Court directed that statement at John Morris, Highland's counsel, not Mr. Sauter. Ex. 35, Appx. 4140 ("Mr. Morris, do you want to respond? I mean I'm not sure, frankly, I care what you say….")

[61] Movants allege this Court "rebuffed [Mr. Dondero] for failing to have access to video, even though he [had] no previous notice he would have to give testimony at the hearing." Renewed Motion at 18. This Court was justifiably confused by Mr. Dondero's lack of access to video. Moments before Mr. Dondero's appearance, Mr. Sauter said he had "to run around the corner and try to make sure [Mr. Dondero] knows how to unmute himself." *Id.* Appx. 4141-4142. The logical inference from that statement is that Mr. Dondero was in the office with Mr. Sauter, not in his car as he claimed. Regardless, all this Court said about Mr. Dondero's lack of video was "this is not ideal, you know, without us seeing you." *Id.* Appx. 4142. That is no "rebuff."

Id. Appx. 4135-4146. Consequently, because of HCRE's (a) inability to satisfy the condition to withdraw and (b) failure to satisfy any of the *Manchester* factors, this Court denied HCRE's request to withdraw the HCRE Claim.

100. Notwithstanding the allegations in the Renewed Motion:

- This Court did not find that HCRE "had acted with 'undue vexatiousness' … merely because [Highland] opposed the claim and had spent 'hundreds of thousands of dollars' doing so." Renewed Motion at 18. As set forth above, "undue vexatiousness" is a *Manchester* factor which this Court had to assess. After reviewing Highland's voluminous evidence and the lack of evidence from HCRE, this Court simply found "the undue vexatiousness factor … weigh[ed] in favor of there has been undue vexatiousness." *Id.* Appx. 4156.

- This Court did not "order[] additional depositions to take place and the parties to attend trial." Renewed Motion at 18. The Motion to Withdraw was denied, and, accordingly, the hearing on the HCRE Claim and Highland's previously scheduled depositions of Mr. Dondero and Mr. McGraner would naturally proceed. *Id.* Appx. 4158.

- This Court did not, "as a parting shot," direct the UST to investigate HCRE and Mr. Dondero. Renewed Motion at 18. Significant evidence had been produced at the hearing on the lack of good faith of the HCRE Claim (and Mr. Dondero's potential perjury) (*Id.* Appx. 4117-4123), and this Court was obligated by law to report the matter to the UST pursuant to 18 U.S.C. § 3057(a).[62]

ARGUMENT

101. Section 455 of Chapter 28 of the United States Code provides, in relevant part, that:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

[62] *See* 18 U.S.C. § 3057(a) ("Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed.")

28 U.S.C. § 455(a), (b)(1). "A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case." FRBP 5004(a).

102. Recusal motions brought under Section 455(a) must be "timely." *Hill v. Schilling*, 495 Fed. App'x 480, 483 (5th Cir. 2012); *see also Grambling Univ. Nat'l Alumni Ass'n v. Bd. of Supervisors for La. System*, 286 Fed. App'x 864, 867 (5th Cir. 2008) (noting that while "[s]ection 455 does not contain an explicit timeliness requirement … this Court has consistently inferred such a requirement") (citing *United States v. Sanford*, 157 F.3d 987, 988 (5th Cir. 1998)). "The timeliness rule requires that 'one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification.'" *Sanford*, 157 F.3d at 988–89 (quoting *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994)). "The most egregious delay—the closest thing to *per se* untimeliness—occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal." *Sanford*, 157 F.3d at 988–89; *see also Delesdernier v. Porterie*, 666 F.2d 116, 122 (5th Cir. 1982) ("Congress did not enact § 455(a) to allow counsel to make a game of the federal judiciary's ethical obligations; we should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage.")

103. Even if a motion is timely, whether to grant it is committed to the sound discretion of the targeted court. *See Hill v. Breazeale*, 197 Fed. App'x 331, 335 (5th Cir. 2006). "The judge abuses [his or her] discretion in denying recusal where a reasonable [person], cognizant of the relevant circumstances surrounding [the] judge's failure to recuse, would harbor legitimate doubts

about that judge's impartiality." *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999) (a motion to recuse is committed to the discretion of the targeted judge). "The standard for bias is not 'subjective' … but, rather, 'objective.'" *Andrade v. Chojnacki*, 338 F.3d 448, 454-55 (5th Cir. 2003) (citing *Vieux Carre Prop. Owners, Residents & Assocs. v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1991)). In other words, it "is with reference to the 'well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person' that the objective standard is currently established." *Id.* (quoting *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995)). "Another maxim is that review should entail a careful consideration of context, that is, the entire course of judicial proceedings, rather than isolated incidents." *Id.* at 455. Finally, the common-law doctrine called the "extrajudicial source rule" under Section 455 "divides events occurring or opinions expressed in the course of judicial proceedings from those that take place outside of the litigation context and holds that the former rarely require recusal." *Id.* The movant must: (1) demonstrate that the alleged comment, action, or circumstance was of "extrajudicial" origin, (2) place the offending event into the context of the entire trial, and (3) do so by an "objective" observer's standard. The movant must also demonstrate the "court's refusal to recuse was not merely erroneous, but, rather, an abuse of discretion." *Id.* at 456-62.

104. Here, it is indisputable that (a) the Renewed Motion, which largely restates the Initial Motion, is "untimely;" (b) "bias" does not exist; (c) there is no "deep seated antagonism;" and (d) there is no evidence of "extrajudicial knowledge." The exceptional and rare remedy of recusal is not warranted and the Renewed Motion, like the Initial Motion, must be denied.

I. The Renewed Motion Must Be Denied as Untimely

105. This Court denied the Initial Motion on the basis that it was untimely and should deny the Renewed Motion on the same grounds.

106. This Court determined the Initial Motion was "untimely" because it was filed: (a) "more than 15 months after the case was transferred to this Court" and after Movants learned about the facts purportedly showing an "appearance of impropriety," (b) "after many dozens of orders" were issued by this Court, and (c) "on the eve of a contempt hearing." Recusal Order at 7. Yet, Movants did not seek recusal until March 2021 and allowed this Court to expend significant judicial resources overseeing this case and Movants' litigation. Movants offered no credible explanation for the delay in bringing the Initial Motion.

107. The Renewed Motion suffers from the same infirmities but is even less "timely" than the Initial Motion. ***First***, the Renewed Motion incorporates the Initial Motion and its "examples" of bias. Those examples were untimely when the Initial Motion was filed in March 2021 and are even more so now. ***Second***, the Renewed Motion was filed (a) thirty-four months after this case was transferred to this Court, (b) seven months after the District Court denied the appeal of the Recusal Order, and (c) after this Court entered many hundreds more orders. The "new" examples of bias in the Renewed Motion are also untimely. With one meritless exception, all "new" examples occurred on or before August 4, 2021—over a year ago—with one actually occurring before the Initial Motion was filed. Like the Initial Motion, the Renewed Motion was also filed to prevent this Court from entering orders adverse to Movants—denying the dispositive motions to dismiss filed in the Kirschner Adversary.[63] Supplemental Motion ¶¶ 7, 9.

108. This, alone, constitutes "*per se* untimeless." *See Hill*, 197 Fed. App'x at 335 (holding district court did not abuse its discretion in denying motion to recuse as untimely where party "waited, for no given reason, to raise the issue until after the district court ruled against

[63] "Kirschner Adversary" means *Marc S. Kirschner, as Litigation Trustee for the Litigation Sub-Trust v. James D. Dondero, et al.*, Adv. Proc. No. 21-03076-sgj (Bankr. N.D. Tex.).

him"); *Sanford*, 157 F.3d at 989 (affirming district court's denial of recusal motion as untimely where party "knew of the facts purportedly causing an appearance of impropriety," but waited until after an adverse decision to raise the recusal issue); *Grambling*, 286 Fed. App'x at 867-88 (affirming denial of recusal motion as "*per se*" untimely where "despite having knowledge of the facts underlying its recusal argument," party "did not immediately move to have this case assigned to a judge from another division or district and instead allowed the case to linger … for nearly ten months. When the [party] finally acted, it did so only after [the judge] had dismissed its claims"); *Hill v. Schilling*, 2014 WL 1516193, at *3 (N.D. Tex. Apr. 17, 2014) (affirming judge's finding that motion to recuse was untimely where it was brought "some eleven months after [plaintiff] and his counsel first became aware of the" facts giving rise to alleged perception of bias); *Da Silva Moore v. Publicis Groupe*, 868 F. Supp. 2d 137, 155 (S.D.N.Y. 2012) ("Plaintiffs here had the requisite knowledge no later than January 4, 2012, but the recusal request did not come until nearly three months later," noting "I have made no efforts to hide my views, relationships or affiliations. If plaintiffs truly believed that any of these issues, individually or collectively, created a bias or the appearance of partiality, they should have promptly moved for my recusal.")

109. This Court also appropriately considered the fact that the Initial Motion came on the "eve of the contempt hearing." Recusal Order at 7. Similarly, Movants seek recusal now, after Mr. Dondero has been twice found in contempt, to prevent this Court from ruling in the Kirschner Adversary. Supplemental Motion ¶ 7. That is, in itself, grounds for denial. *See Weisshaus v. Fagan,* 456 Fed. App'x 23, 34 (2d Cir. 2012) (noting that "[a]lthough there was no dispositive ruling as to [defendant] at the time [plaintiff] brought her recusal motion, the district court aptly noted that the motion came on the heels of its direction that [plaintiff] submit to a deposition, thus strongly suggesting that the motion was a mere fall-back position in response to

an adverse ruling."); *Da Silva*, 868 F. Supp. 2d at 154 (denying recusal motion where "[i]t appears that plaintiffs are improperly using the recusal motion as a 'fall-back position' to an unfavorable ruling.")

110. In light of the expansive nature of this case and this Court's extensive knowledge of the proceedings that it has overseen throughout the last thirty-four months, interests of judicial economy also support this Court's denial of the Renewed Motion. *See United States v. Olis*, 571 F. Supp. 2d 777 (5th Cir. 2008) (affirming denial of recusal motion as untimely where party was aware of facts stated in recusal motion "well before he filed" the motion, noting that party "had duty to file [ ] motion for recusal before the court's judicial resources were spent on resolution of motions" and party "neither argues nor explains why his delay" was reasonable); *Hill*, 495 Fed. App'x at 484 ("Particularly in light of the expansive nature of these proceedings, considerations of judicial economy likewise countenance our conclusion that the district court did not abuse its discretion"); *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) ("The motivation behind a timeliness requirement [for Section 455] is [] to a large extent one of judicial economy"); *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 237 (3d Cir. 2001) ("After a massive proceeding such as this, when the court has invested substantial judicial resources and there is indisputably no evidence of prejudice, a motion for recusal of a trial judge should be supported by substantial justification, not fanciful illusion"); *Weisshaus*, 456 Fed. App'x at 34 (affirming district court's denial of recusal motion as untimely where party "waited almost nineteen months" to file the recusal motion, at which point the district court had already expended substantial judicial resources overseeing and adjudicating" the parties' claims).

111. Accordingly, this Court is well within its discretion to deny the Renewed Motion—like the Initial Motion—as untimely.

II. The Renewed Motion Must Be Denied on the Merits

112. Even if the Renewed Motion had been timely, it must be denied on the merits. The Renewed Motion fails to prove that any of the circumstances that would require disqualification under Section 455 are present here.

A. There Is No Extrajudicial Bias Present Here

113. The core of Movants' argument in the Renewed Motion is, as in the Initial Motion, that this Court's "extrajudicial" bias toward Movants stemmed from opinions formed during the Acis Bankruptcy. Renewed Motion at 4-5; Initial Motion ¶¶ 4-13. That argument is still frivolous.

114. As articulated by the Supreme Court, "[o]pinions formed by the judge on the basis of facts of prior proceedings do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also Conkling v. Turner*, 138 F.3d 577, 592 (5th Cir. 1998) ("As a general rule, for purposes of recusal, a judge's 'personal' knowledge of evidentiary facts means 'extrajudicial,' so facts learned by a judge in his or her judicial capacity regarding the parties before the court, whether learned in the same or a related proceeding, cannot be the basis for disqualification") (internal quotations omitted). Rather, opinions or beliefs formed from events on the record or from prior proceedings, or "intrajudicial" opinions, are subject to a "deferential" review, and are the "type of opinions/expressions that *Liteky* holds nearly exempt from causing recusal." *Andrade*, 338 F.3d at 460-62.

115. Any opinion allegedly formed by this Court from the Acis Bankruptcy, a prior proceeding, is thus not an "extrajudicial" source and is precisely the type of opinion exempt from warranting recusal. *See Liteky*, 510 U.S. at 555; *Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 81 (5th Cir. 2011) (affirming denial of motion for recusal where "the only facts the [judge] learned about [party's] conduct were learned from judicial proceedings in the instant case and in previous

cases"); *Conkling*, 138 F.3d at 592 ("As a general rule, for purposes of recusal, a judge's 'personal' knowledge of evidentiary facts means 'extrajudicial,' so facts learned by a judge in his or her judicial capacity regarding the parties before the court, whether learned in the same or a related proceeding, cannot be the basis for disqualification") (internal quotations omitted).[64]

116. For these same reasons, Movants' reliance on this Court's rulings as evidence of "antagonism" is equally deficient. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion … and can only in the rarest circumstances evidence the degree of favoritism or antagonism required … when no extrajudicial source is involved." *Liteky*, 510 U.S. at 555. Here, and as set forth above, Movants rely on various rulings issued by this Court to demonstrate "bias." These rulings, none of which involve an extrajudicial source, simply do not rise to the rare circumstance of evidencing the degree of antagonism warranted for recusal. *See Liteky*, 510 U.S. at 555 ("Almost invariably, judicial rulings are proper grounds for appeal, not for recusal"); *Andrade*, 338 F.3d at 456 (denying recusal based on judicial rulings where events cited "are embodied in judicial actions that Movants could have, but did not, appeal"). Simply put, Movants offer no credible legal or factual basis for recusal. *See Henderson v. Dep't of Pub. Safety and Corrs.*, 901 F.2d 1288, 1296 (5th Cir. 1990) ("[E]ven the most superficial research would have put [the party] on notice that the factual circumstances he alleged were not grounds for recusal" under *Liteky*, noting "there is absolutely no case authority cited by [party] to the contrary.")

117. Movants' "due process" argument that they "are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum" (Renewed Motion at 19-20) is frivolous and should be summarily rejected. Movants fail to support

[64] Movants rely on only one allegedly "extrajudicial" source relating to this Court's inquiries into COVID-related "PPP loans." Renewed Motion at 8-9; Initial Motion ¶ 52. However, as noted *supra*, this Court took no action against Mr. Dondero or any of the other Movants and did not even ask them to respond.

any notion of a "due process" violation. Nor could they. The record of this case shows the great lengths this Court has gone through to respect Movants' due process rights, notwithstanding their limited, if any, skin in the game. The cases cited by Movants in support of their contention are entirely inapplicable. *Miller v. Sam Houston State Univ.,* 986 F.3d 880, 893 (5th Cir. 2021) does not address the standard for "recusal" under Section 455 or the "extrajudicial" source rule. Rather, *Miller* deals with whether a case should be reassigned to a different district court judge on remand after the original judge did not give plaintiff the opportunity for discovery and *sua sponte* dismissed a plaintiff's claim of sex discrimination and retaliation under the Fair Labor Standards Act. Movants' other case on this point is equally irrelevant.[65] The types of exceptional circumstances warranting recusal in those cases are not present here. Movants otherwise offer no legal basis in support of their argument. Accordingly, this Court properly exercised its discretion in finding that there was no "extrajudicial" source warranting recusal.

B. This Court Does Not Have Deep-Seated Antagonism Toward Movants

118. Similarly, there is no basis to find that this Court has "demonstrate[d] such a 'high degree of favoritism or antagonism as make fair judgment impossible.'" Renewed Motion at 22. Movants contend the "record is replete with examples" of this Court's "antagonism" such that a reasonable observer would doubt this Court's impartiality. *Id.* Movants' arguments are without merit.

119. "Judicial remarks that are critical or disapproving of, or even hostile to, counsel for the parties or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. In support of their argument that this Court harbored "bias" toward Movants, Movants

[65] The Court in *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 167 (5th Cir. 1997), denied a petition for a writ of mandamus challenging denial of recusal premised on racist remarks, where, although a "reasonable person might indeed harbor doubts about the trial judge's impartiality" in a "racially-charged case such as the instant one," the judge had already presided over the case for so long such that recusal at that stage "would be unprecedented."

refer to a number of this Court's statements regarding Mr. Dondero and his conduct. *See generally* ¶¶ 29-32, 34-100 *supra*. In relying on such statements, Movants disregard the law on recusal. *See Andrade*, 338 F.3d at 459 (affirming denial of recusal motion premised on judge's negative comments made on the record—including describing a witness as a "crazy, murdering son-of-a-bitch" and referring to parties' attempt to introduce certain evidence as "bullcrap") (citing *Liteky*, 510, U.S. at 555)). As this Court previously found, Movants' cited remarks are, at best, "clashes between a court and counsel," and such remarks are "simply insufficient" for recusal. Recusal Order at 10; *see also United States v. Landerman*, 109 F.3d 1053, 1066 (5th Cir. 1997) (affirming denial of motion to recuse where district judge allowed "the Government more leeway during its questioning and did interrupt defense counsel's questioning more often than the Government's questioning"); *Garcia v. Woman's Hosp. of Tex.*, 143 F.3d 227, 230 (5th Cir. 1998) (affirming denial of motion to recuse where district judge had made unflattering comments about plaintiff's ability to prove her case).

120. Based on the entirety of the proceedings before this Court, in which all events raised by Movants relate to either this Court's knowledge of prior proceedings or this Court's remarks during these proceedings, the exceptional remedy of recusal is not warranted. *See United States v. Williams*, 127 Fed. App'x 736, 737-38 (5th Cir. 2005) ("As our review of the entire context of the judicial proceedings in which the events challenged in this case arose reveals no disqualifying judicial bias, we conclude that there was no abuse of discretion in the district court's denial of [the] recusal motion"); *Henderson*, 901 F.2d at 1296 (affirming court's denial of recusal motion, where "none of the circumstances requiring disqualification under § 455 are present here" and "the trial judge was well within his discretion in finding that the motion for recusal was not well founded, either in fact or in law.")

121. This Court, respectfully, should again find that that Movants' assertions do not "rise to the threshold standard of raising doubt in the mind of a reasonable observer as to the judge's impartiality" (Recusal Order at 10) and deny the Renewed Motion.

III. This Court Lacks the Authority to Grant Movants' Alternative Relief

122. Pursuant to 28 U.S.C. § 158(a), the District Court sits as a court of appeals over this Court and reviews (a) this Court's final orders and (b), if leave is granted by the District Court, its interlocutory orders. 28 U.S.C. § 158(a)(1), (3). In its February Order, the District Court held that, as a matter of law, an order denying a motion to recuse is "an interlocutory order from which no appeal lies prior to this Court entering a final judgment" and is not an appealable collateral order. *See, e.g.*, Ex. 12, Appx. 2106. And, as set forth on Exhibit 36 (Appx. 4165-4169), there is still no final judgment; multiple matters are currently pending before this Court or are on appeal to the District Court or the Fifth Circuit.[66] Yet, Movants, again, ask this Court to "make clear that any order denying recusal is final so that Movants may appeal this Court's order to the Northern District of Texas." Renewed Motion at 24.

123. As discussed above, in the Highland Objection, and at the August 31, 2022 status conference, it is not for this Court to determine whether its orders are final and appealable. Movants' therefore request this Court to take actions that, respectfully, it has no authority to take: (a) enter an order declaring any interlocutory order it enters denying the Renewed Motion "final" and (b) dictate to the District Court that it has jurisdiction to hear an appeal of that interlocutory order. Movants' request should be denied as a matter of law.

[66] *See Friendly Fin. Serv.-Eastgate, Inc. v. Dorsey (In re Dorsey)*, 489 Fed. Appx. 763, 764 (5th Cir. 2012) ("Here, there is a final judgment from the bankruptcy court, but the appeal of that judgment has not been fully resolved. … [W]e lack jurisdiction to review the motion to recuse. Friendly Finance must await the final resolution of its appeal.")

CONCLUSION

124. For the foregoing reasons, Highland respectfully requests that this Court deny the Renewed Motion and grant such other relief the Court deems just and proper.

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Dated: October 31, 2022

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EXHIBIT 7

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	Case No. 19-34054 (SGJ)
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, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S AMENDED REPLY IN SUPPORT OF AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

MOVANTS' AMENDED REPLY IN SUPPORT OF AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

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I. INTRODUCTION

The Objection to Renewed Motion to Recuse ("Objection") filed by Highland Capital Management, L.P. ("HCMLP" or the "Debtor") only underscores why recusal is not just warranted but necessary in this case. HCMLP devotes only nine pages of its Objection to actual legal argument. But that argument fails to address or distinguish much of the case law cited in Movants' Amended Renewed Motion to Recuse (the "Renewed Motion") [Doc. 3570] and relies on a litany of irrelevant cases that are easily distinguishable. The remaining 41 pages of the Objection consist of procedural background (critical parts of which are wrong) and "additional background," which is largely rhetoric designed to exploit the Court's existing bias.

The main thrust of HCMLP's Objection is that the Renewed Motion is untimely and that the Court's rulings are correct and final. But HCMLP cites the wrong legal standard for timeliness and relies on cases that have nothing to do with the posture of *this* case. HCMLP's other refrain—that all of the Court's rulings discussed in the Renewed Motion are correct and final—is both ironic (given HCMLP's argument that the Court's order on recusal cannot be considered "final") and irrelevant to the ultimate issue of whether the Court's treatment of Movants is objectively biased such that recusal is appropriate. HCMLP's only answer to that key question is that the Court has said it is not biased, and so it must be true. That is not the standard for recusal and provides no basis to deny Movants' Renewed Motion. The Renewed Motion should be granted.

II. HCMLP'S ITERATION OF THE "FACTS" IS IRRELEVANT AND WRONG

HCMLP's 41-page recitation of "facts" is laden with unsubstantiated assertions, misinformation, and irrelevant arguments that appear largely designed to distort rather than educate. Movants see little utility in addressing many of those statements, which are irrelevant to the underlying question of whether the Court bears an objective bias against Movants requiring recusal. Instead, Movants address only the most egregious examples of factual misstatements.

A. HCMLP Misrepresents The Procedural History Of This Case

Although not relevant to the legal question of whether recusal is warranted, HCMLP devotes substantial space in its Objection to discussing actions that HCMLP took early in the bankruptcy case and attempting to hold those actions against Mr. Dondero. *See, e.g.*, Opp., ¶¶ 1, 30-32, 34. For example, while HCMLP accuses Mr. Dondero of forum shopping in connection with the filing of HCMLP's bankruptcy, HCMLP has been represented by the same counsel, Pachulski Stang Ziehl & Jones LLP ("Pachulski"), since before the bankruptcy was filed. Pachulski was the law firm that filed HCMLP's chapter 11 bankruptcy in Delaware on HCMLP's behalf. Moreover, Pachulski mounted a lively argument to the Delaware court against transferring HCMLP's bankruptcy to this Court based on some of the very same concerns Movants have raised in their recusal motion. Renewed Mot. at 5 and nn.20-22.

Additionally, while HCMLP also claims that Mr. Dondero cannot complain about this Court's bias because HCMLP did not appeal the Delaware court's order transferring HCMLP's bankruptcy to the Northern District of Texas, only HCMLP could appeal such a decision, not Mr. Dondero. Notably, HCMLP completely omits any facts related to Pachulski's representation of HCMLP at the time, including any legal advice or representations that Pachulski may have given in connection with any decision regarding pursuing an appeal. It is exceptionally misleading for Pachulski to now argue that Mr. Dondero did something wrong or otherwise sat on his hands.

HCMLP likewise alleges that Mr. Dondero "voluntarily surrendered control of Highland to an independent board of directors" and failed to object to or appeal (and to the contrary, "affirmatively approved") the language of the related Settlement Order restricting Mr. Dondero's actions and allowing the Court to sanction him. Obj., ¶¶ 38-39.[1] But again, HCMLP does not

[1] Mr. Dondero surrendered his positions at Strand, not HCMLP. *See* Settlement Order, Dkt. 339. Notably, while HCMLP argues that Mr. Dondero "voluntarily surrendered" his positions, HCMLP at the same time argues

want to discuss the legal advice that Pachulski (which represented HCMLP at that time) may have given in connection with any of those decisions by HCMLP.

Finally, to justify the Court's treatment of Movants, HCMLP repeatedly invokes the supposed "history and culture of litigiousness" at HCMLP under Mr. Dondero's leadership as well as the "plethora" of rulings and other judgments issued against both Mr. Dondero and his affiliates prior to bankruptcy. *See* Obj., ¶¶ 1, 26, 42. Although Movants dispute HCMLP's characterization of the company's culture prior to bankruptcy, it is worth noting that the decisions made by Highland regarding litigation prior to bankruptcy were not "propagated" solely by Mr. Dondero but were often conceived of and approved by other "human beings," including Thomas Surgent, HCMLP's former and current Chief Compliance Officer, its former Deputy General Counsel, and its current General Counsel. *See* Obj., ¶ 42. HCMLP conveniently buries Mr. Surgent's significant role in the company's past. Further, HCMLP fails to cite a single pre-bankruptcy ruling or judgment *against Mr. Dondero*, and Movants are aware of none. Nonetheless, HCMLP is content to make this statement repeatedly as though it is fact, which is consistent with what HCMLP has done throughout these bankruptcy proceedings.

B. HCMLP Misreads The Court's Order On Movants' Motion To Supplement

At the outset of its Objection, HCMLP argues that Movants' Renewed Motion should be rejected because it was filed in violation of the Court's order denying Movants' Motion for Final, Appealable Order and Supplement to Motion to Recuse ("Motion to Supplement"). Obj., ¶ 23 & n.21. That order directed Movants to either (1) file a "simple motion," seeking only a "revised and amended recusal order" but removing language that Movants perceived to impede their appellate rights, or (2) "file a new motion . . . based on alleged new evidence or grounds for

confusingly and contradictorily that Mr. Dondero was "forced to resign." *Compare* Obj., ¶ 38, *with* Obj., ¶ 32.

recusal" not previously considered by the Court. Order, Dkt. 3479 at 3. Importantly, however, the Court's order on the Motion to Supplement came on the heels of a hearing in which the Court specifically told Movants they could file a "new motion to recuse . . . to start this over *and* supplement the record." App'x at 0210 (emphasis added).[2] HCMLP now argues that what Movants were supposed to file was a motion to recuse limited to new record evidence of bias and nothing more. That argument is both nonsensical and irrelevant.

The entire point of Movants' Motion to Supplement was to ensure that an appellate court, when reviewing Movants' request for recusal, has the benefit of the *entire* record supporting recusal, as Movants made clear in their Motion to Supplement and at the hearing on that motion. *See* Dkt. 3470 at 4; App'x at 0207. If the Court's order were read in the manner suggested by HCMLP, that would mean an appellate court could only consider a small portion of the record on appeal from the Court's denial of Movants' Renewed Motion, which would give the appellate court only a fraction of the relevant picture. That makes no sense and adopting HCMLP's reading of the order would only further impede Movants' due process right to build an appellate record based on all salient evidence, which is all Movants have been trying to do. In fact, HCMLP acknowledges that such attempt to restrict the record would be improper, as it admits that the Court must focus on the "entirety of the proceedings." Obj., ¶ 120.

In any event, HCMLP's argument makes no difference to whether the Court should grant or deny Movants' Renewed Motion. Movants' basis for recusal is not a single fact or an isolated incident. Instead, Movants seek recusal based on a pattern of treatment throughout the bankruptcy proceedings that, taken as a whole, demonstrate both the appearance of bias and actual animus toward Movants. There is no procedural or statutory bar to filing a motion to recuse at any time

[2] All references to "App'x" are to Movants' Appendix filed concurrently with their Renewed Motion. *See* Dkt. 3542-1 and 3571-1.

under these circumstances, based on any record evidence the moving party deems relevant to the issue. The Court may disagree that the evidence cited supports the relief requested, but Movants' mere inclusion of prior evidence is not a reason to deny the Renewed Motion.

C. HCMLP's Arguments About The Outcome Of Various Rulings Are Irrelevant

HCMLP also spends much of its time arguing that various rulings by the Court are final, were not appealed or have been upheld on appeal, or were otherwise correct. *See, e.g.*, Obj., ¶¶ 6, 12 n.11, 35, 39, 45, 64, 69, 71, 80. That is irrelevant. As Movants acknowledged in their Renewed Motion, recusal ordinarily should not be used as a mechanism to challenge the outcome of rulings issued by the courts. *See* Renewed Mot. at 20. And that is not what Movants seek to do. Instead, Movants seek recusal because the Court's *process*—including its overt negative rhetoric, its departure from usual procedures, and its general treatment of Movants—reflects the type of deep-seeded animosity that would cause any objective observer to question the Court's impartiality.[3]

In short, it does not matter whether the Court "got it right" or not. Recusal is required where, as here, the Court has acted in a manner that is partial, or at the very least appears partial.

D. HCMLP Distorts The Factual Record And Fails To Cite Relevant Evidence

HCMLP spills a lot of ink describing (in a manner rife with misstatements and distortions but often lacking citations or evidentiary support) what happened at various hearings cited by Movants in the Renewed Motion as evidence of bias. Again, the outcome of various motions and

[3] In any event, it is ironic that HCMLP argues so strenuously that any order on recusal cannot be final when it argues that various other interlocutory orders of this Court are necessarily final. *See* Obj., ¶¶ 3, 67. Notably, the issue of finality in this context is not as simple as HCMLP would have this Court think. In chapter 11 cases, there typically is no "final judgment" the way there is in an ordinary civil case in federal district court. For that reason, courts have held that the order confirming the chapter 11 plan of reorganization is the "final judgment" in bankruptcy. *See, e.g.*, *In re Shank*, 569 B.R. 238, 249 (Bankr. S.D. Tex. 2017) (citing *United Student Aid Funds, Ins. v. Espinosa*, 559 U.S. 260, 269 (2010)). The Plan was confirmed and became effective more than a year ago in this case. The vast majority of HCMLP's assets have been liquidated. Unsecured creditors have been paid a significant percentage of their claims. Yet HCMLP would seemingly have the courts conclude that that the case still is not "final" for purposes of appeal.

hearings makes little difference to this analysis. *How* those results came to be, on the other hand, makes all the difference. Thus, in addition to clarifying some of the more egregious misstatements made by HCMLP in the Objection, Movants will also clarify its use of the Court's hearing and rulings to demonstrate the Court's bias.

The June 2020 CLO Holdco Hearing. HCMLP argues the Court's statements and actions at the CLO HoldCo hearing are not evidence of bias because "neither CLOH nor the DAF are Movants." Obj., ¶ 47. HCMLP further argues that Movants have the facts wrong because, HCMLP insists, "the $2.5 million was deposited into the court registry *at CLOH's request*." Obj., ¶ 48 (emphasis in original). Both of these arguments are wrong.

First, it makes no difference that CLOH and the DAF are not Movants in the Renewed Motion. Both HCMLP and the Court have repeatedly argued that every entity remotely connected to Mr. Dondero is "controlled" by him, including CLOH and the DAF.[4] Moreover, the whole point is that the Court's animus toward Mr. Dondero results in the Court treating all of Mr. Dondero's affiliates (or presumed affiliates) as inherently suspicious, leading to rulings that are at odds with the evidence and the law. This is precisely what happened at the CLO Holdco hearing.[5]

Second, HCMLP's argument that CLOH's money was deposited into the Court registry because CLOH wanted it there is disingenuous at best. Indeed, even the Debtor argued to the

[4] Indeed, one of the reasons that the Court refused to release CLOH's money, despite the Debtor's argument that it should do so, is because Matt Clemente, on behalf of the Unsecured Creditors Committee, argued at the hearing that the Court should disallow the distributions to CLOH and the DAF because those entities were "owned and/or controlled by Mr. Dondero." HCMLP App'x, at 3245.

[5] HCMLP argues that "Movants cannot have it both ways" and "[e]ither CLOH and the DAF are controlled by Mr. Dondero or they are not." Obj., ¶ 18. They are not "related" but are "connected." But it is HCMLP that is trying to have it both ways: it has argued throughout the bankruptcy proceedings that CLOH and the DAF, like many other entities, are "controlled" by Mr. Dondero, but they take the position in their Objection that the Court's treatment of CLOH and the DAF has nothing to do with him. In any event, the Plan (a document drafted by HCMLP) identifies CLOH and the DAF as "Related Parties," meaning that HCMLP views Mr. Dondero, CLOH, and the DAF as operating in lock-step. *See* Plan at 14.

Court at the hearing that the money should be released to CLOH. *See* March 4, 2020 Hr'g Tr. at 17:8-22, HCMLP App'x at 3234. However, when it became apparent that the Court was disinclined to release the money, Mr. Dondero's counsel proposed that, in the event the Court denied the motion, the funds at issue should be distributed into the registry of the Court as an alternative to permitting HCMLP to retain them. *See id.* at 3260. CLOH and the DAF certainly did not request that the Court retain the funds in its registry indefinitely, nor did they argue that depositing the funds in the Court's registry was the correct course of action.

HCMLP also argues that the Court's actions were not biased because CLOH sought a release of its money from the Court's registry less than a month later, something HCMLP deems "evidence of CLOH's bad faith." Obj., ¶ 19. Accusing Mr. Dondero and any entity connected to him of "bad faith" is another favorite tactic of HCMLP, likely because the Court has demonstrated its receptiveness to accusations of bad faith against Mr. Dondero, even when there is no valid basis for or evidence supporting the accusation. But in this particular instance, the Court did not find that CLOH was acting in bad faith by seeking a release of money that indisputably belonged to it. And again, CLOH never agreed that its money could remain in the Court's registry indefinitely. In any event, HCMLP's argument in this regard is particularly misleading because HCMLP agreed to the release of CLOH's money. It did so because *there was no good faith reason* to refuse to do so. Notably, although the parties objecting to the release of CLOH's funds indisputably had no legal basis to object and no right to the funds (i.e., *zero* ownership interest in the funds), at no time did the Court comment that their objections were "Rule 11 frivolous" or threaten the objectors with sanctions.

The December 2020 Restriction Motion. HCMLP also argues at length about why the Court's actions at the hearing on the Restriction Motion do not support recusal. Obj., ¶¶ 51-56.

In particular, HCMLP cites a string of "admissions" from one of HCMLP's former Executive Vice Presidents, Dustin Norris, to argue that Mr. Norris provided "all of the evidence the Court needed to reach its conclusion" that Mr. Dondero was the sole person responsible for filing the Restriction Motion (which sought to prevent the liquidation of certain CLO assets). Obj., ¶¶ 54-55. But HCMLP conveniently fails to include all of the testimony Mr. Norris provided regarding the decision by the Retail Funds and the Advisors to file the Restriction Motion.[6] Mr. Norris actually testified that, while Mr. Dondero vocalized concern about HCMLP's decision to liquidate the CLO assets, the Advisors' internal legal team, compliance team, and Mr. Norris working with outside counsel, along with senior management of Highland Capital Management Fund Advisors decided to pursue filing the Restriction Motion. *See* December 16, 2020 Hr'g Tr. at 29:21-30:1, HCMLP App'x at 3368. This is the critical testimony, and the Court simply ignored because it did not fit the narrative that Mr. Dondero is the bad actor behind every legal motion made in HCMLP's bankruptcy proceeding and nobody around him is able to make their own informed decision.

The January 2021 Injunctive Relief Hearing. Drawing on one of its favorite unsupported themes (i.e., Mr. Dondero as puppet master), HCMLP next argues that the Court's treatment of the Retail Funds and Advisors at the January 2021 injunctive relief hearing was appropriate because "Mr. Dondero caused the Advisors and Retail Funds to continue interfering with, and unjustifiably threatening, Highland." Obj., ¶ 57. Of course, HCMLP cites no evidence for this accusation. Then HCMLP doubles down, and it accuses Movants of "failing to disclose key facts" relating to the hearing. Obj., ¶ 59. The first such "fact" is HCMLP's argument that Movants "now admit"

[6] The "Retail Funds" are Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. The "Advisors" are Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. Renewed Mot. at 19-20. Although there is no evidence of record that these entities are or were owned or controlled by Mr. Dondero (and HCMLP cites to none), in keeping with its tactic of arguing that every entity is "controlled" by Mr. Dondero, HCMLP labels the Retail Funds and Advisors the "Dondero Parties" and argues that the Retail Funds are "controlled" by him. Obj., ¶¶ 53, 63. They are not.

the K&L Gates Letters were improper. Obj., ¶ 60. In support of this argument, HCMLP quotes a short-hand description of the K&L Gates Letters from Movants' original recusal motion. *Id.*, ¶ 60 n.40. Movants most certainly did not and do not admit that the K&L Gates Letters were improper. Those letters did nothing more than tell the Debtor that the Retail Funds and Advisors intended to *seek the Court's permission* to lift the automatic stay to exercise their contractual rights.

HCMLP nonetheless argues (again, under the guise of "fact") that the K&L Gates Letters were "quintessentially vexatious and sanctionable conduct" because they sought previously denied relief through alternative means. Obj., ¶ 60 (citing *Nix v. Major League Baseball*, 2022 U.S. Dist. LEXIS 104770, at *58-65 (S.D. Tex. June 13, 2022)). It is unclear how a letter explaining the Retail Funds' and Advisors' intent to seek Court permission to act could possibly be considered vexatious, and the case cited by HCMLP does not clear up that mystery. In *Nix*, the plaintiff filed multiple repetitive lawsuits in various jurisdictions and also lawsuits in the same jurisdiction alleging slightly different causes of action. 2022 U.S. Dist. LEXIS, at *58-65. That is vastly different from the situation involved here, where the Retail Funds and Advisors took non-judicial action by asking the Debtor not to liquidate CLO assets at below market value and advising the Debtor that they would seek Court intervention if necessary.

The January 2021 Examiner Motion. HCMLP also argues that the Court's disenfranchisement of Movants makes no difference because Movants "admit" they acted for an improper purpose in seeking the appointment of an examiner in advance of the February 2021 confirmation hearing. Obj., ¶ 67 (citing Movants' original recusal motion). Specifically, according to HCMLP, Movants "admit" that they filed a motion for an examiner "to force a delay of the long-scheduled Confirmation Hearing." *Id.* But the quote HCMLP cites (which is from Movants' original recusal motion as opposed to the Renewed Motion) is taken out of context. The

very next sentence of the original recusal motion explains that Movants sought to have the examiner motion heard on an *expedited basis* to *prevent* delay of the confirmation hearing, which might occur if the motion was heard on an ordinary schedule. *See* Original Recusal Mot., Dkt. 2061, ¶ 37.[7] Rather than provide expedited relief—something the Court has done many times at HCMLP's request—the Court set the hearing on Movants' motion on a date *after* the scheduled confirmation hearing, ensuring that Movants could not be meaningfully heard because, as the Court knew, an examiner cannot be appointed after plan confirmation.[8]

Orders Requiring Mr. Dondero to Appear. HCMLP does not meaningfully dispute that the Court took the extraordinary measure of requiring Mr. Dondero to appear at all hearings, including hearings that had nothing to do with him. Instead, HCMLP argues (without citation) that Mr. Dondero proved that the Court's order was appropriate when he "subsequently failed to appear at a hearing thereby validating the Court's concerns." Obj., ¶ 76. This accusation is highly disingenuous. As Mr. Dondero's counsel explained on the record at that hearing, the motion at issue (a motion to continue) was set on an expedited basis, Mr. Dondero's counsel was not aware that Mr. Dondero needed to attend non-evidentiary hearings in the main bankruptcy case and, therefore, counsel failed to coordinate with Mr. Dondero to apprise him of the hearing and his need to appear, which counsel admitted was an "oversight" on counsel's part.[9] In other words, there is no evidence that Mr. Dondero deliberately flouted the Court's order. Notwithstanding counsel's admission that the mistake was his, the Court *sua sponte* issued a new order requiring Mr. Dondero

[7] Notwithstanding that HCMLP ignores the context of the quote it relies on (which actually shows that Movants' intent was the opposite of delay), HCMLP deems Movants' act of filing the examiner motion "quintessentially vexatious." Obj., ¶ 67.

[8] For that reason, HCMLP's observation that "[n]o party appealed the denial of the Examiner Motion" makes no sense. As HCMLP's counsel is no doubt aware, an examiner cannot be appointed after plan confirmation, so any appeal of the Court's order would have been futile and no doubt would have been labeled by HCMLP as "vexatious."

[9] *See* Supp. App'x, Ex. Z, May 20, 2021 Hr'g Tr. at 17:20-22:26.

to appear at every hearing going forward, whether substantive or not, and whether he took a position on the issue to be heard or not. *See* Order dated May 24, 2021, Dkt. 2362.

HCMLP also strenuously argues that the Court "*never* ordered Nancy Dondero to appear at any hearings." Obj., ¶ 77. But HCMLP admits that the Court *did* order the trustee of The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust to attend any hearings involving those entities or hearings at which those entities took a position. Order, Dkt. 2458. And the Court knew at that point that Mr. Dondero's sister, Nancy Dondero, was the acting trustee of Dugaboy. The Court only ordered the trustees to appear because it "ha[d] concerns whether these Trusts [were] simply acting at the direction of Mr. Dondero and are not independent parties." *Id.* at 3. In other words, the Court's order intentionally targeted Mr. Dondero.[10] In the more than three years since this bankruptcy proceeding began, the Court has not ordered any other party to attend all hearings.

Other Supposed "Facts". In addition to these factual misstatements and distortions, HCMLP also fails to cite evidence and, on numerous occasions, couches allegations as fact. By way of example only:

- HCMLP makes numerous statements of supposed "fact" without citing any evidence to support the allegation, including, but not limited to: Obj., ¶¶ 28 (Mr. Dondero and his entities are legion), 30 (chapter 11 filed in Delaware because Mr. Dondero thought it would be a more hospitable forum), 37 (settlement was necessary due to Dondero entities' history of self-dealing), 42 (Mr. Dondero and his entities have a history of litigiousness supported only by a footnote that is further factual argument rather than evidence to support such an allegation), 57 (Mr. Dondero continued to cause advisors to interfere with HCMLP), 63 (Mr. Dondero controls all of the Dondero entities and causes them to attempt to reassert control

[10] HCMLP also argues that the Court's order requiring the trustees for Dugaboy and Get Good to appear at hearings was much narrower than the order regarding Mr. Dondero. Obj., ¶ 77. While the Court did not order the trustees to attend all hearings, the order was nonetheless incredibly broad. It required Ms. Dondero as trustee to attend "all future hearings in th[e] Bankruptcy Case in which the Trusts have taken or are taking a position." Order, Dkt. 2458, at 3. The order further clarified: "This directive does not apply merely to evidentiary hearings or "substantive" hearings, and [sic] it applies to the underlying bankruptcy case as well as related adversary proceedings in which the Trusts are parties or take positions." *Id*.

over HCMLP), 82 (Movants filed the HV Complaint).

- HCMLP repeatedly attributes actions to the Movants that the Movants did not take and calls every party it describes a "Dondero party," again without citation to any evidence of ownership, control, or even involvement. *See, e.g.*, Obj., ¶ 1, 53, 63, 82, 85.

- In describing the Court's "experience with Mr. Dondero," HCMLP cites (as one example of Mr. Dondero's prior "bad acts") that "Mr. Dondero allegedly orchestrated a fraudulent transfer of assets that left the Acis debtors judgment proof." Obj., ¶ 29. It is unclear how an unsubstantiated "allegation" could support this Court's opinions of Mr. Dondero, but this highlights the problem.

HCMLP's recitation of supposed facts falls well short of providing any viable reason to reject Movants' Renewed Motion.

E. HCMLP's Factual Arguments Only Underscore Why Recusal Is Necessary

What is perhaps most telling about HCMLP's recitation of "facts" is its tendency to repeatedly emphasize those points that it believes will resonate with this Court, even where the point is untethered to fact.

Most notably, HCMLP repeats its allegations that the problem here is not judicial bias but "the never-ending, meritless, vindictive, and vexatious litigation strategy that Mr. Dondero stubbornly clings to regardless of the burdens imposed on the judicial system, the havoc wrought, and the damages inflicted on himself, Highland's creditors, and even his own steadfast loyalists." Obj., ¶ 2. That statement is remarkably ironic, for a number of reasons. First, as HCMLP acknowledges, "[t]his Court did *not* find or conclude that Movants are 'vexatious litigants.'" *Id.*, ¶ 71 n. 43 (emphasis in original).[11] Nonetheless, HCMLP uses that adjective to describe Mr.

[11] Under Texas law, a Court "'may find a *plaintiff* a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant' and one of three additional prerequisites has occurred within the last seven years … These additional elements include (1) the filing of at least five suits as a *pro se* litigant that have been dismissed against the plaintiff; (2) relitigating a case *pro se* after having previously received an adverse and final determination; and (3) a prior finding in state or federal court that the plaintiff is a vexatious litigant in an action concerning the same or substantially similar facts." *Baldwin v. Zurich Am. Ins. Co.*, 2017 WL 2963515, *4 (W.D. Tex. July 11, 2017) (citing Tex. Civ. Prac. & Rem. Code § 11.054).

Dondero no less than *12 times* in its Objection alone.[12] HCMLP goes as far as using an out-of-context quote to describe Movants as "quintessentially vexatious."[13] "Vexatious" is also the adjective most used by HCMLP and its counsel to describe Mr. Dondero when arguing before this Court.[14] Consequently, it only makes sense that the adjective: (1) found its way into the Court's order confirming HCMLP's Fifth Amended Plan of Reorganization (as Modified) (the "Plan"), (2) provided the purported justification for the Court to adopt a sweeping channeling provision, and (3) has been subsequently regurgitated by appellate courts, as if there has been some finding or legal basis to declare Mr. Dondero "vexatious."[15] There has not, which is why the Court's ubiquitous use of the term is so problematic and so emblematic of the Court's bias.

HCMLP likewise repeats the same tired accusation that a myriad of "courts and arbitration panels" in various states and foreign jurisdictions have adjudicated claims or ruled against Mr. Dondero. Obj., ¶¶ 1, 6.[16] HCMLP does not cite any examples of such judgments or rulings, because there are none.[17] That reality does not seem to bother HCMLP; instead, HCMLP merely

[12] Obj., ¶¶ 2, 60, 67, 70, 71, 95, 97, 100; *see also id.*, ¶ 42 (describing the "culture of litigiousness" under Mr. Dondero's control).

[13] Obj., ¶¶ 67.

[14] *See, e.g.*, Dkt. 1828, ¶ 22 ("Exculpation is particularly appropriate in this case to stem the tide of frivolous and vexatious litigation against the Exculpated Parties which Dondero and his Related Entities are seeking so desperately to continue to pursue."); Dkt. 3487 at 2 ("abruptly moving to withdraw its Dondero-signed proof of claim after two years of litigation, and after taking Highland's deposition but days before its own Witnesses were to be deposed, is a textbook example of vexatiousness—and is just the latest instance of Mr. Dondero bringing motions, or asserting claims, or filing objections, only to withdraw them after forcing Highland to spend time, money, and effort addressing them."); Dkt. 3550, ¶ 22 ("The Gatekeeper was created to give Highland, among others, breathing room to consummate the Plan and manage Highland's assets free from Mr. Dondero's vexatious and harassing litigation for the benefit of all creditors.").

[15] *See, e.g.*, *NexPoint Advisors, L.P. et al. v. Highland Cap. Mgmt., L.P.*, No. 21-10449 (5th Cir. Aug. 19, 2022), Opinion at 8, 14.

[16] *See also id.*, ¶ 28 (claiming that "[t]he adverse rulings *against Mr. Dondero* and his entities are legion," but citing none).

[17] The only actual examples cited by HCMLP are the arbitration award issued in favor of the Redeemer Committee against HCMLP, and a discovery ruling issued by the Delaware Chancery Court in a totally separate proceeding. Obj., ¶¶ 26-27 & nn.25-26. But again, neither the arbitration award or the discovery ruling were issued against Mr. Dondero.

argues that the actual parties involved in those legal battles were controlled by Mr. Dondero, so the Court should attribute any bad findings to him. Obj., ¶ 28 n.7. Despite being legally and factually unsupported, the Court has previously adopted that logic, which is why HCMLP employs it here.

More importantly, it makes no difference whether *other* courts have ruled against parties controlled by Mr. Dondero on other issues. The Due Process Clause of the United States Constitution requires an impartial and disinterested tribunal. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."). Section 455 was enacted because litigants "ought not have to face a judge where there is a reasonable question of impartiality." H. Rep. No. 1453, 93rd Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355. Movants are entitled to fair treatment in *this* Court on the evidentiary record actually before it.

III. HCMLP'S LEGAL ARGUMENTS ARE MERITLESS

A. HCMLP's Argument Regarding Timeliness Is Wrong

Throughout its Objection, HCMLP repeatedly references the timing of Movants' Renewed Motion, arguing that the length of time that has passed since various rulings issued by the Court makes the Renewed Motion "per se" untimely. Obj., ¶¶ 102, 108. HCMLP's argument misstates the law and misses the point.

As a preliminary matter, the Fifth Circuit Court of Appeals has never adopted a "*per se* untimeliness" rule. To the contrary, the Fifth Circuit has expressly "declined" to do so. *United States v. Sanford*, 157 F.3d 987, 988 (5th Cir. 1998). Indeed, even in *Hill v. Schilling*, 495 F. App'x 480, 483 (5th Cir. 2012)—the case cited by HCMLP for its "per se untimeliness" argument—the Fifth Circuit did not adopt or apply a per se rule. Instead, the Court, faced with *a single alleged act* of judicial impropriety, explained that "*the closest thing to* per se untimeliness"

occurs "when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal." *Hill*, 495 F. App'x at 483 (emphasis added). In *Hill*, unlike here, the movants sought recusal based solely on their allegation that the trial judge's spouse held an economic interest in one of the parties. *Id.* Despite knowing about the economic interest for some time, the movants proceeded through trial and did not move to recuse the judge until after receiving an unfavorable judgment. *Id.* In that very different circumstance, the Fifth Circuit agreed that the motion to recuse was untimely.[18]

The Fifth Circuit's reasoning in *Hill* (and the remaining cases cited by Movants) has no application to this case, where Movants assert a *pattern of conduct* that, taken as a whole, reveals both the appearance of bias and actual animus towards Movants. *See Davis v. Board of School Com'rs of Mobile Cnty.*, 517 F.2d 1044, 1051 (5th Cir. 1975) (grounds for recusal exist "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party"). Nor is this a situation where Movants have employed a "wait and see" approach and only sought recusal after an adverse judgment. As HCMLP itself argues, nothing in this case is "final," the Kirschner litigation (which the Court has recommended it should retain through trial) is in its nascent stages, the Court continues to preside over several other adversary proceedings involving Movants, and the Plan allows the Court to sit as gatekeeper over any potential disputes

[18] The entirety of the case law cited by HCMLP is similarly inapposite. In each of those cases, there was a single alleged basis for recusal, either the judge's personal relationship with one of the parties or the judge's economic interest in the outcome of the litigation. *See Sanford*, 157 F.3d at 988 (recusal based on fact that one party's counsel previously testified against judge); *United States v. Olis*, 571 F. Supp. 2d 777, 783 (5th Cir. 2008) (recusal based on judge's alleged social contacts with interested parties); *Grambling Univ. Nat'l Alumni Ass'n v. Bd. of Supervisors for La. System*, 286 F. App'x 864, 867 (5th Cir. 2008) (recusal based on court's prior working relationship with counsel, a former judge of the same court); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994) (recusal based on judge's social contacts with interested parties); *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) (recusal based on judge's knowledge of extrajudicial facts as a result of familial relationship with one party); *Delesdernier v. Porterie*, 666 F.2d 116, 122 (5th Cir. 1982) (recusal based on court's prior working relationship with counsel).

even touching upon the Plan. Movants seek recusal now because the Court's bias and animus represents a *continuing and ongoing harm* that can only be remedied if a non-biased fact-finder presides over the myriad proceedings still before the Court. There is no timing issue under these circumstances.

Further, HCMLP's contention that concerns of judicial economy render the Renewed Motion untimely is also wrong. As Movants explained in their opening brief, the goal of 28 U.S.C. § 455 is to promote public confidence in the judicial system by avoiding *even the appearance* of partiality. *See* Renewed Mot. at 19-20; *see also Levitt v. Univ. of Texas at El Paso*, 847 F.2d 221, 226 (5th Cir. 1988). For that reason, courts addressing this issue have consistently chosen impartiality over judicial economy, including in cases where recusal was sought only on remand after trial. *See* Renewed Mot. at 23 & n.122 (citing cases). As these courts have explained, "the gain in protecting against actual bias, prejudice, or conflict of interest outweighs the loss to judicial economy . . ." *See, e.g.*, *York*, 888 F.2d at 1055. Judicial economy is not more important than impartial justice and certainly is no reason to deny the Renewed Motion.

B. Movants Do Not Rely On Extrajudicial Bias, Nor Is It Required For Recusal

HCMLP next contends that the "core" of the Renewed Motion is extrajudicial bias, which it claims does not exist. Obj., ¶ 113. This is a gross mischaracterization of Movants' arguments. Movants expressly do not rely on extrajudicial bias as the basis for recusal, nor is extrajudicial bias a prerequisite to recusal, as Movants explained in their opening brief. *See* Renewed Mot. at 20 n.102, 103. Rather, in *Liteky*, a case on which HCMLP principally relies, the Supreme Court clarified that extrajudicial bias, while a common basis for establishing grounds for recusal, is not the exclusive means. *Liteky v. United States*, 510 U.S. 540, 551, 554 (1994) ("The fact that an opinion held by a judge derives form a source outside judicial proceedings is not a *necessary* condition for 'bias or prejudice' recusal, since predispositions developed during the course of a

trial will sometimes (albeit rarely) suffice."). It bears repeating that "judicial remarks during the course of a trial" that "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible," *will* support a bias or partiality challenge. *Id.* at 555; Renewed Mot. at 21. The Fifth Circuit recognized this "pervasive bias" exception to the extrajudicial bias doctrine even before *Liteky*. *See Davis*, 517 F.2d at 1051.

In any event, as HCMLP acknowledges, Movants do point to at least one instance in which the Court relied on an extrajudicial source—a news article that the Judge read—to make inquiries about whether HCMLP applied for or received COVID-related Payroll Protection Plan ("PPP") loans. Obj., ¶ 46 n. 64. HCMLP nonetheless argues that the Court's reliance on an extrajudicial source is not evidence of bias because the Court took no action against Mr. Dondero or Movants and only required HCMLP to respond to the Court's inquiries. *Id.* HCMLP misses the point. The reason that Movants cite this particular example is because the Court raised the issue of PPP loans only because of the Court's unfavorable perception (untethered to any factual basis) of Mr. Dondero. Specifically, the Court stated that it had "extrajudicial knowledge thanks to keeping up with current events" and openly questioned in Court whether "Mr. Dondero or Highland affiliates" *improperly* obtained PPP loans.[19] An exchange then occurred between the Court and HCMLP's counsel in which HCMLP's counsel represented that the Debtor had not obtained a PPP loan but that he had "no way of answering" whether "Mr. Dondero, or any of his affiliated funds" had done so.[20] As a result, the Court required Debtor's counsel to investigate whether any such loan had been obtained and to report back to the Court, explaining "you can probably imagine the different things going through my brain," and clarifying, "I'm not expecting it to be Highland Capital

[19] Movants' App'x, Ex. E at 42:10-20.

[20] *Id.* at 42:25-43:22.

Management, LP."[21] In short, the Court directed HCMLP to investigate Mr. Dondero and his affiliates for suspected wrongdoing based on an admittedly extrajudicial source. That is evidence of bias based on an extrajudicial source that weighs in favor of recusal.

C. There Can Be No Doubt Of The Court's Antagonism For Movants

HCMLP next argues that there is no basis to find that the Court has demonstrated the degree of favoritism or antagonism necessary for recusal. Obj., ¶ 22. However, in making this argument, HCMLP cites little more than the Court's own subjective denial of bias. *See* Obj., ¶ 12 (quoting Court's statements that it has "the utmost respect for [Movants]" and "no disrespect for Mr. Dondero"); *id.* at ¶ 119 (noting the Court's characterization of its statements as mere "clashes between a court and counsel" that are "simply insufficient" for recusal). That cursory response ignores the substantial body of statements made by the Court throughout these proceedings, including statements where the Court accuses Mr. Dondero and his affiliates of wrongdoing (often based on little more than suspicion), describes them as bad actors, and determines that they lack credibility in virtually every situation in which they are called to give testimony.[22]

HCMLP's response also ignores the substantial body of case law cited in Movants' opening brief, which contain examples of bias warranting recusal that were far less egregious than what has occurred in this case. If, as HCMLP insists, the Court focuses on the "entirety of the proceedings" (Obj., ¶ 120), there can be no doubt that the Court's statements amount to much more than mere "clashes between a court and counsel." The Court's negative statements about Mr. Dondero and his affiliates are so consistent and pervasive that they have been regurgitated ad

[21] *Id.* at 43:13-22.

[22] *See, e.g.*, January 26, 2021 H'rg Tr. at 240:14-20 (The Court to Mr. Dondero: "But the more I hear, the more I feel you're just trying to burn the house down. Okay? Maybe it's an either/or proposition with you: I'll either get my company back or I'll burn the house down. That's what it feels like."); Confirmation Order, Dkt. 1943 at ¶ 19 ("[T]he Bankruptcy Court questions [the objectors'] good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero.").

nauseum by his detractors, adopted by HCMLP as a method of bolstering almost every argument it makes before this Court, and repeated by appellate courts even when this Court's statements do not amount to true "findings" of fact. By way of summary, the Court has:

- admitted that the negative opinions the Court formed about Mr. Dondero during the Acis Bankruptcy cannot be excised from the Court's mind;
- made repeated references to proceedings in the Acis Bankruptcy to justify findings in the HCMLP proceedings that are not otherwise supported by this bankruptcy record;
- made repeated negative statements about Mr. Dondero, as well as entities and individuals that the Court perceives to have some relationship to Mr. Dondero, in connection with the Court's ruling;
- repeatedly threatened Mr. Dondero and his counsel with sanctions, questioned Movants' good faith, or concluded Movants were acting in bad faith for simply: (1) defending lawsuits and motions; (2) asserting valid legal positions; and/or (3) preserving their rights, including in the exact manner in which others have been permitted to do so (e.g., the US Trustee's objections to the Plan);
- sanctioned Mr. Dondero in connection with a motion that he and others testified he had no role in filing or responsibility for authorizing;
- prophylactically sanctioned Mr. Dondero and other entities and counsel if and when they assert their lawful appellate rights;
- disregarded the presumption that related corporations have institutional independence and concluded, without supporting evidence, that any entity the Court demes to be connected to or controlled by Mr. Dondero (i.e., including highly regulated, publicly-traded funds governed by independent boards) is essentially no more than a tool of Mr. Dondero;
- disregarded the testimony of any witness with a connection to Mr. Dondero as per se less credible, which includes attorneys and persons who owe fiduciary duties and ethical obligations; and
- ruled against Mr. Dondero and Movants at ever possible opportunity, regardless of the evidence and the testimony before the Court.

In its Renewed Motion, Movants cited the Court to several cases in which the courts held that the same type of obvious antagonism displayed here was sufficient to require recusal. Renewed Mot. at 7 n.32, 9 n.40, 22 n.114. HCMLP does not attempt to address those cases, much

less distinguish them. And many of those cases involve much less antagonism than what is at issue here. *See e.g.*, *Johnson v. Sawyer*, 120 F.3d 1307, 1334-38 (5th Cir. 1997) (appearance of bias found based on judicial remarks like: the court had a "bone to pick" with the Internal Revenue Service; questioning the witness's integrity because the testimony contradicted the court's prior order; expressing concern post-trail about the conduct of the lawyers; attributing assertions to the wrong counsel); *Sentis Grp., Inc., Coral Grp., Inc. v. Shell Oil Co*, 559 F.3d 888, 904-05 (8th Cir. 2009) (a "sufficiently high degree of antagonism" was found where the court directed profanities at Plaintiffs or Plaintiffs' counsel, denied Plaintiffs a meaningful opportunity to respond to Defendants' argument that misconstrued the court's prior orders, and dismissed Plaintiff's attempt to explain those orders); *see also United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (noting "the district judge's failure to accord any weight to Microsoft's interests in making its determination adds to the appearance of bias in this case").

The test for disqualification is simple: would it appear to a reasonable person that the court's impartiality may be questioned? 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (2001). A cursory review of the record from these proceedings makes the answer to that question an easy "yes" here. The Court's orders targeting Mr. Dondero (and those the Court deems associated with him) compromise the appearance of justice. *Rorrer v. City of Stow*, 743 F.3d 1025, 1049-50 (6th Cir. 2014) (finding the appearance of impartiality from the court's issuance of a one-sided discovery order that limited the number of witness plaintiff may call without explanation or apparent rationale). So do the Court's consistent expressions suggesting it has already decided Mr. Dondero is a bad actor. *See Matter of Johnson*, 921 F.2d 585, 587 (5th Cir. 1991) (judge abused discretion in declining to recuse where the record included statements that the judge "all but made up [his] mind as to what he was going to do in the case and

that he was "not in the least inclined to be neutral"); *United States v. Bergrin*, 682 F.3d 261, 283-84 (3d Cir. 2012) (the court's repeated expressions of discomfort with the manner in which an indictment was plead allowed the court's impartiality to reasonably be questioned); *United States v. Whitman*, 209 F.3d 619, 625-26 (6th Cir. 2000) (the court's impromptu lecture of defendant's counsel's attitude during proceedings "had the unfortunate effect of creating the impression that the impartial administration of the law was not his primary concern"). Viewed wholistically, this record is more than sufficient to raise the appearance of partiality.

D. HCMLP Mischaracterizes The Alternative Relief Sought By Movants

Finally, HCMLP argues that this Court has no authority to grant Movants' request to issue a ruling on Movants' Renewed Motion that eliminates the retention of jurisdiction language that appeared in the Court's prior order denying recusal. According to HCMLP, "it is not for this Court to determine whether its orders are final and appealable," and the Court "has no authority" to enter an order of the type requested by Movants. Again, HCMLP mischaracterizes the relief sought by Movants and is wrong.

Contrary to HCMLP's argument, Movants do not expect (and do not ask) this Court to make any *ruling* that its order on recusal is final, or to otherwise include language of finality. Movants merely ask the Court to *eliminate* any existing "reservation" language that could be construed by an appellate court as rendering the order non-final on the issue. As Movants have now explained multiple times, when Movants appealed this Court's denial of their original motion to recuse, the District Court held it lacked jurisdiction to consider the appeal because the Bankruptcy Court's ruling was non-final. *See* Renewed Mot. at 2 & n.6; *see also* Movants' App'x, Ex. U at 5:11-6:9. In describing the Bankruptcy Court's order, the District Court expressly noted the last sentence of that order, in which the Bankruptcy Court "reserve[d] the right to supplement or amend th[e] ruling." *Id.*; *see also Dondero v. Hon. Stacey G. Jernigan*, Civ. Action No. 3-21-

CV-0879-K, Dkt. 39 at 2. HCMLP itself argued on appeal that this reservation of rights language was important and impeded finality because "Judge Jernigan's potential future supplementation or amendment of the Recusal Order 'might change the calculus' of the order." *See id.*, Dkt. 31 at 5. Movants simply ask this Court to remove any perceived impediment to appellate review.

For that reason, HCMLP's argument that the Court does not have authority to give the alternative relief requested by Movants makes no sense. This Court can obviously craft its orders using whatever language (or eliminating any language) it sees fit. That is all Movants ask the Court to do. HCMLP's final argument should be rejected.

IV. CONCLUSION

It is time to put motion practice relating to recusal to an end. Movants respectfully request that the Court consider the *entirety* of the record supporting recusal and issue an order on Movants' motion that accounts for the lengthy history of this case and the whole body of evidence presented. Movants also request that the Court issue an order that does not contain reservation of rights or other limiting language that could be later interpreted by an appellate court as an impediment to appellate jurisdiction.

Dated: December 15, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 15, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT 8

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Debtor.	Chapter 11 Case No. 19-34054 (SGJ) 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, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

MOVANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

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, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "Movants") file this *Supplemental Memorandum of Law in Support of Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455,* supplementing their Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455 (the "Amended Renewed Recusal Motion") [DE # 3570-3571.1] with information regarding two books published by Judge Jernigan, which Movants recently learned about and read. Those books, which were written and published while the Court was presiding over the bankruptcies of Acis Capital Management, L.P., Acis Capital Management GP, LLC, and HCMLP (the "Bankruptcy Proceedings"), contain derisive commentary about financial industry executives, the financial industry generally, and the financial instruments specifically at issue in HCMLP's bankruptcy.

Further, the second novel appears based on Judge Jernigan's experiences with HCMLP and Mr. Dondero in the Bankruptcy Proceedings.

On February 27, 2023, Highland Capital Management Fund Advisors, LP filed a motion to recuse in the case styled: *In re: Highland Capital Management LP*, case number 21-03076, in the U.S. Bankruptcy Court for the Northern District of Texas. As addressed in that motion, the two novels at issue contain highly antagonistic statements about the hedge fund industry, hedge fund managers, and the same investment vehicles that the Court knows HCMLP managed pre-petition. While the Court claims at the outset of each novel that they are works of fiction, there can be little doubt, under the circumstances, that the books are based upon Judge Jernigan's experiences as a sitting bankruptcy judge—and, in particular, from the Court's experience presiding over the Bankruptcy Proceedings.

The first novel, *He Watches All My Paths*, was released on January 3, 2019, just weeks before the Court confirmed the joint bankruptcy plan of Acis Capital Management, L.P. and Acis Capital Management GP, LLC (collectively, "Acis")—companies for which Mr. Dondero served as CEO and for which HCMLP performed certain management services prior to Acis's bankruptcy. Against that backdrop, the book describes the financial industry as being dominated by "[h]igh flying hedge fund managers" that "suck up money like an i-robot vacuum" and seem to "make money no matter what" and who routinely show "outrageous amounts of hubris" as part of their "bro culture." Moreover, the novel's central protagonist, a Dallas federal bankruptcy judge, suspects that the death threats she is receiving are coming from a hedge fund manager that has previously appeared in her court.

The second novel, *Hedging Death*, was released in March 2022, less than a year after HCMLP's Plan became effective and while the Bankruptcy Proceedings were still ongoing.

Hedging Death invokes even more details from the Bankruptcy Proceedings. Again, the central protagonist of the novel is a Dallas bankruptcy judge, and the protagonist's husband is, like Judge Jernigan's husband, a retired police officer and private investigator.[1] The story involves a Dallas hedge fund manager who is described as a reckless investment manager and vexatious litigant—the same language that the Court has described Mr. Dondero in the Bankruptcy Proceedings. The investment firm in the novel is called *Ranger* Capital and is experiencing economic distress largely due to extensive litigation stemming from bad investments. Notably, HCMLP's original name was *Ranger* Asset Management, as is prominently disclosed on the website of Mr. Dondero's investment firm NexPoint and which has been mentioned in other filings in the Bankruptcy Proceedings. In addition, HCMLP, like the "fictitious" Ranger Capital, initially sought chapter 11 protection because of investor litigation. The similarities do not stop there. In the novel, Ranger Capital, like HCMLP, is a "multi-billion dollar conglomerate, which manage[s] not just hedge funds but private equity funds, [collateralized debt obligations], CLOs, REITs, life settlements, and all manner of complicated financial products." HCMLP and its affiliates managed hedge funds, private equity funds, CDOs, CLOs,[2] REITS, life settlement portfolios, and private investment accounts for institutions around the world—exactly the same unusual mix of investments at issue in the second "fictional" novel.[3] There can be no question that the basis for this mix of investments is derived from the Court's work in Acis and Highland Bankruptcies.

[1] *See Hedging Death*, back cover.
[2] Notably, Highland was a pioneer that launched one of the first ever CLOs and was the world's largest CLO manager for years.
[3] Notably, there are no other enterprises in Dallas that manage this mixture of product types. Moreover, this mixture includes products not normally found at the same firm because they (1) require divergent skill sets and teams to manage, (2) usually have significantly different time horizons for asset realization (which require a diverse base of investors with different timing needs), and (3) have limited overlap in which managed funds can take investments, such as CLOs and CDOs (which only can invest in debt), private equity (which is equity only), and REITs (which are real-estate only). Consequently, firms normally do not manage combinations of CLO and CDOs on one hand and REITs and private equity on the other, or products that are regarded as esoteric even within the finance community, such as life settlements portfolios.

Indeed, even financial hubs such as New York and Los Angeles have only a limited number of firms with the mixture of products found at HCMLP.[4] Notably, the novel describes the life settlement industry—an industry the Court knows that HCMLP and Mr. Dondero invested in—as "creepy," "immoral," "unethical," and "should be illegal."

In short, Judge Jernigan's writings, which any reasonable person would agree appear patterned after Mr. Dondero, are additional evidence that the Court harbors exceedingly negative views about hedge fund managers and the hedge fund industry, generally, as well as Mr. Dondero specifically. At the very least, the commentary made in the novels about the financial managers, the financial industry, and the financial products at issue would lead a reasonable observer to question the Court's impartiality in these Bankruptcy Proceedings, mandating recusal.

In short, the Court's negative opinions of Mr. Dondero, Movants, and their perceived affiliates—as set forth in the Amended Renewed Recusal Motion and as reflected by the Court's commentary in two recently-published novels—reveal a high degree of antagonism, which makes it nearly impossible for Mr. Dondero and the Affected Parties to fully defend themselves and assert their rights in this forum, including in connection with claims filed against Mr. Dondero and Affected Parties. At a minimum, that is the perception that has been created.[5]

Movants hereby supplement the Amended Renewed Recusal Motion. In doing so, pursuant to 28 U.S.C. § 455, Movants respectfully request the Court, after considering the Amended Renewed

[4] Highland's unique history created this diversity of product types. Highland primarily was a CLO manager that then created hedge funds to house its purchase of CLO equity tranches. Highland only opened its private equity funds when, in the 2008 financial crisis, bankruptcies forced many of the CLO's debt positions to convert to equity. Highland created REITs because Dondero made personal investments in real estate, and a transactional lawyer hired in the legal department evidenced a flare for real estate investments which proved successful enough to support a REIT business. Life settlements also were the idea of a single analyst from another business unit to whom Dondero gave an opportunity. The Highland mixture of products likely exists only at a sprawling firm that invests in almost all asset types, or but not at any other founder-managed mid-size firm.

[5] *Liteky v. United States*, 510 U.S. 540, 551 (1994); *In re Kansas Pub. Employees Retirement Sys.*, 85 F.3d 1353, 1358 (8th Cir. 1996).

Recusal Motion and this Supplement thereto, grant their Motion and recuse herself from presiding over this proceeding. In the alternative, Movants hereby request that the Court make clear that any order denying recusal is final on the issue so that Movants may pursue any appellate remedies that exist, including mandamus.

Dated: March 3, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 3, 2023, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT 9

Hedge Fund Alert
THE WEEKLY UPDATE ON FUND MANAGEMENT INTELLIGENCE

FEBRUARY 1, 2023

THE GRAPEVINE

Ivan Chee has signed on with **Millennium Management** as a senior portfolio manager. A quantitative specialist who trades mortgage products, Chee started at the New York multi-strategy firm in January. He previously spent more than six years at **Squarepoint Capital,** where his coverage included commercial mortgage-backed securities and related products, including derivatives and risk-transfer bonds. Chee earlier mined the asset class at **Premium Point Investments** and **Morgan Stanley.** Millennium manages $58 billion.

Ron Biscardi is in the midst of holding his largest conference ever at the Fontainebleau Miami Beach hotel this week, with the **iConnections** event expanding into the Eden Roc Miami Beach hotel next door. Nearly

See GRAPEVINE on Back Page

Equity Firm Led By Conatus Alum Shuts Down After Failing to Recover From Tech-Stock Swoon

A brutal first half last year appears to have undone **Emerson Point Capital,** with multiple sources saying the Larchmont, N.Y., equity shop recently closed its doors.

Emerson Point, led by former **Conatus Capital** portfolio manager **Amir Mokari,** generated strong returns over its first four years of operation, but last year's rout in growth stocks – and particularly technology shares – led to steep losses in all three of its funds. The firm, which managed $825 million of gross assets as recently as July, terminated its **SEC** registration on Jan. 26. The operation appears to have spent the latter half of 2022 unwinding its positions.

See EMERSON POINT on Page 7

Maounis Steers Verition to Fast-Growing AUM, Solid Performance Amid Hiring Binge

Buoyed by inflows and performance gains, **Verition Fund Management** continues to add staff at a blistering pace emblematic of the biggest hedge find giants.

The Greenwich, Conn., multi-strategy firm has hired at least 107 people in the past 12 months, including five portfolio managers in November alone and dozens of other investment professionals during the year.

The firm employed 220 people, including 135 investment pros, at yearend 2021 – up 115 total employees and 76 investment professionals from yearend 2020. Its investment professionals now number more than 200.

Verition, which has never had a down year since it began trading in 2008, also boosted its assets under management by 40% in 2022, from $4.8 billion to $6.7 billion.

See VERITION on Page 7

In Wild Crypto Field, Hunting Hill Revamps Plan, Delays DeFi Launch, Eschews Genesis Vets

Hunting Hill Global Capital has retooled the planned expansion of its digital-asset products, including delaying the launch of a fund and nixing the possible hire of two key staffers.

The move follows continuing upheaval in the cryptocurrency industry, including the Jan. 20 bankruptcy of **Genesis Global Holdco,** a major lender where the would-be employees last worked. A third Genesis alumnus who signed on with Hunting Hill remains there.

The $700 million hedge fund manager had sought to launch two products this quarter within a new digital-asset trading unit that would also take over management of Hunting Hill Global's existing $42 million market-neutral crypto fund.

See HUNTING HILL on Page 8

Niederhoffer... From Page 3

that we want to address in our program, and it also has the impact of increasing our overall expected return even if none of these tail-risk scenarios occur," he said.

Based in Sunny Isles, Fla., R.G. Niederhoffer has more than $900 million under management. In addition to the flagship, it runs R.G. Niederhoffer Short Alpha, a UCITS vehicle linked to that strategy, and R.G. Niederhoffer Emerald.

Niederhoffer founded the firm in 1993 following a five-year run at hedge fund shop **Niederhoffer Investments,** headed by his brother, **Victor Niederhoffer.**

"I wouldn't normally be making a big deal over it," Roy Niederhoffer said about his inflation concerns. "[But] whether or not people invest with us in this fund, it's a message that everyone needs to hear, a risk factor everyone needs to consider." ■

Bankruptcy Litigant: Recuse Novelist Judge

A U.S. bankruptcy proceeding in Texas involving hedge fund operator **Highland Capital Management** has gotten so contentious that one of the founders, **James Dondero,** is pressing the judge to recuse herself from the case.

Dondero says Judge **Stacey G.C. Jernigan** has labeled him "vexatious" and "litigious" and called Dallas-based Highland a "ruinous web," according to a motion for recusal. Her alleged animus stems from a previous case tried in her court involving Dondero, according to the motion, which was filed in September but which has not been previously reported.

Meanwhile, in a strange coincidence, Jernigan has penned a crime thriller portraying the sordid details of a fictional Dallas credit-fund manager that she says is not based on Dondero, though the firm's name in the novel is nearly identical to the name of an investment shop Dondero previously ran.

Dondero initially tried to get the judge to recuse herself in March 2021, a motion denied by Jernigan. Dondero followed in September 2022 by leveling several allegations, though he did not refer to Jernigan's novel.

"The Court's animus toward Movants [Dondero and affiliated parties] is so evident, persistent, and severe that Movants cannot receive fair treatment or justice in this Court," according to the 2022 motion. Jernigan, according to the filing, accused Dondero of "carpet-bombing us with paper and causing to expend resources," labeling Dondero as "vexatious" and "litigious" and calling him a bad actor. She also characterized Highland Capital as a "Byzantine empire" and "ruinous web," according to the filings.

"These accusations – which, to be clear, is all they are – have no basis in the realities of HCMLP's [Highland Capital's] business or Mr. Dondero's management of it," the filing states.

Highland, whose assets peaked in 2007 at around $40 billion, was a credit shop founded in 1998 by Dondero and **Mark Okada.** Dondero now runs Dallas real estate investment shop **NexPoint Advisors,** which he started in 2012. Okada is now founder of **Sycamore Tree Capital** in Dallas.

Highland's hedge fund, Highland Crusader Fund, experienced severe losses in 2007 during the credit crisis, and its managers took steps similar to other credit-oriented hedge funds in that era, including the suspension of investor redemptions.

Highland became enmeshed in a frenzy of litigation, eventually filing for Chapter 11 bankruptcy protection a decade later in 2019 in **U.S. Bankruptcy Court** in Wilmington, Del. Highland took the drastic step "to bring its numerous long-running legal dramas to a close," according to a 2020 article in **Institutional Investor** headlined "Nothing Can Stop This Hedge Fund Soap Opera."

An independent three-person board, the Unsecured Creditors Committee, was formed with distressed-debt specialist **James Seery** emerging as chief executive and chief reorganization officer in July 2019. The venue of the bankruptcy was moved to Texas in January 2020 at the behest of the creditors committee.

The issue for Dondero is that he had been part of a previous bankruptcy case in the same court. That first case, his lawyers insist, spawned the judge's alleged animus toward Dondero.

That case involved **Acis Capital Management,** which managed a $100 million portfolio of collateralized loan obligations. Dondero, whose Highland was providing services to Acis, was also chief executive of Acis.

"Following transfer [to Texas], this Court foreshadowed that it would rely on the negative opinions it formed during the Acis Bankruptcy in dealing with Mr. Dondero, his former employees, and his affiliated entities," the filing says.

Jernigan, who declined to comment on the pending case, moonlights as a novelist. Her latest legal thriller, "Hedging Death," was published last March even as the case, first filed in her court in 2020, is ongoing.

In the novel, Jernigan's protagonist, Judge Avery Lassiter, is embroiled in a story of "death, debt, and deception in Dallas," according to one advertisement.

A major character in the book is wealthy Texas hedge fund manager Cade Graham, who is suspected of insurance fraud and is believed to have faked his own death. Graham is described in the novel as "a well-known playboy and high-flying Dallas hedge fund manager."

"Graham was the founder and CEO of Dallas-based Ranger Capital, a multibillion-dollar conglomerate, which managed not just hedge funds but private equity funds, CDOs, CLOs, REITs, life settlements and all manner of complicated financial › See HIGHLAND on Page 5

Highland... From Page 4

products," a description of the novel reads.

A Highland Capital predecessor firm was called **Ranger Asset Management.** Separately, a Dallas firm unaffiliated with Highland or Dondero is called **Ranger Capital Group,** which runs traditional and alternative investment funds.

Traci Ellison, a courtroom deputy for Jernigan, said the judge "wanted me to share that no characters of any of her books are based on Mr. Dondero or any other actual person in a pending case. Her books are legal fiction."

Jernigan has a history of drawing criticism. In an unrelated bankruptcy case – Cadle Co. vs. Brunswick Homes, et al. – she was chastised by the **U.S. Court of Appeals** for the Northern District of Texas in 2014. The appellate court said it was "troubled by the bankruptcy court's use of indirect inferences," alleging Jernigan let her personal views and unfounded suspicions cause her to draw incorrect conclusions. ■

Shikuma Touts New Tech, Same Strategy

Shikuma Capital is enhancing its investing technology to take full advantage of its short-term discretionary tactical-trading ideas.

Although Shikuma's strategy continues to have a high annualized return of 15% since inception in August 2018 – substantially higher than the 5.9% annualized return of the HFRI Macro Total Index – last year the firm missed a big surge among global-macro funds. Shikuma's hedge fund was down 12.5% in 2022, while the HFRI index was up 9%.

In part, last year's slump was because the London firm has yet to set up, for its short-term discretionary tactical-trading book, an application trading interface, or API. The API would allow the firm to quickly seize on advantageous times to get in and out of trades.

Shikuma now expects to have an API in place within the next several weeks. It will allow the firm to grow its short-term tactical-trading book from about 3% to 5% of Shikuma's total assets to, over time, as much as 20% of its portfolio. The strategy is heavily dependent on pricing data, including breakout, mean reversion and other pattern analyses conducted by Shikuma.

The firm launched a commingled fund in 2021 and is now trading about $22 million of partner and investor capital.

In all, about a third of the firm's assets are in discretionary strategies, with the rest systematically traded via algorithms based on pricing or economic models. The firm plans to, over time, bring that to a 50-50 split, although that may change depending on market conditions.

Despite the plan to increase its discretionary book and the losses its systematic book cost it last year, Shikuma believes it's on the right track with its algorithmic models.

The firm wrote in a Jan. 10 letter to investors that now is not the time to change its approach to systematic investing.

"Our Asset Allocation models are rooted in fundamental principles – i.e., the impact that inflation, momentum, and liquidity have on assets' returns – and we believe that these are unlikely to change . … While there is always a margin for improvement and lessons to be learned, we believe that 2022 was simply a bad year and that sticking to our Asset Allocation strategy will start paying off before too long," Shikuma wrote. "Historical precedents suggest that when it does, it tends to do so with dividends."

Shikuma's correlation to other indexes, including other global-macro funds, is very low – only a 0.29 correlation to the HFRI Macro Index, for instance, and a 0.15 correlation to the S&P. The strategy also has handily beat the annualized return of the S&P 500 – which is 9.2% from August 2018 through yearend.

Shikuma was founded in 2020 by four executives, of whom two, chief investment officer **Tommaso Mancuso** and co-portfolio manager **Marco Tosi,** each spent 12 years at **Hermes Investment Management.** That entity is now known as **Federated Hermes** following Hermes Investment's purchase of **Federated Investors** in 2018. The combined entity managed $669 billion at yearend.

Mancuso headed and established a multi-strategy trading unit at Hermes in 2014 and earlier headed portfolio management at Hermes BKP, a $2.5 billion fund-of-hedge funds business. He joined Hermes in 2008 and earlier worked at **Pioneer Alternative.** Tosi worked with Mancuso as head of risk and quant for the multi-asset division and also worked at Hermes BKP and Pioneer Alternative.

While Shikuma's hedge fund launched in October 2021, the firm's trading strategies began while Mancuso and Tosi were still with Hermes. They had sought to launch the strategy at that firm, but Hermes was then, and remains, focused on investment strategies that embody environmental, social and governance issues.

So, Mancuso and Tosi's global-macro strategy couldn't fit within Hermes' ESG mandates. As a result, they were able to take their trading models and track record from Hermes and use it to form Shikuma. Until they launched their hedge fund, they had been running capital via separate accounts at Hermes and Shikuma.

Shikuma's other two co-founders are **Thomas Pontin** and **Anna McCutcheon.** Pontin previously headed sales and marketing for **ADG Capital** and also worked at **Harmonic Capital** and **Fulcrum Asset Management.**

McCutcheon previously founded her own systematic proprietary trading firm, **Nublu Investments,** and earlier headed asset-raising and was a portfolio manager for both **Fortelus Capital** and **Tisbury Capital.** ■

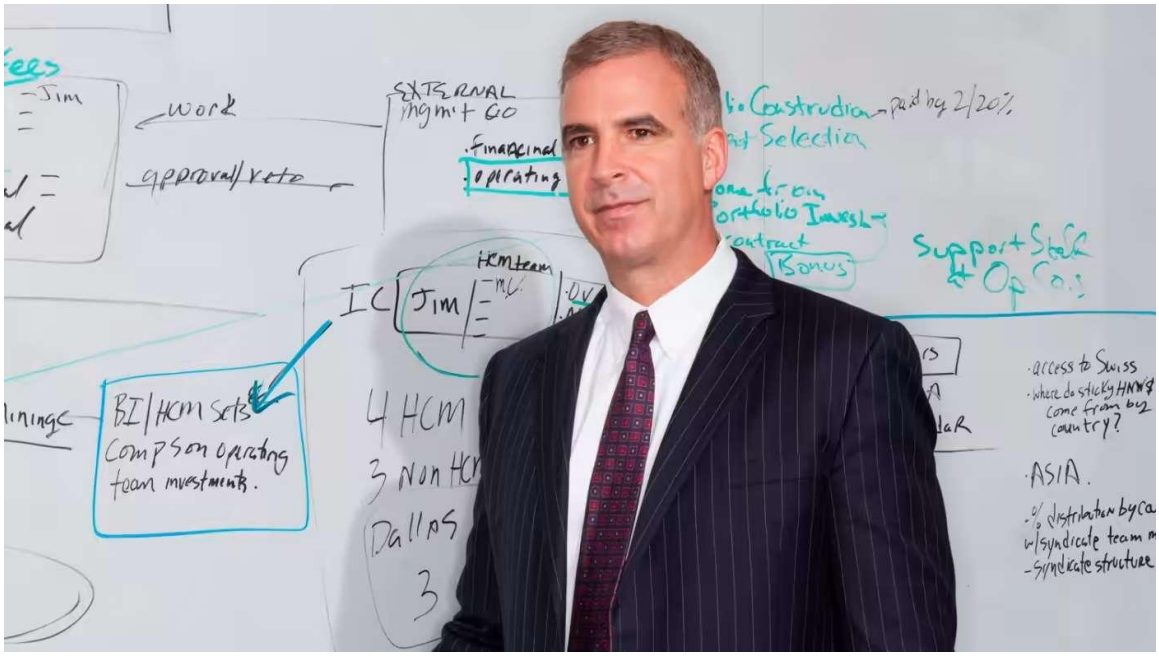
EXHIBIT 10

Opinion **On Wall Street**

Highland court saga tests fact vs fiction

Dallas judge's novel that features a financier is raised in court battle

MARK VANDEVELDE



Jim Dondero in 2011 © Brent Humphreys

Mark Vandevelde 7 HOURS AGO

Jim Dondero, the distressed debt investor who was once a scourge of private equity, is the kind of hard-charging financier you might read about in a novel. In fact, Dondero thinks it possible that you have read about him in a novel — one that, strikingly, was written by a federal judge who is overseeing the bankruptcy of Highland Capital Management, his once high-flying investment firm.

Highland's rise and messy fall is a story for the ages. During the go-go years, visitors to Dondero's Dallas office reported that the staff there worked under the glassy gaze of animals that he had shot dead from his porch. The firm raked in billions of dollars of capital in the years before 2008, investing some of it on consumer debt, real estate, even unwanted life insurance policies. Its core business, though, was owning the debt of companies that had been bought by private equity firms.

Dondero's enthusiasm for private equity was sometimes unrequited. Some of the biggest US buyout firms grew so tired of their shouting matches with his underlings that they tried to freeze Highland out of owning debt issued by the companies they bought. Yet the firm was difficult to avoid, and had a reputation for being quick to threaten legal action when deals went wrong. In one celebrated case, Highland reportedly delivered its demands to a recalcitrant borrower with a 10-minute ultimatum, and a warning that the firm already had a representative stationed outside a nearby bankruptcy court.

When the financial crisis struck, Dondero enjoyed a glimpse of the bonanza. His firm held some of the debt issued by Metro-Goldwyn-Mayer in connection with its ill-fated 2004-05 buyout by a consortium that included Texas Pacific Group. The deal soured, and Highland ended up owning a slice of the movie studio.

Distressed debt investors have only grown more influential since then, with about $272bn under management as of last year, according to a tally maintained by Preqin, more than double the amount 10 years earlier.

But Highland was not among the victors of the financial crisis. Its flagship vehicle, the Crusader fund, closed to investors in 2008 after suffering losses, triggering battles that are still echoing across American courtrooms. Perhaps it is the endless fighting, or perhaps it is just the passage of time, but Dondero looks less youthful now. According to a person who works with him, his hair has turned greyer.

After losing a legal skirmish with investors, Highland Capital Management entered bankruptcy in 2019. Initially filed in Delaware, the Highland case became a page-turner after it moved to a Dallas court, where judges are less frequently called upon to deal with complex corporate bankruptcies.

Dondero, who resigned as a director after a negotiation with creditors, grew unhappy with the proceedings. US bankruptcy judge Stacey Jernigan took exception to Dondero's conduct, too, twice ruling him in contempt of court. Jernigan imposed sanctions of nearly $240,000 on Dondero and others over one of those incidents, warning that if they appealed against her ruling and lost, she would hit them with $100,000 more.

What began as a routine business dispute has, over time, become something more poetic. Dim the courtroom lights, and you would have a real-life Texas noir.

One wonders whether that thought ever occurred to Jernigan, who is not only the bankruptcy court's chief judge but also a part-time author. Her most recent novel, *Hedging Death*, features a fund manager named Cade Graham. Her fictitious financier buys an eclectic range of assets, from commercial debt to life insurance policies whose original owners no longer want them — a trade that one character calls "creepy". "His boyish brown hair had turned silver," Jernigan writes of Graham, "and his sun-kissed smooth skin had grown weathered."

In a ruling handed down this week, in which she denied Dondero's request that she step aside on grounds of bias, Jernigan was emphatic: her novel, she wrote, was "entirely fiction", and "not about Mr Dondero or the hedge fund industry". In the story, she points out, Graham fakes his own death in Mexico after linking up with drug cartels. He is a Princeton graduate. (Dondero holds a degree from the University of Virginia.)

Authorial intention is a slippery notion but it is striking that a close observer of the distressed debt industry should devise an unappealing character whom Dondero sees as "patterned after" himself. Jernigan insists that any resemblance to actual people, living or dead, "is entirely coincidental".

mark.vandevelde@ft.com

EXHIBIT 11

EXHIBIT F

EXECUTION VERSION

THIRD AMENDED AND RESTATED
SHARED SERVICES AGREEMENT

This Third Amended and Restated Shared Services Agreement (this "***Agreement***") by and among Highland Capital Management, L.P., a Delaware limited partnership ("***HCMLP***"), and Acis Capital Management, L.P., a Delaware limited partnership ("***Acis***"), and any affiliate of Acis that becomes a party hereto, is dated effective as of January 1, 2016 (the "***Effective Date***"). Each of the signatories hereto is individually a "***Party***" and collectively the "***Parties***".

RECITALS

WHEREAS, the Parties entered into that certain Second Amended and Restaed Shared Services Agreement dated January 1, 2015 (the "***Prior Agreement***"); and

WHEREAS, the Parties now desire to amend and restate the Prior Agreement in its entirety as set forth herein.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the Parties agree, intending to be legally bound, that the Prior Agreement is amended and restated in its entirety to read as follows:

ARTICLE I
DEFINITIONS

"***Actual Cost***" means, with respect to any period hereunder, one hundred percent (100%) of the actual costs and expenses caused by, incurred or otherwise arising from or relating to (i) the Shared Services and (ii) the Shared Assets, in each case during such period.

"***Affiliate***" means a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified Person. The term "***control***" (including, with correlative meanings, the terms "***controlled by***" and "***under common control with***") means the possession of the power to direct the management and policies of the referenced Person, whether through ownership interests, by contract or otherwise.

"***Agreement***" has the meaning set forth in the preamble.

"***Allocation Percentage***" has the meaning set forth in Section 4.01.

"***Annual Revenue***" means for any fiscal year the aggregate revenue of HCMLP or Acis, as applicable, on a consolidated basis as reflected on its audited financial statements for such fiscal year.

"***Applicable Margin***" shall mean an additional amount equal to 5% of all costs allocated by Service Provider to the other parties hereto under Article IV Sections 4.01(a) and 4.01(b); provided that the parties may agree on a different margin percentage as to any allocation item or items to the extent the above margin percentage, together with the allocated cost of such item or service, would not reflect an arm's length value of the particular service or item allocated.

"***Change***" has the meaning set forth in Section 2.02(a).

"***Change Request***" has the meaning set forth in Section 2.02(b).

"***Code***" means the Internal Revenue Code of 1986, as amended, and the related regulations and published interpretations.

"***Effective Date***" has the meaning set forth in the preamble.

"***Governmental Entity***" means any government or any regulatory agency, bureau, board, commission, court, department, official, political subdivision, tribunal or other instrumentality of any government, whether federal, state or local, domestic or foreign.

"***Indemnified Party***" has the meaning set forth in Section 8.03.

"***Indemnifying Party***" has the meaning set forth in Section 8.03.

"***Liabilities***" means any cost, liability, indebtedness, obligation, co-obligation, commitment, expense, claim, deficiency, guaranty or endorsement of or by any Person of any nature (whether direct or indirect, known or unknown, absolute or contingent, liquidated or unliquidated, due or to become due, accrued or unaccrued, matured or unmatured).

"***Loss***" means any cost, damage, disbursement, expense, liability, loss, obligation, penalty or settlement, including interest or other carrying costs, legal, accounting and other professional fees and expenses incurred in the investigation, collection, prosecution and defense of claims and amounts paid in settlement, that may be imposed on or otherwise incurred or suffered by the referenced Person; provided, however, that the term "***Loss***" will not be deemed to include any special, exemplary or punitive damages, except to the extent such damages are incurred as a result of third party claims.

"***New Shared Service***" has the meaning set forth in Section 2.03.

"***Notice of Claim***" has the meaning set forth in Section 8.03.

"***Party***" or "***Parties***" has the meaning set forth in the preamble.

"***Person***" means an association, a corporation, an individual, a partnership, a limited liability company, a trust or any other entity or organization, including a Governmental Entity.

"***Quarterly Report***" has the meaning set forth in Section 5.01.

"***Recipient***" means Acis and any of Acis' direct or indirect Subsidiaries or managed funds or accounts in their capacity as a recipient of the Shared Services and/or Shared Assets.

"***Service Provider***" means any of HCMLP and its direct or indirect Subsidiaries in its capacity as a provider of Shared Services or Shared Assets.

"***Service Standards***" has the meaning set forth in Section 6.01.

"***Shared Assets***" shall have the meaning set forth in Section 3.03.

"***Shared Services***" shall have the meaning set forth in Section 2.01.

"***Shared Services and Employees Agreement***" has the meaning set forth in the recitals.

"***Subsidiary***" means, with respect to any Person, any Person in which such Person has a direct or indirect equity ownership interest in excess of 50%.

"***Tax***" or "***Taxes***" means: (i) all state and local sales, use, value-added, gross receipts, foreign, privilege, utility, infrastructure maintenance, property, federal excise and similar levies, duties and other similar tax-like charges lawfully levied by a duly constituted taxing authority against or upon the Shared Services and the Shared Assets; and (ii) tax-related surcharges or fees that are related to the Shared Services and the Shared Assets identified and authorized by applicable tariffs.

"***Term***" has the meaning set forth in Section 7.01.

ARTICLE II
SHARED SERVICES

Section 2.01 Services. During the Term, Service Provider will provide Recipient with Shared Services, each as described more fully on **Annex A** attached hereto, the "***Shared Services***")

Section 2.02 Changes to the Shared Services.

(a) During the Term, the Parties may agree to modify the terms and conditions of a Service Provider's performance of any Shared Service in order to reflect new procedures, processes or other methods of providing such Shared Service, including modifying the applicable fees for such Shared Service to reflect the then current fair market value of such service (a "***Change***"). The Parties will negotiate in good faith the terms upon which a Service Provider would be willing to provide such New Shared Service to Recipient.

(b) The Party requesting a Change will deliver a description of the Change requested (a "***Change Request***") and no Party receiving a Change Request may unreasonably withhold, condition or delay its consent to the proposed Change.

(c) Notwithstanding any provision of this Agreement to the contrary, a Service Provider may make: (i) Changes to the process of performing a particular Shared Service that do not adversely affect the benefits to Recipient of Service Provider's provision or quality of such Shared Service in any material respect or increase Recipient's cost for such Shared Service; (ii) emergency Changes on a temporary and short-term basis; and/or (iii) Changes to a particular Shared Service in order to comply with applicable law or regulatory requirements, in each case without obtaining the prior consent of Recipient. A Service Provider will notify Recipient in writing of any such Change as follows: in the case of clauses (i) and (iii) above, prior to the implementation of such Change, and, in the case of clause (ii) above, as soon as reasonably practicable thereafter.

Section 2.03 New Shared Services. The Parties may, from time to time during the Term of this Agreement, negotiate in good faith for Shared Services not otherwise specifically listed in Section 2.01 (a "***New Shared Service***"). Any agreement between the Parties on the terms for a New Shared Service must be in accordance with the provisions of Article IV and Article V hereof, will be deemed to be an amendment to this Agreement and such New Shared Service will then be a "***Shared Service***" for all purposes of this Agreement.

Section 2.04 Subcontractors. Nothing in this Agreement will prevent Service Provider from, upon notice to Recipient, using subcontractors, hired with due care, to perform all or any part of a Shared Service hereunder. A Service Provider will remain fully responsible for the performance of its obligations under this Agreement in accordance with its terms, including any obligations it performs through subcontractors, and a Service Provider will be solely responsible for payments due to its subcontractors.

ARTICLE III
SHARED ASSETS

Section 3.01 Shared IP Rights. Each Service Provider hereby grants to Recipient a non-exclusive right and license to use the intellectual property and other rights granted or licensed, directly or indirectly, to such Service Provider (the "***Shared IP Rights***") pursuant to third party intellectual property Agreements ("***Third Party IP Agreements***"), provided that the rights granted to Recipient hereunder are subject to the terms and conditions of the applicable Third Party IP Agreement, and that such rights shall terminate, as applicable, upon the expiration or termination of the applicable Third Party IP Agreement. Recipient shall be licensed to use the Shared IP Rights only for so long as it remains an Affiliate of HCMLP. In consideration of the foregoing licenses, Recipient agrees to take such further actions as a Service Provider deems to be necessary or desirable to comply with its obligations under the Third Party IP Agreements.

Section 3.02 Other Shared Assets. Subject to Section 3.01, each Service Provider hereby grants Recipient the right, license or permission, as applicable, to use and access the benefits under the agreements, contracts and licenses that such Service Provider will purchase, acquire, become a party or beneficiary to or license on behalf of Recipient (the "***Future Shared Assets***" and collectively with the Shared IP Rights, the "***Shared Assets***").

ARTICLE IV
COST ALLOCATION

Section 4.01 Actual Cost Allocation Formula. The Actual Cost of any item relating to any Shared Services or Shared Assets shall be allocated based on the Allocation Percentage. For purposes of this Agreement, "***Allocation Percentage***" means:

(a) To the extent 100% of such item is demonstrably attributable to the Acis, 100% of the Actual Cost of such item shall be allocated to Acis;

(b) To the extent a specific percentage of use of such item can be determined (e.g., 70% for HCMLP and 30% for Acis), that specific percentage of the Actual Cost of such item will be allocated to HCMLP or Acis, as applicable; and

(c) All other portions of the Actual Cost of any item that cannot be allocated pursuant to clause (a) or (b) above is agreed to be allocated between HCMLP and Acis in proportion to the fee earning assets managed by Acis. It is agreed in good faith between both parties that Actual Cost shall be calculated as follows: for each fund included within Annex B, Actual Cost shall be calculated in exact conformity with the calculation of management fees for such funds, except that the management fee rates applied in the calculation will be replaced by the fee rates described in Annex B. For avoidance of doubt, the calculation will apply to any form of management fees, except for incentive fees earned from any fund and subordinated management fees for collateralized loan obligation (CLO) funds.

For the avoidance of doubt, Acis shall separately reimburse HCMLP for the actual costs and expenses caused by, incurred or otherwise arising from or relating to business development services that are borne by HCMLP on behalf of or for the benefit of Acis.

Section 4.02 Non-Cash Cost Allocation. The actual, fully burdened cost of any item relating to any Shared Services or Shared Assets that does not result in a direct, out of pocket cash expense may be allocated to HCMLP and Acis for financial statement purposes only, without any corresponding cash reimbursement required, in accordance with generally accepted accounting principles, based on the Allocation Percentage principles described in Section 4.01 hereof.

ARTICLE V
PAYMENT OF COST AND REVENUE SHARE; TAXES

Section 5.01 Quarterly Statements. Within sixty (60) days following the end of each calendar quarter during the Term (or at such time as may be otherwise agreed by the parties), each Service Provider shall furnish the other Parties hereto with a written statement with respect to the Actual Cost paid by it in respect of Shared Services and Shared Assets provided by it, in each case, during such period, setting forth (i) the cost allocation in accordance with Article IV hereof together with the Applicable Margin on such allocated amounts, and (ii) any amounts paid pursuant to Section 5.02 hereof, together with such other data and information necessary to complete the items described in Section 5.03 hereof (hereinafter referred to as the "***Quarterly Report***").

Section 5.02 Settlement Payments. At any time during the Term, any Party may make payment of the amounts that are allocable to such Party together with the Applicable Margin related thereto, regardless of whether an invoice pursuant to Section 5.03 hereof has been issued with respect to such amounts.

Section 5.03 Determination and Payment of Cost and Revenue Share.

(a) Within ten (10) days of the submission of the Quarterly Report described in Section 5.02 hereof (or at such other time as may be agreed by the parties), the Parties shall (i) agree on the cost share of each of the Parties and Applicable Margin as calculated pursuant to the provisions of this Agreement; and (ii) prepare and issue invoices for the cost share and Applicable Margin payments that are payable by any of the Parties.

(b) Within ten (10) days of preparation of the agreement and the issuance of the invoice described in Section 5.03(a) (or at such other time as may be agreed by the parties), the Parties shall promptly make payment of the amounts that are set forth on such cost allocation invoice.

Section 5.04 Taxes.

(b) Recipient is responsible for and will pay all Taxes applicable to the Shared Services and the Shared Assets, provided to Recipient, provided, that such payments by Recipient to Service Provider will be made in the most tax-efficient manner and provided further, that Service Provider will not be subject to any liability for Taxes applicable to the Shared Services and the Shared Assets as a result of such payment by Recipient. Service Provider will collect such Tax from Recipient in the same manner it collects such Taxes from other customers in the ordinary course of Service Provider's business, but in no event prior to the time it invoices Recipient for the Shared Services and Shared Assets, costs for which such Taxes are levied. Recipient may provide Service Provider with a certificate evidencing its exemption from payment of or liability for such Taxes.

(c) Service Provider will reimburse Recipient for any Taxes collected from Recipient and refunded to Service Provider. In the event a Tax is assessed against Service Provider that is solely the responsibility of Recipient and Recipient desires to protest such assessment, Recipient will submit to Service Provider a statement of the issues and arguments requesting that Service Provider grant Recipient the authority to prosecute the protest in Service Provider's name. Service Provider's authorization will not be unreasonably withheld. Recipient will finance, manage, control and determine the strategy for such protest while keeping Service Provider reasonably informed of the proceedings. However, the authorization will be periodically reviewed by Service Provider to determine any adverse impact on Service Provider, and Service Provider will have the right to reasonably withdraw such authority at any time. Upon notice by Service Provider that it is so withdrawing such authority, Recipient will expeditiously terminate all

proceedings. Any adverse consequences suffered by Recipient as a result of the withdrawal will be submitted to arbitration pursuant to Section 9.14. Any contest for Taxes brought by Recipient may not result in any lien attaching to any property or rights of Service Provider or otherwise jeopardize Service Provider's interests or rights in any of its property. Recipient agrees to indemnify Service Provider for all Losses that Service Provider incurs as a result of any such contest by Recipient.

(d) The provisions of this Section 5.04 will govern the treatment of all Taxes arising as a result of or in connection with this Agreement notwithstanding any other Article of this Agreement to the contrary.

ARTICLE VI
SERVICE PROVIDER RESPONSIBILITIES

Section 6.01 Service Provider General Obligations. In providing the Services, the Service Provider:

(a) will conform with (1) any applicable written procedures, policies and guidelines adopted by the applicable Recipient and furnished to the Service Provider, and (2) the Recipient's objectives, policies and restrictions as stated in the Recipient's Indenture, Management Agreement, Partnership Agreement, Bye-laws, and/or other governing documents, as applicable, each as supplemented or amended from time to time, as furnished to the Service Provider (such governing document, the "***Applicable Restrictions***"). Until the Recipient delivers any supplements or amendments to the Service Provider, the Service Provider shall be fully protected in relying on the Applicable Restrictions previously furnished by the Recipient to the Service Provider. In providing the services in accordance with the requirements of this Section, the Service Provider shall be entitled to receive and act upon advice of counsel to the Recipient, or to the Service Provider that is also acceptable to the Recipient; and

(b) will provide the Shared Assets, or the Services, as applicable, to Recipient on a non-discriminatory basis and will use commercially reasonable efforts to provide the Shared Assets, or the Services, as applicable, in the same manner as if it were providing such services and assets on its own account. Service Provider will use its commercially reasonable efforts to conduct its duties hereunder in a lawful manner in compliance with applicable laws, statutes, rules and regulations and in accordance with the service standards. The standards set forth in this Section 6.01 are referred to in this Agreement as the "***Service Standards***."

Section 6.02 Books and Records; Access to Information. Service Provider will keep and maintain books and records on behalf of Recipient in accordance with past practices and internal control procedures. Recipient will have the right, at any time and from time to time upon reasonable prior notice to Service Provider, to inspect and copy (at its expense) during normal business hours at the offices of Service Provider the books and records relating to the Shared Services and Shared Assets, with respect to Service Provider's performance of its obligations hereunder. This inspection right will include the ability of Recipient's financial auditors to review such books and records in the ordinary course of performing standard financial auditing services for Recipient (but subject to Service Provider imposing reasonable access restrictions to Service Provider's and its Affiliates' proprietary information and such financial auditors executing appropriate confidentiality agreements reasonably acceptable to Service Provider). Service Provider will promptly respond to any reasonable requests for information or access.

Section 6.03 Return of Property and Equipment. Upon expiration or termination of this Agreement, Service Provider will be obligated to return to Recipient, as soon as is reasonably practicable, any equipment or other property or materials of Recipient that is in Service Provider's control or possession.

ARTICLE VII
TERM AND TERMINATION

Section 7.01 Term. The term of this Agreement will commence as of the Effective Date and will continue in full force and effect until the first anniversary of the Effective Date (the "***Term***"), unless terminated earlier in accordance with Section 7.02. The Term shall automatically renew for successive one year periods unless sooner terminated under Section 7.02.

Section 7.02 Termination.

(a) Subject to Section 7.02(b), either Party may terminate this Agreement upon at least 30 days advance written notice at any time prior to the expiration of the Term.

(b) In the event of any proposed termination of this Agreement while services are being rendered hereunder with respect to any Recipient, the effectiveness of such termination shall be conditioned on either (i) Acis or HCMLP, as applicable, confirming, in a manner reasonably satisfactory to each such Recipient, that the termination of this Agreement would not cause an Adverse Account Event (as defined below), or (ii) the continued provision of the Shared Services and Shared Assets, and/or Investment Services, as applicable, on substantially the terms provided herein until such time as a replacement provider or providers of the Shared Services and Shared Assets, or Investment Services, can be engaged by Acis or HCMLP, as applicable, on terms that would not cause an Adverse Account Event. As used herein, "***Adverse Account Event***" means (i) any event that would constitute a violation of any of the Applicable Restrictions, (ii) any event that would result in a material adverse deviation from the Service Standards rendered to the Recipient immediately prior to such event, or (iii) in the case of any Recipient that is an issuer of structured finance securities under an indenture with notes rated by S&P or Moody's, the failure to receive rating agency confirmation consistent with the terms of such indenture that the termination of this Agreement would not cause either S&P or Moody's to effect a withdrawal, reduction, suspension or other adverse action with respect to any then current rating of any class of notes of such Recipient issued under such indenture. In the event Acis or HCMLP relies on clause (ii) above to avoid termination of this Agreement, such party agrees to use its commercially reasonable efforts to procure such replacement Shared Services and Shared Assets, or Investment Services, as applicable, as soon as reasonably practicable following the Service Provider's notice of its desire to terminate this Agreement.

ARTICLE VIII
LIMITED WARRANTY; LIMITATION ON LIABILITY; INDEMNIFICATION

Section 8.01 Limited Warranty. Service Provider will perform the Shared Services hereunder in accordance with the Service Standards. Except as specifically provided in this Agreement, Service Provider makes no express or implied representations, warranties or guarantees relating to its performance of the Shared Services and the granting of the Shared Assets under this Agreement, including any warranty of merchantability, fitness, quality, non-infringement of third party rights, suitability or adequacy of the Shared Services and the Shared Assets for any purpose or use or purpose. Service Provider will (to the extent possible and subject to Service Provider's contractual obligations) pass through the benefits of any express warranties received from third parties relating to any Shared Service and Shared Asset, and will (at Recipient's expense) assist Recipient with any warranty claims related thereto.

Section 8.02 Indemnification. Subject to the limitations of liability set forth in Section 8.04, Service Provider and Recipient will indemnify and hold each other harmless against all Losses resulting from: (i) such Party's performance or failure to perform, in any material manner, any of its obligations under this Agreement; (ii) the breach by such Party, in any material manner, of any representation, warranty,

covenant or agreement contained herein; (iii) loss of or damage to tangible real or tangible personal property (including damage to their property), in any material manner, in each case to the extent that such Loss was proximately caused by any negligent or willful act or omission by the Party from whom indemnity is sought, its agents, employees or subcontractors, in connection with the provision or receipt of the Shared Services or the Shared Assets; (iv) such Party's use of the Shared Services and Shared Assets; (v) the breach by such Party of the license granted in Section 3.01; or (vi) the breach by such party of the Third Party IP Agreements.

Section 8.03 Notice and Procedures. A Party seeking indemnification pursuant to Section 8.02 (the "***Indemnified Party***") will give prompt written notice in reasonable detail (the "***Notice of Claim***") to the indemnifying Party (the "***Indemnifying Party***") stating the basis of any claim for which indemnification is being sought hereunder within thirty (30) days after its knowledge thereof; provided, however, that the Indemnified Party's failure to provide any such notice to the Indemnifying Party will not relieve the Indemnifying Party of or from any of its obligations hereunder, except to the extent that the Indemnifying Party suffers prejudice as a result of such failure. If the facts giving rise to such indemnification involve an actual or threatened claim by or against a third party:

(a) the Parties will cooperate in the prosecution or defense of such claim and will furnish such records, information and testimony and attend to such proceedings as may be reasonably requested in connection therewith; and

(b) the Indemnified Party will make no settlement of any claim that would give rise to liability on the part of the Indemnifying Party without the latter's prior written consent which will not be unreasonably withheld or delayed, and the Indemnifying Party will not be liable for the amount of any settlement affected without its prior written consent.

Section 8.04 Consequential Damages. Except with respect to a Party's fraud or willful misconduct, and except with respect to damages sought by a third party in connection with a third party claim, none of the Parties, or their Affiliates, will be liable to the other Parties, or their Affiliates, for any damages other than direct damages. Each Party agrees that it is not entitled to recover and agrees to waive any claim with respect to, and will not seek, consequential, punitive or any other special damages as to any matter under, relating to or arising out of the transactions contemplated by this Agreement, except with respect to such claims and damages arising directly out of a Party's fraud or willful misconduct, or with respect to damages sought by third parties in connection with third party claims.

ARTICLE IX
MISCELLANEOUS

Section 9.01 No Partnership or Joint Venture; Independent Contractor. Nothing contained in this Agreement will constitute or be construed to be or create a partnership or joint venture between or among HCMLP or Acis or their respective successors or assigns. The Parties understand and agree that, with the exception of the procurement by Service Provider of licenses or other rights on behalf of Recipient pursuant to Section 3.01, this Agreement does not make any of them an agent or legal representative of the other for any purpose whatsoever. With the exception of the procurement by Service Provider of licenses or other rights on behalf of Recipient pursuant to Section 3.01, no Party is granted, by this Agreement or otherwise, any right or authority to assume or create any obligation or responsibilities, express or implied, on behalf of or in the name of any other Party, or to bind any other Party in any manner whatsoever. The Parties expressly acknowledge that Service Provider is an independent contractor with respect to Recipient in all respects, including with respect to the provision of the Shared Services.

Section 9.02 Amendments; Waivers. Except as expressly provided herein, this Agreement may be amended only by agreement in writing of all Parties. No waiver of any provision nor consent to any exception to the terms of this Agreement or any agreement contemplated hereby will be effective unless in writing and signed by all of the Parties affected and then only to the specific purpose, extent and instance so provided. No failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof, nor will any single or partial exercise preclude any further or other exercise of such or any other right.

Section 9.03 Schedules and Exhibits; Integration. Each Schedule and Exhibit delivered pursuant to the terms of this Agreement must be in writing and will constitute a part of this Agreement, although schedules need not be attached to each copy of this Agreement. This Agreement, together with such Schedules and Exhibits constitutes the entire agreement among the Parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the Parties in connection therewith.

Section 9.04 Further Assurances. Each Party will take such actions as any other Party may reasonably request or as may be necessary or appropriate to consummate or implement the transactions contemplated by this Agreement or to evidence such events or matters.

Section 9.05 Governing Law. This Agreement and the legal relations between the Parties will be governed by and construed in accordance with the laws of the State of Texas applicable to contracts made and performed in such State and without regard to conflicts of law doctrines unless certain matters are preempted by federal law.

Section 9.06 Assignment. Except as otherwise provided hereunder, neither this Agreement nor any rights or obligations hereunder are assignable by one Party without the express prior written consent of the other Parties.

Section 9.07 Headings. The descriptive headings of the Articles, Sections and subsections of this Agreement are for convenience only and do not constitute a part of this Agreement.

Section 9.08 Counterparts. This Agreement and any amendment hereto or any other agreement delivered pursuant hereto may be executed in one or more counterparts and by different Parties in separate counterparts. All counterparts will constitute one and the same agreement and will become effective when one or more counterparts have been signed by each Party and delivered to the other Parties.

Section 9.09 Successors and Assigns; No Third Party Beneficiaries. This Agreement is binding upon and will inure to the benefit of each Party and its successors or assigns, and nothing in this Agreement, express or implied, is intended to confer upon any other Person or Governmental Entity any rights or remedies of any nature whatsoever under or by reason of this Agreement.

Section 9.10 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given: (i)immediately when personally delivered; (ii) when received by first class mail, return receipt requested; (iii) one day after being sent for overnight delivery by Federal Express or other overnight delivery service; or (iv) when receipt is acknowledged, either electronically or otherwise, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to the other Parties will, unless another address is specified by such Parties in writing, be sent to the addresses indicated below:

If to HCMLP, addressed to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

If to Acis, addressed to:

Acis Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972)628-4147

Section 9.11 Expenses. Except as otherwise provided herein, the Parties will each pay their own expenses incident to the negotiation, preparation and performance of this Agreement, including the fees, expenses and disbursements of their respective investment bankers, accountants and counsel.

Section 9.12 Waiver. No failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof, nor will any single or partial exercise preclude any further or other exercise of such or any other right.

Section 9.13 Severability. If any provision of this Agreement is held to be unenforceable for any reason, it will be adjusted rather than voided, if possible, to achieve the intent of the Parties. All other provisions of this Agreement will be deemed valid and enforceable to the extent possible.

Section 9.14 Arbitration; Jurisdiction. Notwithstanding anything contained in this Agreement or the Annexes hereto to the contrary, in the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that either party or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and, thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another, mutually agreeable arbitration service. The arbitrator(s) shall be duly licensed to practice law in the State of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each (each deposition is to be taken pursuant to the Texas Rules of Civil Procedure); (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admission; (v) ten requests for production, provided, that, in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, which shall include electronic documents; and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrator(s) shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. No arbitrator will have authority to render a decision that contains an outcome determinative error of state or federal law, or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrator(s) has failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the

American Arbitration Association's dispute resolution rules or other mutually agreeable, arbitration service rules. The party initiating arbitration shall pay all arbitration costs and arbitrator's fees, subject to a final arbitration award on who should bear costs and fees. All proceedings shall be conducted in Dallas, Texas, or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and/or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

Section 9.15 General Rules of Construction. For all purposes of this Agreement and the Exhibits and Schedules delivered pursuant to this Agreement: (i) the terms defined in Article I have the meanings assigned to them in Article I and include the plural as well as the singular; (ii) all accounting terms not otherwise defined herein have the meanings assigned under GAAP; (iii) all references in this Agreement to designated "Articles," "Sections" and other subdivisions are to the designated Articles, Sections and other subdivisions of the body of this Agreement; (iv) pronouns of either gender or neuter will include, as appropriate, the other pronoun forms; (v) the words "herein," "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision; (vi) "or" is not exclusive; (vii) "including" and "includes" will be deemed to be followed by "but not limited to" and "but is not limited to, "respectively; (viii) any definition of or reference to any law, agreement, instrument or other document herein will be construed as referring to such law, agreement, instrument or other document as from time to time amended, supplemented or otherwise modified; and (ix) any definition of or reference to any statute will be construed as referring also to any rules and regulations promulgated thereunder.

IN WITNESS HEREOF, each of the Parties has caused this Agreement to be executed by its duly authorized officers as of the day and year first above written.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____
Name: James Dondero
Title: President

ACIS CAPITAL MANAGEMENT, L.P.

By: Acis Capital Management GP, LLC,
its general partner

By:_____
Name: James Dondero
Title: President

Annex A

Shared Services

Finance and Accounting
- Book keeping
- Cash management
- Financial reporting
- Accounts payable
- Accounts receivable
- Expense reimbursement
- Vendor management
- Tax preparation and filing
- CLO surveillance and monitoring
- Administrative assistance

Facilities
- Equipment and Office Supplies
- General Overhead
- Rent & Parking

Human Resources
- Payroll services
- Health insurance
- Employee benefits

Marketing and Public Relations
- Business Development
- Investor relations
- Investor due diligence
- Public relations

Legal
- In-house litigation support
- Compliance & Compliance Systems
- Document review and preparation

IT
- System infrastructure support
- Website management
- Email and Hardware support

Operations and Production
- Middle office services
- Procurement
- Trade settlement

Annex B

4.01(c) Fee Schedule – Acis Funds

Fund	Annualized Shared Service Fee Rate (bps)
Acis CLO 2013-1, Ltd.	15
Acis CLO 2013-2, Ltd.	15
Acis CLO 2014-3, Ltd.	15
Acis CLO 2014-4, Ltd.	15
Acis CLO 2014-5, Ltd.	15
Acis CLO 2015-6, Ltd.	15
Hewitt's Island CLO, Ltd.	15
Endurance Investments Holdings, Ltd.	15
Acis CLO Value Fund II	15
BayVK R2 Lux S.A.	15

Additionally, for advised funds (including CLO's, hedge funds or any other advised accounts) following the Effective Date which are managed by Acis, Acis will pay HCMLP an annualized shared service fee at a rate of 15 basis points per year.

EXHIBIT G

EXECUTION VERSION

THIRD AMENDED AND RESTATED SUB-ADVISORY AGREEMENT

by and between

ACIS CAPITAL MANAGEMENT, L.P.

and

HIGHLAND CAPITAL MANAGEMENT, L.P.

Dated March 17, 2017

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THIRD AMENDED AND RESTATED
SUB-ADVISORY AGREEMENT

This Third Amended and Restated Sub-Advisory Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated as of March 17, 2017, is entered into by and between Acis Capital Management, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the sub-advisor hereunder (in such capacity, the "Sub-Advisor" and together with the Management Company, the "Parties").

R E C I T A L S

WHEREAS, the Parties entered into that certain Second Amended and Restated Sub-Advisory Agreement dated July 29, 2016 to be effective January 1, 2016 (the "Existing Agreement");

WHEREAS, the Management Company from time to time has entered and will enter into portfolio management agreements, investment management agreements and/or similar agreements (each such agreement as amended, modified, waived, supplemented or restated, subject in each case to the requirements of Section 8, a "Management Agreement") and related indentures, credit agreements, collateral administration agreements, service agreements or other agreements (each such agreement as amended, modified, waived, supplemented or restated, subject in each case to the requirements of Section 8, a "Related Agreement"), in each case as set forth on Appendix A hereto, as amended from time to time, pursuant to which the Management Company has agreed to provide portfolio and/or investment management services to certain funds and accounts and to certain collateralized loan obligation issuers and to borrowers in certain short-term or long-term warehouse or repurchase facilities in connection therewith (any such transaction, a "Transaction", any fund, account, issuer, warehouse borrower or repurchase agreement seller in respect of any such Transaction, an "Account", and the assets collateralizing each such Transaction and/or comprising the portfolio of such Account, a "Portfolio");

WHEREAS, the Management Company and the Sub-Advisor desire to enter into this Agreement in order to permit the Sub-Advisor to provide certain limited services to assist the Management Company in performing certain obligations under the Management Agreements and Related Agreements;

WHEREAS, the Parties now desire to amend and restate the Existing Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals, and the receipt of good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, intending to be legally bound, hereby agree that the Existing Agreement is hereby amended, restated and replaced in its entirety as follows.

1. Appointment; Limited Scope of Services.

(a) Highland is hereby appointed as Sub-Advisor to the Management Company for the purpose of assisting the Management Company in managing the Portfolios of each Account

pursuant to the related Management Agreement and Related Agreements, in each case that have been included in the scope of this Agreement pursuant to the provisions of Section 8, subject to the terms set forth herein and subject to the supervision of the Management Company, and Highland hereby accepts such appointment.

(b) Without limiting the generality of the foregoing, the Sub-Advisor shall, during the term and subject to the provisions of this Agreement:

(i) make recommendations to the Management Company in its capacity as portfolio manager, investment manager or any similar capacity for any applicable Account as to the general composition and allocation of the Portfolio with respect to such Account among various types of securities, the nature and timing of the changes therein and the manner of implementing such changes, including recommendations as to the specific loans and other assets to be purchased, retained or sold by any such Account;

(ii) place orders with respect to, and arrange for, any investment by or on behalf of such Account (including executing and delivering all documents relating to such Account's investments on behalf of such Account or the Management Company, as applicable), upon receiving a proper instruction from the Management Company;

(iii) identify, evaluate, recommend to the Management Company, in its capacity as portfolio manager for such Account, and, if applicable, negotiate the structure and/or terms of investment opportunities within the specific investment strategy of the Management Company for such Account;

(iv) assist the Management Company in its capacity as portfolio manager for such Account in performing due diligence on prospective Portfolio investments by such Account;

(v) provide information to the Management Company in its capacity as portfolio manager for such Account regarding any investments to facilitate the monitoring and servicing of such investments and, if requested by the Management Company, provide information to assist in monitoring and servicing other investments by such Account

(vi) assist and advise the Management Company in its capacity as portfolio manager for such Account with respect to credit functions including, but not limited to, credit analysis and market research and analysis; and

(vii) assist the Management Company in performing any of its other obligations or duties as portfolio manager for such Account.

The foregoing responsibilities and obligations are collectively referred to herein as the "Services."

Notwithstanding the foregoing, all investment decisions will ultimately be the responsibility of, and will be made by and at the sole discretion of, the Management Company. Furthermore, the

parties acknowledge and agree that the Sub-Advisor shall be required to provide only the services expressly described in this Section 1(b), and shall have no responsibility hereunder to provide any other services to the Management Company or any Transaction, including, but not limited to, administrative, management or similar services.

(c) The Sub-Advisor agrees during the term hereof to furnish the Services on the terms and conditions set forth herein and subject to the limitations contained herein. The Sub-Advisor agrees that, in performing the Services, it will comply with all applicable obligations of the Management Company set forth in the Management Agreements and the Related Agreements. In addition, with respect to any obligation that would be part of the Services but for the fact that the relevant Management Agreement or Related Agreement does not permit such obligation to be delegated by the Management Company to the Sub-Advisor, the Sub-Advisor, upon request in writing by the Management Company, shall work in good faith with the Management Company and shall use commercially reasonable efforts to assist the Management Company in satisfying all such obligations.

2. Compensation.

(a) As compensation for its performance of its obligations as Sub-Advisor under this Agreement in respect of any Transaction, the Sub-Advisor will be entitled to receive the Sub-Advisory Fee payable thereto. The "Sub-Advisory Fee" shall be payable in accordance with Appendix A attached hereto, as such appendix may be amended by the Parties from time to time.

(b) Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Sub-Advisor for any and all costs and expenses that are properly Company Expenses or that may be borne by the Management Company under the Management Company LLC Agreement.

(c) Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any and all amounts payable to the Sub-Advisor pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

(d) From time to time, the Management Company may enter into sub-advisory agreements with certain management companies on similar terms to this Agreement. Promptly following the receipt of any fees pursuant to such sub-advisory agreements, the Management Company shall pay 100% of such fees to the Sub-Advisor.

3. Representations and Warranties.

(a) Each of the Management Company and the Sub-Advisor represents and warrants, as to itself only, that:

(i) it has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(ii) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(iii) no consent, approval, authorization or order of or declaration or filing with any government, governmental instrumentality or court or other person or entity is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(iv) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (A) its constituting and organizational documents; (B) the terms of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound; (C) any statute applicable to it; or (D) any law, decree, order, rule or regulation applicable to it of any court or regulatory, administrative or governmental agency, body of authority or arbitration having or asserting jurisdiction over it or its properties, which, in the case of clauses (B) through (D) above, would have a material adverse effect upon the performance of its duties hereunder.

(b) The Sub-Advisor represents and warrants to the Management Company that it is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act").

(c) The Management Company acknowledges that it has received Part 2 of Highland Capital Management, L.P.'s Form ADV filed with the Securities and Exchange Commission. The Sub-Advisor will provide to the Management Company an updated copy of Part 2 of its Form ADV promptly upon any amendment to such Form ADV being filed with the Securities and Exchange Commission.

4. Standard of Care; Liability; Indemnification.

(a) Sub-Advisor Standard of Care. Subject to the terms and provisions of this Agreement, the Management Agreements and/or the Related Agreements, as applicable, the Sub-Advisor will perform its obligations hereunder and under the Management Agreements and/or the Related Agreements in good faith with reasonable care using a degree of skill and attention no less than that which the Sub-Advisor uses with respect to comparable assets that it manages for others and, without limiting the foregoing, in a manner which the Sub-Advisor reasonably believes to be consistent with the practices and procedures followed by institutional managers of national standing relating to assets of the nature and character of the Portfolios, in each case except as expressly provided otherwise under this Agreement, the Management Agreements and/or the

Related Agreements. To the extent not inconsistent with the foregoing, the Sub-Advisor will follow its customary standards, policies and procedures in performing its duties hereunder, under the Management Agreements and/or under the Related Agreements.

(b) Exculpation. To the fullest extent permitted by law, none of the Sub-Advisor, any of its affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)) (each a "Covered Person") will be liable to the Management Company, any Member, any shareholder, partner or member thereof, any Account (or any other adviser, agent or representative thereof), or to any holder of notes, securities or other indebtedness issued by any Account (collectively, the "Management Company Related Parties"), for (i) any acts or omissions by such Covered Person arising out of or in connection with the provision of the Services hereunder, for any losses that may be sustained in the purchase, holding or sale of any security or debt obligation by any Account, or as a result of any activities of the Sub-Advisor, the Management Company or any other adviser to or agent of the Account or any other sub-advisor appointed by the Management Company to provide portfolio management services to any other delegatee of the Management Company or any other person or entity, unless such act or omission was made in bad faith or is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a "Disabling Conduct") on the part of such Covered Person, (ii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of the Sub-Advisor, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of the Sub-Advisor with reasonable care, or (iii) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to any Management Company Related Party, no Covered Person acting under this Agreement shall be liable to such Management Company Related Party for its good-faith reliance on the provisions of this Agreement.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to any Management Company Related Party solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to any such Management Company Related Party, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to any Management Company Related Party in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care

(c) Indemnification. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated ("Claims"), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the Services, the activities of the Management Company Related Parties, or activities undertaken in connection with the Management Company Related Parties, or otherwise relating to or arising out of this Agreement, any Management Agreement and/or the Related Documents, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of *nolo contendere* or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder may be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 4(c) shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 4(c) to the fullest extent permitted by law

(d) Other Sources of Recovery etc. The indemnification rights set forth in Section 4(c) are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or

indemnification from any Person in which any of the Transactions has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained

(e) Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 4(c) shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person

(f) Reliance. A Covered Person shall incur no liability to any Management Company Related Party in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

(g) Rights Under Management Agreements and Related Agreements. The Management Company will ensure that the Sub-Advisor is provided substantially similar indemnification and exculpation rights as are afforded to the Management Company in its role as portfolio manager under any future Management Agreement or Related Agreement encompassed within the Services hereunder, and it is expressly acknowledged by the Parties that the Sub-Advisor may not consent to including a Management Agreement and the related Transaction and Related Agreements within the scope of this Agreement pursuant to Section 8 if such indemnification and exculpation rights are not reasonably acceptable to it.

5. Limitations on Employment of the Sub-Advisor; Conflicts of Interest.

(a) The services of the Sub-Advisor to the Management Company are not exclusive, and the Sub-Advisor may engage in any other business or render similar or different services to others including, without limitation, the direct or indirect sponsorship or management of other Transactions, investment-based accounts or commingled pools of capital, however structured, having investment objectives similar to those of the Management Company or the Accounts. Moreover, nothing in this Agreement shall limit or restrict the right of any manager, partner, officer or employee of the Sub-Advisor to engage in any other business or to devote his or her time and attention in part to any other business, whether of a similar or dissimilar nature to the Management Company or any Account, or to receive any fees or compensation in connection therewith.

(b) So long as this Agreement or any extension, renewal or amendment of this Agreement remains in effect, the Sub-Advisor shall be the only portfolio management sub-advisor for the Management Company. The Sub-Advisor assumes no responsibility under this Agreement other than to render the services called for hereunder. It is understood that directors, officers, employees, members and managers of the Management Company are or may become interested in the Sub-Advisor and its Affiliates as directors, officers, employees, partners, stockholders, members, managers or otherwise, and that the Sub-Advisor and directors, officers, employees,

partners, stockholders, members and managers of the Sub-Advisor and its Affiliates are or may become similarly interested in the Management Company as members or otherwise.

(c) The Management Company acknowledges that various potential and actual conflicts of interest may exist with respect to the Sub-Advisor as described in the Sub-Advisor's Form ADV Part 2A and as described in Appendix B hereto, and the Management Company expressly acknowledges and agrees to the provisions contained in such Appendix B, as amended from time to time with mutual consent of the Parties.

6. Termination; Survival.

(a) This Agreement may be terminated, in its entirety or with respect to any Management Agreement, at any time without payment of penalty, by the Management Company upon 30 days' prior written notice to the Sub-Advisor.

(b) This Agreement shall terminate automatically with respect to any Management Agreement on the date on which (i) such Management Agreement has been terminated (and, if required thereunder, a successor portfolio manager has been appointed and accepted) or discharged; or (ii) the Management Company is no longer acting as portfolio manager, investment manager or in a similar capacity (whether due to removal, resignation or assignment) under such Management Agreement and the Related Agreements. Upon the termination of this Agreement with respect to any Management Agreement the Management Company shall provide prompt notice thereof to the Sub-Advisor, and Appendix A hereto shall be deemed to be amended by deleting such Management Agreement and the Related Agreements related thereto.

(c) All accrued and unpaid financial and indemnification obligations with respect to any conduct or events occurring prior to the effective date of the termination of this Agreement shall survive the termination of this Agreement.

7. Cooperation with Management Company. The Sub-Advisor shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Sub-Advisor. Specifically, the Sub-Advisor agrees that it will provide the Management Company with reasonable access to information relating to the performance of Sub-Advisor's obligations under this Agreement.

8. Management Agreements and Related Agreements. The Sub-Advisor's duty to provide Services in connection with any Management Agreement shall not commence until (a) Appendix A to this Agreement has been amended by mutual agreement of the Parties to include such Management Agreement and the related Account, fund and/or account and Related Agreements and (b) the Sub-Advisor acknowledges receipt of such Management Agreement and each Related Agreement. The Sub-Advisor shall not be bound to comply with any amendment, modification, supplement or waiver to any Management Agreement or any Related Agreement until it has received a copy thereof from the Management Company. No amendment, modification, supplement or waiver to any Management Agreement or Related Agreement that, when applied to the obligations and rights of the Management Company under such Management Agreement or Related Agreement, affects (i) the obligations or rights of the Sub-Advisor hereunder; (ii) the amount of priority of any fees or other amounts payable to the Sub-Advisor hereunder; or (iii) any

definitions relating to the matters covered in clause (i) or (ii) above, will apply to the Sub-Advisor under this Agreement unless in each such case the Sub-Advisor has consented thereto in writing (such consent not to be unreasonably withheld or delayed unless the Sub-Advisor determines in its reasonable judgment that such amendment, modification, supplement or waiver could have a material adverse effect on the Sub-Advisor).

9. Amendments; Assignments.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 9, without the prior written consent of the other Party and (ii) in accordance with the Advisers Act and other applicable law.

(b) Except as otherwise provided in this Section 9, the Sub-Advisor may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with the Advisers Act and other applicable law.

(c) The Sub-Advisor may, without satisfying any of the conditions of Section 9(a) other than clause (ii) thereof (so long as such assignment does not constitute an assignment within the meaning of Section 202(a)(1) of the Advisers Act), (1) assign any of its rights or obligations under this Agreement to an affiliate; *provided* that such affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Sub-Advisor pursuant to this Agreement and (ii) has the legal right and capacity to act as Sub-Advisor under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Sub-Advisor under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Sub-Advisor in another corporate or similar form and has substantially the same staff; provided, further, that the Sub-Advisor shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Sub-Advisor will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

10. Advisory Restrictions. This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any Management Agreement or any part thereof. It is the express intention of the parties hereto that (i) the Services are limited in scope; and (ii) this Agreement complies in all respects with all applicable (A) contractual provisions and restrictions contained in each Management Agreement and each Related Agreement and (B) laws, rules and regulations (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the Services to be provided under this Agreement shall automatically without action by any person or entity be limited, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

11. Records; Confidentiality.

(a) The Sub-Advisor shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; provided, that the Sub-Advisor shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

(b) The Sub-Advisor shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Sub-Advisor hereunder and shall not disclose any such information to non-affiliated third parties except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its rating of notes issued in connection with a Transaction or supplying credit estimates on any obligation included in the Portfolios, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Account for which the Management Company serves as portfolio manager, (iv) as required by (A) applicable law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Sub-Advisor or any of its affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Sub-Advisor on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Sub-Advisor may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Transaction, or (ix) information relating to performance of the Portfolios as may be used by the Sub-Advisor in the ordinary course of its business. Notwithstanding the foregoing, it is agreed that the Sub-Advisor may disclose without the consent of any Person (1) that it is serving as Sub-Advisor to the Management Company and each Account, (2) the nature, aggregate principal amount and overall performance of the Portfolios, (3) the amount of earnings on the Portfolios, (4) such other information about the Management Company, the Portfolios and the Transactions as is customarily disclosed by Sub-Advisors to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Sub-Advisor, the Management Company, the Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

12. Notice. Any notice or demand to any party to this Agreement to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail, facsimile or email transmission or by delivering it by hand as follows (or to such other address, email address or facsimile number as shall have been notified to the other parties hereto):

(a) If to the Management Company:

Acis Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Sub-Advisor:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

13. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

14. WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

15. Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties.

16. No Waiver. The performance of any condition or obligation imposed upon any party hereunder may be waived only upon the written consent of the parties hereto. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other party under this Agreement. Any failure by any party to this Agreement to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

17. Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written form of communication, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

18. Third Party Beneficiaries. Nothing in this Agreement will be construed to give any person or entity other than the parties to this Agreement, the Accounts and any person or entity with indemnification rights hereunder any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. Except as provided in the foregoing sentence, this Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the parties to this Agreement and their successors and assigns.

19. No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the parties. Except as expressly provided herein or in any other written agreement between the parties, no party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other party.

20. Entire Agreement. This Agreement, together with each Management Agreement and Related Agreement, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the parties with respect to such subject matter.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as the Sub-Advisor

By: Strand Advisors, Inc., its General Partner

By:_____
Name: James Dondero
Title: President

ACIS CAPITAL MANAGEMENT, L.P.,
as the Management Company

By: Acis Capital Management GP, LLC, its General Partner

By:_____
Name: James Dondero
Title: President

Appendix A

The Management Company shall pay to the Sub-Advisor a Sub-Advisory Fee for the Services for the Accounts in an amount equal to the aggregate management fees that would be received by the Management Company for such Accounts if such management fees were calculated in exact conformity with the calculation of management fees for such Accounts, except that the management fee rates applied in such calculation were replaced by the fee rate set forth in the following table. Such fees shall be payable promptly (or at such time as is otherwise agreed by the parties) following the Management Company's receipt of management fees for such Accounts, it being understood that none of the foregoing shall prohibit the Management Company from waiving or entering into side letters with respect to management fees for such Accounts; provided that any such waived or reduced amounts shall not be recognized for purposes of calculating the fees payable by the Management Company hereunder. Notwithstanding the foregoing, the parties may agree to a different allocation from that set forth during any period in order to reflect the then current fair market value of the Services rendered.

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Issuer / Borrower / Fund / Account	Management Agreement	Related Agreements	Date of Management Agreement	Annualized Sub-Advisory Fee Rate (bps)
Hewett's Island CLO I-R, Ltd.	**Management Agreement**	**Indenture**	**November 20, 2007**	20
Acis CLO 2013-1 Ltd.	**Portfolio Management Agreement**	**Indenture**	**March 18, 2013**	20
Acis CLO 2013-2 Ltd.	**Portfolio Management Agreement**	**Indenture**	**October 3, 2013**	20
Acis CLO 2014-3 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**February 25, 2014**	20
Acis CLO 2014-4 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**June 5, 2014**	20
Acis CLO 2014-5 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**November 18, 2014**	20
Acis CLO 2015-6 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**April 16, 2015**	20
BayVK R2 Lux S.A., SICAV-FIS	**Agreement for the Outsourcing of the Asset Management**	**Service Level Agreement**	**February 27, 2015**	20
Acis Loan Funding, Ltd.	**Portfolio Management Agreement**		**August 10, 2015**	0

APPENDIX B

Purchase and Sale Transactions; Brokerage

The Management Company acknowledges and agrees that the Sub-Advisor or any of its affiliates may acquire or sell obligations or securities, for its own account or for the accounts of its customers, without either requiring or precluding the acquisition or sale of such obligations or securities for the account of any Account. Such investments may be the same or different from those made by or on behalf of the Management Company or the Accounts.

Additional Activities of the Sub-Advisor

Nothing herein shall prevent the Sub-Advisor or any of its clients, its partners, its members, funds or other investment accounts managed by it or any of its affiliates, or their employees and their affiliates (collectively, the "Related Entities"), from engaging in other businesses, or from rendering services of any kind to the Management Company, its affiliates, any Account or any other Person or entity regardless of whether such business is in competition with the Management Company, its affiliates, such Account or otherwise. Without limiting the generality of the Sub-Advisor and its Related Entities may:

(a) serve as managers or directors (whether supervisory or managing), officers, employees, partners, agents, nominees or signatories for the Management Company or any affiliate thereof, or for any obligor or issuer in respect of any of the Portfolio Assets or any affiliate thereof, to the extent permitted by their respective organizational documents and underlying instruments, as from time to time amended, or by any resolutions duly adopted by the Management Company, any Account, their respective affiliates or any obligor or issuer in respect of any of the Portfolio Assets (or any affiliate thereof) pursuant to their respective organizational documents;

(b) receive fees for services of whatever nature rendered to the obligor or issuer in respect of any of the Portfolio Assets or any affiliate thereof;

(c) be retained to provide services unrelated to this Agreement to the Management Company, any Account or their respective affiliates and be paid therefor, on an arm's-length basis;

(d) be a secured or unsecured creditor of, or hold a debt obligation of or equity interest in, the Management Company, any Account or any affiliate thereof or any obligor or issuer of any Portfolio Asset or any affiliate thereof;

(e) sell any Portfolio Asset to, or purchase or acquire any Portfolio Asset from, any Account while acting in the capacity of principal or agent; *provided, however*, that any such sale or purchase effected by the Sub-Advisor shall be subject to applicable law and any applicable provisions of this Agreement, the related Management Agreement and Related Agreements, as applicable;

(f) underwrite, arrange, structure, originate, syndicate, act as a distributor of or make a market in any Portfolio Asset;

(g) serve as a member of any "creditors' board", "creditors' committee" or similar creditor group with respect to any Portfolio Asset; or

(h) act as portfolio manager, portfolio manager, investment manager and/or investment adviser or sub-advisor in collateralized bond obligation vehicles, collateralized loan obligation vehicles and other similar warehousing, financing or other investment vehicles.

As a result, such individuals may possess information relating to obligors and issuers of Portfolio Assets that is (a) not known to or (b) known but restricted as to its use by the individuals at the Sub-Advisor responsible for monitoring the Portfolio Assets and performing the Services under this Agreement. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Management Company and/or any Account and otherwise create conflicts of interest for the Management Company and/or any Account. The Management Company acknowledges and agrees that, in all such instances, the Sub-Advisor and its affiliates may in their discretion make investment recommendations and decisions that may be the same as or different from those made by the Management Company with respect to the investments of any Account and they have no duty, in making or managing such investments, to act in a way that is favorable to any Account.

The Management Company acknowledges that there are generally no ethical screens or information barriers between the Sub-Advisor and certain of its affiliates of the type that many firms implement to separate Persons who make investment decisions from others who might possess applicable material, non-public information that could influence such decisions. The officers or affiliates of the Sub-Advisor may possess information relating to obligors or issuers of Portfolio Assets that is not known to the individuals at the Sub-Advisor responsible for providing the Services under this Agreement. As a result, the Sub-Advisor may from time to time come into possession of material nonpublic information that limits the ability of the Sub-Advisor to effect a transaction for the Management Company and/or any Account, and the Management Company and/or such Account's investments may be constrained as a consequence of the Sub-Advisor's inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Management Company and/or such Account.

Unless the Sub-Advisor determines in its sole discretion that such Transaction complies with the conflicts of interest provisions set forth in the applicable Management Agreement and Related Agreements, he Sub-Advisor will not direct any Account to acquire or sell loans or securities entered into or issued by (i) Persons of which the Sub-Advisor, any of its affiliates or any of its officers, directors or employees are directors or officers, (ii) Persons of which the Sub-Advisor or any of its respective affiliates act as principal or (iii) Persons about which the Sub-Advisor or any of its affiliates have material non-public information which the Sub-Advisor deems would prohibit it from advising as to the trading of such securities in accordance with applicable law.

It is understood that the Sub-Advisor and any of its affiliates may engage in any other business and furnish investment management and advisory services to others, including Persons which may have investment policies similar to those followed by the Management Company with respect to the Portfolio Assets and which may own securities or obligations of the same class, or which are of the same type, as the Portfolio Assets or other securities or obligations of the obligors or issuers of the Portfolio Assets. The Sub-Advisor and its affiliates will be free, in their sole discretion, to

make recommendations to others, or effect transactions on behalf of themselves or for others, which may be the same as or different from those effected with respect to the Collateral. Nothing in this Agreement, in the Management Agreements or in the Related Agreements shall prevent the Sub-Advisor or any of its affiliates, acting either as principal or agent on behalf of others, from buying or selling, or from recommending to or directing any other account to buy or sell, at any time, securities or obligations of the same kind or class, or securities or obligations of a different kind or class of the same obligor or issuer, as those directed by the Sub-Advisor to be purchased or sold on behalf of an Account. It is understood that, to the extent permitted by applicable law, the Sub-Advisor, its Related Entities, or any of their owners, directors, managers, officers, stockholders, members, partners, partnership committee members, employees, agents or affiliates or the other Covered Persons or any member of their families or a Person or entity advised by the Sub-Advisor may have an interest in a particular transaction or in securities or obligations of the same kind or class, or securities or obligations of a different kind or class of the same issuer, as those that may be owned or acquired by an Account. The Management Company agrees that, in the course of providing the Services, the Sub-Advisor may consider its relationships with other clients (including obligors and issuers) and its affiliates.

The Management Company agrees that neither the Sub-Advisor nor any of its affiliates is under any obligation to offer any investment opportunity of which they become aware to the Management Company or any Account or to account to the Management Company or any Account for (or share with the Management Company or any Account or inform the Management Company or any Account of) any such transaction or any benefit received by them from any such transaction. The Management Company understands that the Sub-Advisor and/or its affiliates may have, for their own accounts or for the accounts of others, portfolios with substantially the same portfolio criteria as are applicable to the Accounts. Furthermore, the Sub-Advisor and/or its affiliates may make an investment on behalf of any client or on their own behalf without offering the investment opportunity or making any investment on behalf of the Management Company or any Account and, accordingly, investment opportunities may not be allocated among all such clients. The Management Company acknowledges that affirmative obligations may arise in the future, whereby the Sub-Advisor and/or its affiliates are obligated to offer certain investments to clients before or without the Sub-Advisor offering those investments to the Management Company or any Account.

The Management Company acknowledges that the Sub-Advisor and its affiliates may make and/or hold investments in an obligor's or issuer's obligations or securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's obligations or securities made and/or held by the Management Company or any Account, or in which partners, security holders, members, officers, directors, agents or employees of the Sub-Advisor and its affiliates serve on boards of directors, or otherwise have ongoing relationships or otherwise have interests different from or adverse to those of the Management Company and the Accounts.

Defined Terms

For purposes of this Appendix B, the following defined terms shall have the meanings set forth below:

"Portfolio" shall mean, with respect to any Account and/or Transaction, the assets held by or in the name of the Account or any subsidiary of the Account in respect of such Transaction,

whether or not for the benefit of the related secured parties, securing the obligations of such Account.

"Portfolio Asset" shall mean any loan, eligible investment or other asset contained in the Portfolio.

"Transaction" shall mean any action taken by the Sub-Advisor on behalf of any Account with respect to the Portfolio, including, without limitation, (i) selecting the Portfolio Assets to be acquired by the Account, (ii) investing and reinvesting the Portfolio, (iii) amending, waiving and/or taking any other action commensurate with managing the Portfolio and (iv) instructing the Account with respect to any acquisition, disposition or tender of a Portfolio Asset or other assets received in respect thereof in the open market or otherwise by the Account.

EXHIBIT H

EXECUTION VERSION

FOURTH AMENDED AND RESTATED SHARED SERVICES AGREEMENT

by and between

ACIS CAPITAL MANAGEMENT, L.P.

and

HIGHLAND CAPITAL MANAGEMENT, L.P.

Dated March 17, 2017

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FOURTH AMENDED AND RESTATED
SHARED SERVICES AGREEMENT

This Fourth Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated as of March 17, 2017, is entered into by and between Acis Capital Management, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the staff and services provider hereunder (in such capacity, the "Staff and Services Provider" and together with the Management Company, the "Parties").

R E C I T A L S

WHEREAS, the Parties entered into that certain Third Amended and Restated Shared Services Agreement dated effective January 1, 2016 (the "Existing Agreement");

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act");

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company;

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a "Shared Employee") is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time); and

WHEREAS, the Parties now desire to amend and restate the Existing Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree that the Existing Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"Advisers Act" shall have the meaning set forth in the Recitals to this Agreement.

"Advisory Restriction" shall have the meaning set forth in Section 5.01(b).

"Affiliate" shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term "control" means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

"Agreement" shall have the meaning set forth in the Preamble to this Agreement.

"Applicable Asset Criteria and Concentrations" means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more CLOs or Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

"Applicable Law" shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof, including the Risk Retention Rules, of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

"CLO or Account" shall mean a collateralized loan obligation transaction, including any type of short-term or long-term warehouse or repurchase facility in connection therewith, or a fund or account advised by the Management Company, as applicable.

"Covered Person" shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

"Governmental Authority" shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission,

corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

"Highland" shall have the meaning set forth in the preamble to this Agreement.

"Indebtedness" shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers' acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) with respect to the Management Company, all indebtedness relating to the acquisition by the EU Originator Series of a collateral obligation that failed to settle (including any ineligible or defaulted collateral obligation) into a CLO; (e) all capital lease obligations; (f) all indebtedness guaranteed by such Person or any of its subsidiaries; (g) all capital lease obligations; (h) all indebtedness guaranteed by such Person or any of its subsidiaries.

"Management Company" shall have the meaning set forth in the preamble to this Agreement.

"Operating Guidelines" means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a CLO or Account.

"Parties" shall have the meaning set forth in the preamble to this Agreement.

"Portfolio" means the Management Company's portfolio of collateral loan obligations, debt securities (including equity investments or subordinated securities in a CLO such as a Retention Interest), other similar obligations, preferred return notes, financial instruments, securities or other assets held directly or indirectly by, or on behalf of, the Management Company from time to time;

"Securities Act" shall mean the Securities Act of 1933, as amended.

"Staff and Services Fee" shall have the meaning set forth in Section 3.01 of this Agreement.

"Staff and Services Provider" shall have the meaning set forth in the preamble to this Agreement.

"Shared Employee" shall have the meaning set forth in the Recitals to this Agreement.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) "or" is not exclusive (unless preceded by "either") and "include" and "including" are

not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) "writing", "written" and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) "hereof", "herein", "hereunder" and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. Highland is hereby appointed as Staff and Services Provider for the purpose of providing such services and assistance as the Management Company may request from time to time to, and to make available the Shared Employees to, the Management Company in accordance with and subject to the provisions of this Agreement and the Staff and Services Provider hereby accepts such appointment. The Staff and Services Provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.1 and subject to Section 2.4 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, accounting, payments, operations, technology and finance;

(b) *Legal/Compliance/Risk Analysis*. Assistance and advice with respect to legal issues, compliance support and implementation and general risk analysis;

(c) *Management of Collateral Obligations and CLOs and Accounts*. Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any CLO or Account from time to time.

(d) *Valuation*. Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such

valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a CLO or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(e) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a CLO or Account managed by the Management Company, CLO transactions involving the Management Company, and any other rights and obligations of the Management Company;

(f) *Marketing*. Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified CLOs or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(g) *Reporting*. Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any CLO or Account, including reports relating to (i) purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(h) *Administrative Services*. The provision of office space, information technology services and equipment, infrastructure and other related services requested or utilized by the Management Company from time to time;

(i) *Shared Employees*. The provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(j) *Ancillary Services*. Assistance and advice on all things ancillary or incidental to the foregoing; and

(k) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any CLO or Account or similar securitization, (c) the substantive investment management decisions with respect to any CLO or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. The name, location and such other matters as the Parties desire to reflect with respect to each Shared Employee shall be identified on the books and records of each of the Management Company and the Staff and Services Provider, which may be amended in writing from time to time by the Parties to add or remove any Shared Employee to reflect the employment (or lack thereof) of such employee. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. If at any time any Shared Employee (or any other person employed by the Staff and Services provider who also provides services to the Management Company) shall be terminated from employment with the Staff and Services Provider or otherwise resigns or is removed from employment with the Staff and Services Provider, then such person may only serve as a separate direct employee of the Management Company upon the approval of the Management Company. The Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate

with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any CLO or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

(i) The Staff and Services Provider shall make reasonably available for use by the Management Company, including through Shared Employees providing services pursuant to this Agreement, any relevant intellectual property and systems necessary for the provision of the services hereunder.

(j) The Staff and Services Provider shall require that each Shared Employee:

(i) certify that he or she is subject to, and has been provided with, a copy of each Party's Code of Ethics and will make such reports, and seek prior clearance for such actions and activities, as may be required under the Codes of Ethics;

(ii) be subject to the supervision and oversight of each Party's officers and directors, including without limitation its Chief Compliance Officer ("CCO"), which CCO may be the same Person, with respect to the services provided to that Party or its clients;

(iii) provide services hereunder and take actions hereunder only as approved by the Management Company;

(iv) provide any information requested by a Party, as necessary to comply with applicable disclosure or regulatory obligations;

(v) to the extent authorized to transact on behalf of the Management Company or a CLO or Account, take reasonable steps to ensure that any such transaction is consistent with any policies and procedures that may be established by the Parties and all Applicable Asset Criteria and Concentrations; and

(vi) act, at all times, in a manner consistent with the fiduciary duties and standard of care owed by the Management Company to its members and direct or indirect investors or to a CLO or Account as well as clients of Staff and Services Provider by seeking to ensure that, among other things, information about any investment advisory or trading activity applicable to a particular client or group of clients is not used to benefit the Shared Employee, any Party or any other client or group of clients in contravention of such fiduciary duties or standard of care.

(k) Unless specifically authorized to do so, or appointed as an officer or authorized person of the Management Company with such authority, no Shared Employee may contract on behalf or in the name of the Management Company, acting as principal.

Section 2.04 Applicable Asset Criteria and Concentrations. The Management Company will promptly inform the Staff and Services Provider in writing of any Applicable Asset Criteria and Concentrations to which it agrees from time to time and the Staff and Services Provider shall take such Applicable Asset Criteria and Concentrations into account when providing assistance and advice in accordance with Section 2.2 above and any other assistance or advice provided in accordance with this Agreement.

Section 2.05 Compliance with Management Company Policies and Procedures. The Management Company will from time to time provide the Staff and Services Provider and the Shared Employees with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a CLO or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company and the Staff and Services Provider's powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive the Staff and Services Fee payable thereto. The "Staff and Services Fee" shall be payable in accordance with Appendix A attached hereto, as such appendix may be amended by the Parties from time to time.

From time to time, the Management Company may enter into shared services agreements with certain management companies on similar terms to this Agreement. Promptly following the receipt of any fees pursuant to such shared services agreements, the Management Company shall pay 100% of such fees to the Staff and Services Provider.

Section 3.03 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.04 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance; Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable

access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records; Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any CLO or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any CLO or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such

information as is routinely disclosed to the trustee, custodian or collateral administrator of any CLO or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such CLO or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the CLOs or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Management Vehicles, the CLOs or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01 Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless such act or omission was made in bad faith or is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a "Disabling Conduct") on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To

the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated ("Claims"), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder may be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be

determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the CLOs or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations

and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum

and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, CLO or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as

expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any CLO or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any CLO or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

(a) If to the Management Company:

Acis Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as the Sub-Advisor

By: Strand Advisors, Inc., its General Partner

By:_____
Name: James Dondero
Title: President

ACIS CAPITAL MANAGEMENT, L.P.,
as the Management Company

By: Acis Capital Management GP, LLC, its General Partner

By:_____
Name: James Dondero
Title: President

Appendix A

The Management Company shall pay to the Staff and Services Provider a Staff and Services Fee for the services for the CLOs or Accounts in an amount equal to the aggregate management fees that would be received by the Management Company for such CLOs or Accounts if such management fees were calculated in exact conformity with the calculation of management fees for such CLOs or Accounts, except that the management fee rates applied in such calculation were replaced by the fee rate set forth in the following table. Such fees shall be payable promptly (or at such time as is otherwise agreed by the parties) following the Management Company's receipt of management fees for such CLOs or Accounts, it being understood that none of the foregoing shall prohibit the Management Company from waiving or entering into side letters with respect to management fees for such CLOs or Accounts; provided that any such waived or reduced amounts shall not be recognized for purposes of calculating the fees payable by the Management Company hereunder. Notwithstanding the foregoing, the parties may agree to a different allocation from that set forth during any period in order to reflect the then current fair market value of the Services rendered.

[*Remainder of Page Intentionally Left Blank*.]

Issuer / Borrower / Fund / Account	Management Agreement	Related Agreements	Date of Management Agreement	Annualized Staff and Services Fee Rate (bps)
Hewett's Island CLO I-R, Ltd.	Management Agreement	Indenture	November 20, 2007	15
Acis CLO 2013-1 Ltd.	Portfolio Management Agreement	Indenture	March 18, 2013	15
Acis CLO 2013-2 Ltd.	Portfolio Management Agreement	Indenture	October 3, 2013	15
Acis CLO 2014-3 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	February 25, 2014	15
Acis CLO 2014-4 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	June 5, 2014	15
Acis CLO 2014-5 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	November 18, 2014	15
Acis CLO 2015-6 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	April 16, 2015	15
BayVK R2 Lux S.A., SICAV-FIS	Agreement for the Outsourcing of the Asset Management	Service Level Agreement	February 27, 2015	15
Acis Loan Funding, Ltd.	Portfolio Management Agreement		August 10, 2015	0

EXHIBIT I

JAMS ARBITRATION PROCEEDING

JOSHUA N. TERRY,	§	
	§	
Claimant,	§	
	§	
v.	§	**JAMS No. 1310022713**
	§	
HIGHLAND CAPITAL MANAGEMENT, LP, ACIS CAPITAL MANAGEMENT, LP, ACIS CAPITAL MANAGEMENT GP, LLC, JAMES DONDERO, as trustee of THE DUGABOY INVESTMENT TRUST, and MARK K. OKADA,	§	
	§	
Respondents.	§	

AFFIDAVIT OF SCOTT S. HERSHMAN IN SUPPORT OF HIGHLAND'S REQUEST FOR ATTORNEYS' FEES

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, personally appeared Scott S. Hershman, who is personally known to me, and upon his oath deposed and said as follows:

1. I am a partner with Lackey Hershman, L.L.P., counsel to Respondents in this case. I am over eighteen (18) years of age and fully capable of making this affidavit. The facts stated herein are true and correct and are based upon my personal knowledge.

2. I have been an attorney for nearly thirty years and have been licensed in both Illinois and Texas state courts. I have litigated disputes in the state and federal courts and arbitration tribunals in Texas, Illinois, New York, California, Hawaii, Nevada, Arizona, Tennessee, Michigan, Florida, North Carolina, Georgia, New Mexico, Colorado, Delaware, and Mississippi. I have also litigated disputes in Mexico, Canada, the Far East, and Europe. At the

appellate level I have practiced in the state and federal courts in Texas, Illinois, California, New Mexico, Arizona, Nevada, New York, and Louisiana. I have also litigated in the state Supreme Courts of Texas, Illinois, California, Arizona, Delaware, and Nevada. The vast majority of my practice has been in complex commercial litigation, much of which is substantively and procedurally similar to the case at bar.

3. I have been designated as an expert on the reasonableness of attorneys' fees, professional responsibility, and professional malpractice too many times to count. I am familiar with the current legal and factual standards in determining the reasonableness of attorneys' fees as well as the current practices, rates, and costs associated with litigation in cases such as the one at bar.

4. I reviewed the substantive pleadings; a portion of correspondence between the lawyers; the court's and tribunal's rulings; portions of certain depositions and discovery; all of Respondents' redacted monthly billing statements;[1] and all of Claimant Joshua Terry's ("Terry") billing statements that were made available to Respondents (June 2016 – April 2017). I also spoke with Jamie Welton.

5. Highland's claim for attorneys' fees, costs, and expenses arise from the Employment Agreement and Terry's theft of company property in breach of that agreement and duties to his employer (Highland), both of which are governed by Texas law. *See* Highland's Statement of Claim (May 24, 2017); (Employment Agreement § 7.6 (stipulating to the application of Texas law to all disputes "relating to the interpretation and enforcement of the provisions of this Agreement") (Resp. Tr. Ex. 1).

6. Terry purports that his claim for attorneys' fees, costs, and expenses is made "[p]ursuant to Texas Civil Practice and Remedies Code section 38.001 and the LPA." *See*

[1] True and correct copies of Respondents' redacted bills are attached as Exhibit 1.

Claimant's First Amended Statement of Claim (Jan. 11, 2017). The only claim based on Texas law asserted by Terry is his claim for wrongful termination under *Sabine Pilot*, which does not allow for the recovery of attorneys' fees. *See Ed Rachal Found. V. D'Unger*, 117 S.W.3d 348, 357-58 (Tex. App.—Corpus Christi 2003), *rev'd in part on other grounds*, 207 S.W.3d 330 (Tex. 2006); *Garcia v. Sunbelt Rentals, Inc.*, 310 F.3d 403, 404-05 (5th Cir. 2003). All of Terry's other claims arise out of or related to the LPA, which is governed by Delaware law. *See* LPA § 6.11 (Resp. Tr. Ex. 77).

7. Both Texas and Delaware adhere to the American Rule, which prohibits the award of attorneys' fees unless they are expressly authorized by a statutory or contractual fee-shifting provision. *See LG Ins. Mgmt. Serv. L.P. v. Leick*, 378 S.W.3d 632, 640 (Tex. App.—Dallas 2012) ("Texas follows the 'American Rule' for the award of attorneys' fees, which prohibits the awarding of attorneys' fees unless they are permitted by statute or contract."); *In re Boomerang Tube, Inc. et al.*, 548 B.R. 69, 71-75 (Bankr. D. Del. 2016) (holding that any departures from the American Rule must be "specific and explicit" and "must authorize the award of a reasonable attorney's fee, fees, or litigation costs and usually refer to a prevailing party in the context of an adversarial action") (citations omitted); *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, *2 (Del. Super. Ct. Mar. 2012) (Requiring "clear and unequivocal articulation of intent" to deviate from the American Rule, and holding that parties "should not expect the court to deviate from the American Rule if care has not been taking in drafting a contract's language.").

8. Highland is entitled to recover its attorneys' fees and costs on at least one of three separate grounds: (i) Section 5.4 of the Employment Agreement, which explicitly provides that Highland "shall be entitled" "to recover the Company's attorneys' fees, costs, and expenses

related to the breach" by Terry; (ii) TEX. CIV. PRAC. & REM. CODE § 38.001, which provides for the recovery of attorneys' fees in breach of contract cases; and (iii) TEX. CIV. PRAC. & REM. CODE §§ 134.005(b) and/or 134A005(3), which provide for the recovery of attorneys' fees in cases involving theft of company property or misappropriation of trade secrets.

9. It is my opinion that none of the parties, including Terry, are entitled to recover attorneys' fees under the LPA because there is no "specific and explicit" statutory or "clear and unequivocal" contractual departure from the American Rule. First, there is no applicable statutory basis under Delaware law for attorneys' fees, nor was one pled, and the LPA expressly superseded and waived ability to recover under Chapter 38 of the Texas Civil Practices & Remedies Code. *See* Claimant's First Amended Statement of Claim (Jan. 24, 2017) (failing to assert any claim for attorneys' fees under Delaware law); LPA §6.12(b)(iv) (stipulating to the American Rule and providing it is "intended to supersede any rights under Texas Civil Practices and Remedies Code § 38.001(8), which rights the parties expressly waive.") (Resp. Tr. Ex. 77). Second, there is no specific or explicit contractual fee-shifting provision in the LPA, which, to the contrary, expressly incorporated the American Rule. *See* LPA § 6.12(b)(iv) (stipulating to the American Rule) (Resp. Tr. Ex. 77). Notably, the waiver of attorneys' fees under Chapter 38 of the Texas Civil Practices and Remedies Code does not apply to Highland's claims because such a waiver cannot be applied to a non-party to the LPA. *See In re Boomerang Tube, Inc. et al.*, 548 B.R. 69, 71-75 (Bankr. D. Del. 2016) (holding that contractual waiver of attorneys' fees is not binding on persons or entities that are not a party to the subject contract). And, in any event, there is an applicable fee-shifting provision in the Employment Agreement, which entitles Highland to recover its attorneys' fees, costs, and expenses related to Terry's breach of that agreement. *See* Employment Agreement § 5.4 (Resp. Tr. Ex. 1).

10. It is my conclusion that Highland's reasonable and necessary attorneys' fees that it should recover are $1,605,844.45. It is my conclusion that Highland's reasonable and necessary costs that they should recover are $787,454.36.[2] I base that on the following.

11. Texas and Delaware courts suggest considering the following when determining the reasonableness of attorneys' fees: the time and labor required; novelty and difficulty of questions involved; the skill required to perform the legal services properly; the likelihood the employment precludes other employment; customary fees; the amount involved and the results obtained; time limitations; the nature and length of the professional relationship; and the experience, reputation and ability of the lawyers. Each of those factors, when applied to this case, confirm my conclusion.

12. This dispute obviously required substantial time and labor. Both sides employed numerous lawyers and several experts. There were initially two forums, and once the arbitration is concluded, there is a substantial likelihood that the state court will also become involved once again. Counting both forums, the parties filed or had to respond to dozens of motions, briefs, responsive papers, and other pleadings. There were multiple hearings, both in the state court and in the arbitration. Each of those had to be prepared for and attended. There were 11 depositions, and substantial written discovery. The case took a total of 13 months to try, culminating in an eight-day arbitration proceeding. In addition to that final proceeding, there were several preliminary hearings, including emergency and injunctive hearings in the state court and discovery and dispositive hearings in the arbitration.

13. This case presented numerous issues of law and fact, many of which were complex given the underlying business and transactions at issue. These included, among other things, the issue of what claims should be arbitrated, given the conflicting provisions in the

[2] A true and correct summary of Respondents' recoverable costs is attached as Exhibit 2.

subject employment agreement and the LPA, and the existence of parties who were not party to those agreements. This case also involved theft of company information and misappropriation of trade secrets; the rights to company information; and injunctive and emergency relief issues. The case also involved the analysis of and litigation over multiple commercial agreements, which were complicated by the nature of the underlying business and structured financial products.

14. A great deal was at stake. This case involved Terry's allegation that Respondents owed him more than $200 million dollars.[3] Respondents were seeking to protect highly confidential and privileged information, the disclosure of which could damage Respondents and/or their investors.

15. Because of the workload and expedited timing of the proceedings, including the parties' success in litigating this case in just over a year (rather than the 2 or 3 years that would be customary), employment in this case precluded other employment by the Respondents' attorneys to a substantial degree.

16. Respondents' law firms have a long and deep professional relationship with Respondents. Lackey Hershman has represented Highland Capital Management, L.P. and its affiliates for sixteen years. This provided Respondents with extra value and inherent efficiencies of having lawyers that were familiar with their people and workings. This relationship is invaluable in a case such as this and often saves a significant amount of fees.

17. Respondents' lawyers have significant experience in this type of case and are extremely well thought of in the industry. I have personally observed Jamie Welton and Marc Katz in court and believe they are two of the most extraordinary lawyers I have ever seen.

[3] Should the Panel consider awarding Terry his attorneys' fees, which, as detailed in this Affidavit, I do not believe he is entitled to, the Panel should consider reducing those fees based on, among other things, the fact that Terry significantly overstated his recoverable damages by a factor of twenty.

18. Hourly rates for matters such as these typically range from $500.00 to $1,500.00 per hour for senior attorneys and $200.00 to $500.00 per hour for more junior attorneys. Respondents' billing rates were well within these parameters. The weighted average of Respondents' hourly rate was approximately $585.00 per hour. Jamie Welton, lead counsel for Respondents, was $700.00 per hour. That amount was imminently reasonable for an attorney of his caliber and experience. Terry's lead counsel billed at $685.00 per hour. It appears that Terry and his lawyers then switched to a blended fee arrangement, where his lawyers billed at approximately 30-50% of their normal hourly rates in exchange for a partial contingency. Backing out the reduced rates, Terry's lawyers' blended rate is roughly the same as Respondents' blended rate.

19. Lackey Hershman also capped its hours at 10 per day, despite several lawyers spending far more than that nearly every day of the arbitration and on several days preparing for the arbitration and during the course of the litigation. Lackey Hershman also did not bill for paralegal time.

20. In addition to the criteria suggested by Texas authority, I compared Terry's fees (for the 11 months Terry made available) to Respondents' fees. In cases such as these, it is typical, if not uniformly true, that the fees of multiple corporate defendants are two to five times more than the fees of an individual petitioner/plaintiff. This is the case for several reasons, including differences in factual investigation; discovery; and case management.

21. With respect to factual investigation, an individual plaintiff and its lawyers have essentially one source for information—the plaintiff. That was essentially the case here. On the other hand, there were multiple parties on the other side, several of which were corporate entities, making any factual investigation a far broader and more complicated task. This

typically involves interviewing numerous people, not just one plaintiff. As is often the case, some of the witnesses no longer work for the parties and thus must be located, and contacted, often requiring the party to go through an individual's counsel. General counsel and other legal and compliance department personnel are typically if not always involved in the process and thus adds an additional layer of complication. There is also a need to avoid interfering with ongoing business, business relationships, and employee relationships, all of which makes factual investigation more complicated and time consuming.

22. The same holds true with discovery. In this case, when responding to discovery, the sole source of document production and interrogatory responses was Terry. In this case, it appears that the only documents Terry had in his possession were those that he stole from Respondents. On the other hand, Respondents' counsel had to review, locate, and analyze the documents produced by several entities, numerous employees, and third parties. In responding to interrogatories, Respondents had to interview multiple individuals and analyze a significantly greater amount of documents. There is simply an enormous difference between handling discovery when one represents a single, individual client versus handling discovery when one has multiple corporate entities with various deponents and employees.

23. The same also holds true for case management. All of the factors complicating discovery and factual investigation similarly complicate the case management.

24. For the 11 months I had available to compare Respondents' bills with Terry's bills (June 2016 – April 2017), I found that Respondents' fees fell well within the expected norm. For the 11 months I had available from Terry (June 2016 – April 2017), Respondents' lawyers billed approximately 1,170 hours. Terry's lawyers billed approximately 813 hours. Respondents' lawyers' total hours were significantly less than I would have anticipated, given

Terry's lawyers' hours. As noted above, Respondents' lawyers' blended hourly rate, and individual rates, were more than reasonable.

25. Another factor supporting my determination that all of Respondents' fees were necessary and reasonable is that a substantial portion of those fees were made necessary by the litigation tactics of Terry and his counsel. Terry filed an opposition and motion for sanctions because Respondents initiated a state court proceeding. He did so even though the subject employment agreement provided that the exclusive venue for any disputes on the employment agreement would be in the state or federal courts in Dallas County. He did so despite the fact that it was black letter law one must seek injunctive relief in the state or federal courts, even in the face of a binding arbitration provision. He did so even though Highland was not party to the LPA. Terry also fought hard, in both forums, in resisting the return of documents and information that was irrefutably the property of Highland. Terry and his lawyers also failed to disclose (and return) certain documents Terry had in his possession that should have been quickly disclosed and returned. *See generally* Bench Brief of Professor Moss; Respondents' Post-Hearing Brief.

26. Respondents incurred a total of $1,605,844.45 in fees in this dispute. Based on the eight-day length of that trial; the work necessary to prepare for and present the case; the complexity of the issues at hand; and all the other factors detailed above, it is my opinion that that amount is imminently reasonable and necessary, and should be recovered.

27. Respondents also incurred $787,454.36 in costs, primarily experts, discovery, and arbitration fees. Based on the above criteria, it is also my opinion that those, too, are all reasonable and necessary and recoverable by Respondents. **In total, I believe Respondents should be awarded $2,393,298.81 in attorneys' fees and costs**.

28. It is my opinion that neither party is, at this juncture, entitled to recover fees for anything that is to occur in the future, including post-trial motions, appeals to the extent permitted, and collection efforts. In order to be entitled to such fees at this juncture, they must be not only reasonable and necessary, but foreseeable and expected. Given the fact that the panel has yet to make an award, there is no way to determine what, if anything, will occur after the panel issues its award. Respondents, however, are certainly entitled to petition the panel for fees at a later date.

29. I also considered whether a portion of Highland's fees should be segregated. Based on my review of the file, I concluded that Highland's fees should not be segregated because Respondents' claims and defenses all arose out of and were inextricably interwoven with the breach of Employment Agreement claim against Terry and basis for his termination. Respondents' defense to Terry's claims were primarily the breach of his Employment Agreement, basis for his termination from Highland, and his theft of company property — the very same bases of Highland's claims against Terry. As such, both Highland's claims and Respondents' defenses to Terry's claims, entailed the very same facts and law and are thus intertwined and not subject to segregation.

This concludes my affidavit testimony.

Scott S. Hershman

SUBSCRIBED AND SWORN TO BEFORE ME on this the 13th day of October, 2017.

Notary Public, State of Texas

EXHIBIT J

October 20, 2017

VIA EMAIL AND FIRST CLASS MAIL

NOTICE TO ALL PARTIES
(Please See Service List)

Re: ***Terry, Joshua N. vs. Highland Capital Management, LP., et al.***
JAMS Ref. No.: 1310022713

Dear Counsel:

Enclosed please find the **Final Award** executed by the arbitrator.

Please feel free to contact me should you have any questions.

Thank you,

Judy Stephenson

Judy E. Stephenson
Senior Case Manager
jstephenson@jamsadr.com

Enclosure

JAMS

TERRY, JOSHUA N.	§	
	§	
Claimant,	§	
	§	
v.	§	**JAMS ARBITRATION NO. 1310022713**
	§	
HIGHLAND CAPITAL MANAGEMENT, LP, ACIS CAPITAL MANAGEMENT, LP, ACIS CAPITAL MANAGEMENT GP, LLC, DONDERO JAMES D. as TRUSTEE/THE DUGABOY INVESTMENT TRUST and OKADA, MARK K.	§	
	§	
Respondents.	§	

FINAL AWARD

Parties and Counsel: The parties are identified in the caption and are represented as follows:

Brain P. Shaw
Rogge Dunn
Clouse Dunn LLP
1201 Elm Street, Suite 5200
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Email: rogge@clousedunn.com
Counsel for Claimant, Joshua N. Terry

Paul B. Lackey
Jamie R. Welton
Bruce E. Bagelman
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AND

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Phone: 214-659-4400; Fax: 214-659-4401
Email: marckatz@andrewskurth.com
Email: robhoffman@andrewskurth.com
Counsel for Respondents, Highland Capital Management, LP, ACIS Capital Management, LP, ACIS Capital Management GP, LLC, Dondero, James D. as Trustee/The Dugaboy Investment Trust, and Okada, Mark K.

Arbitrator:

Hon. Harlan Martin
Hon. Glen M. Ashworth (Ret.)
Hon. Mark Whittington (Ret.)
JAMS
8401 N. Central Expressway, Suite 610
Dallas, Texas 75225
Telephone: 214-744-5267; Fax: 214-720-6010

Case Manager:

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HEARING

In accordance with the Parties' agreement to arbitrate and Court Order, disputes between Claimant, Joshua N. Terry ("Terry") and Highland Capital Management, LP, ("Highland"), ACIS

Capital Management, LP ("ACIS"), ACIS Capital Management GP, LLC ("ACIS GP"), James Dondero, as Trustee of the Dugaboy Investment Trust ("Trust"), and Mark K. Okada ("Okada"), all Respondents were submitted to binding arbitration before JAMS. The Arbitration Panel members are the Hon. Glen M. Ashworth (Ret.), the Hon. Mark Whittington (Ret.) and the Hon. Harlan Martin (Former), serving as Chairman of the Panel.

The arbitration hearing was conducted in Dallas, Texas on the dates of September 2, 3, 6, 7, 8, 11, 12, 13, 14 and 15, 2017, with additional briefing submitted thereafter. The briefing was closed and the hearing was complete on September 28, 2017.

PROCEDURAL BACKGROUND

In Cause No. DC-16-11396, styled Highland Capital Management, LP vs. Joshua N. Terry, the 162nd Judicial District Court stayed the litigation and Ordered the parties to arbitration.

The Panel has previously dismissed all claims stated by Terry against Jams Dondero, individually. James Dondero is not an appropriate party to this proceeding and did not obligate himself to the Parties' arbitration agreement.

The Panel has previously dismissed Terry's claims for Declaratory Judgment relief.

The Panel has previously dismissed Terry's claims for Exemplary Damages, as same are an excluded remedy by the terms of the Parties' arbitration agreement.

The Panel has previously denied Respondents' Motion to Disqualify Clouse Dunn and ruled that the firm is not disqualified to represent Terry.

The Panel has declined to entertain any request for injunctive relief.

REMAINING CLAIMS STATED BY PARTIES

Terry states claims against Highland for Sabine Pilot wrongful termination and seeks damages for deferred compensation, unpaid wages, future wages and reimbursement of benefits not paid. Terry states claims against ACIS, ACIS GP and Highland for reputational damages, resulting from statements published in the pending District Court litigation and a press release to Law 360.

Terry states claims against ACIS, ACIS GP, Trust and Okada for breach of contract and seeks damages for amounts due under the terms of the ACIS LPA and damages resulting from overcharging expenses and withholding of retirement assets.

Terry states claims against ACIS and ACIS GP for fraud.

Terry states claims against ACIS GP for breach of fiduciary duty.

Terry states claims against ACIS, ACIS GP and Highland for conversion of assets, fraudulent transfer of ACIS assets, recovery of his attorney's fees and costs, together with pre and post award interest.

Highland states claims against Terry, "subject to, and without waiver of its contention that Highland is not a party to a valid arbitration agreement with Terry and its claims against him are not arbitrable or within the scope of any applicable arbitration agreement, which contentions remain fully reserved." With this reservation, Highland states claims against Terry for breach of employment agreement, theft/theft of trade secrets, breach of fiduciary duty/self-dealing and recovery of its attorneys' fees and costs together with pre and post award interest.

BACKGROUND FACTS

Terry began his employment with Highland in 2005. During the ensuing years he achieved remarkable success and ultimately became Highland's most productive portfolio manager and had direct responsibility for more than ten billion dollars of assets under his management.

In 2011, Terry, James Dondero and Okada formed ACIS as a registered investment advisor to raise money from third-party investors to invest in collateralized loan obligations, (CLOs). ACIS earns a fee for managing the loans.

As the general partner of ACIS, ACIS GP owned .1%. As limited partners of ACIS, Trust owned 59.9%; Okada owned 15% and Terry owned 25%.

James Dondero owned 100% of Trust and was an officer of ACIS GP, and in fact made or approved the financial strategies and decisions of ACIS. While Okada was less active, Terry was responsible for the day-to-day management of ACIS. Terry managed well, attracted significant investors and grew ACIS assets under his management from nothing to three billion seven hundred million dollars in less than six years.

Prior to 2016, Terry enjoyed a good relationship with Dondero. Terry had never been criticized, written up or disciplined during his eleven years of employment with Highland. Terry had been paid millions of dollars in Highland salary, bonuses and ACIS profit distributions, as he had produced many more millions for Highland and his ACIS partners.

Thereafter, tensions arose between Terry and Dondero which were centered in Dondero's plans to have Trussway Holdings, Inc. acquire Targa, a Brazilian latex manufacturer, out of bankruptcy. Trussway is a Highland affiliated company controlled by Dondero. The plan was to have Highland managed CLOs loan Trussway approximately seventeen million dollars so

Trussway could loan a Highland affiliated Brazilian entity the money to acquire Targa and have Trussway use its cash to acquire its own equity to effectively increase Highland's ownership in Trussway.

At this time, Trussway's only lenders were the Highland CLOs and it owed the Highland CLOs approximately fifty six million dollars in Trussway notes coming due on May 31, 2016. Trussway did not have the money to pay the notes. Trussway did have more than twenty three million dollars still available on its revolver note (credit line), with the Highland CLOs. Dondero's plan was to extend the notes then due within days and finance Trussway's acquisition of Targa by drawing down the revolver funds. Dondero's plan was to not pay any of the CLOSs' notes until such time as Trussway could be refinanced or sold.

All of the Highland CLOs lending to Trussway were "pre-crisis" 2009, CLOs. One of the CLOs, Pamco-Cayman, had matured years before and its notes were in technical default. Another, Vahalla was maturing within four months.

Terry was opposed to Dondero's plan and saw a need to vigorously oppose the plan. Terry was the portfolio manager of these Highland CLOs and was convinced it would be a breach of his fiduciary duty to allow the Pamco-Cayman and Vahalla notes to be extended, as they were past or near maturity. Terry's opposition escalated at the May 2016 Conflicts Committee meeting and having been told that outside counsel had approved the transaction, Terry was sure they could not know all of the facts. Terry then informed outside counsel of "the facts" and his opposition to Dondero's plan. Outside counsel was in agreement with Terry and thereafter, on June 9, 2016, the Conflicts Committee approved the Trussway/Targa Transaction, but with the Pamco-Cayman and Vahalla notes being paid off and not extended. Thus, less cash was available to Dondero to fund his plan.

On June 9, 2016, following the Conflicts Committee meeting, Dondero told Terry that "he had lost all trust in him"; that "he could not go through another conflicts process with him"; and "it was best that Terry work with Surgent, Highland's Chief Compliance Officer (CCO), on an exit or transition out of Highland." The next day, Dondero emailed Terry and told him to focus on a "clean break scenario" and not come back to the office. On June 13, 2106, Terry received an email from Highland's Human Resources (H/R) director advising that he had been terminated for cause, but that Highland was "willing to consider the separation package previously offered", presumably referring to CCO Surgent's email of June 10, 2106, wherein he acknowledges that, "We are in agreement that we would like the termination of this relationship to be amicable." On June 13, 2016, Terry communicates with Dondero protesting his termination and demanding he be paid by Highland and ACIS. Thereafter, Highland's outside counsel sent a letter to Terry's counsel, demanding the return of all Highland related documents in the possession of Terry. Terry's counsel responds and reminds Highland's counsel of Terry's prior offer to return appropriate documents to Highland, and suggests a protocol for managing the electronically stored documents and electronic devices in possession of ESI, a third party forensics vendor, and demands redemption of Terry's and his wife's retirement account investments in ACIS CLO Value Fund II (CLOVF). Terry first requested redemption of these retirement account investments on June 20, 2016.

Thereafter, on June 27, 2016, Terry returns documents to Highland and continues to await an agreement on ESI return protocols. However, on July 27, 2016, Highland's counsel rejects the proposed ESI return protocols and does not suggest alternate protocols. In the same e-mail string, Highland's counsel responds to Terry's request for redemption of the retirement investments in CLOVF, advising that; "we do not contest that Mr. Terry has submitted a request

for redemption in full of all of his accounts. However, please note that those accounts do not have any value." On September 1, 2016, the CCO, for the first time, memos Terry's "compliance file" with allegations of Terry's breach of fiduciary duty, self-dealing and material compliance violations regarding the CLOVF. This memo alleges an investor loss in the CLOVF attributed solely to Terry's actions and that Highland in part offset such loss against "Mr. Terry's" remaining interest in the CLOVF, "in accordance with Section 3.5(c) of the Agreement of Limited Partnership." Thus, Terry's and his wife's retirement investment in the CLOVF was swept by Highland or others and "those accounts have no value," as stated in Highland's counsel's email of July 27, 2016.

On September 7, 2016, the Parties mediated their dispute, but did not settle. The next day Highland filed suit against Terry alleging the same facts which the CCO alleged in his September 1, 2016 memo, and alleging Terry had a sexual relationship with a number of his subordinates, and alleging that Terry made disparaging/disrespectful remarks about Dondero. Highland's suit stated claims for breach of employment agreement, breach of fiduciary duty/self-dealing, violation of the Texas Uniform Trade Secrets Act and sought declaratory relief that Terry was terminated for cause.

On September 12, 2106, Highland files its Application for Temporary Restraining Order and Motion to Disqualify Terry's attorneys, and Terry files his Motion to Compel Arbitration. On September 28, 2106, the Court issued its Order compelling the Parties to arbitration and Ordered the litigation (Cause No. DC-16-11396, 162nd Judicial District Court) stayed pending a Final Award in Arbitration.

ANALYSIS OF FACTS AND CLAIMS

The Panel first addresses Terry's claims for breach of contract stated against ACIS and ACIS GP and breach of fiduciary duty stated against ACIS GP.

The evidence establishes that Highland terminated Terry's employment on June 9, 2016. The ACIS Limited Partnership Agreement (LPA), Section 4.04 requires that, "upon the resignation, death, disability or termination of employment with the Partnership or any Affiliate Employer (for any reason whatsoever) (as such event, a 'Removal Event') of any Limited Partner, the Partnership Interest of such Limited Partner shall automatically be forfeited to the Partnership and such Limited Partner shall be entitled to receive in consideration of such interest an amount equal to (i) 100% of such Limited Partners Percentage Interest of all Net Available Cash through the first year end following the Removal Event, (ii) 66 2/3% of such Limited Partner's Percentage Interest of all Net Available Cash through the second year end following such Removal Event, (iii) 33 1/3% of such limited Partner's Percentage Interest of Net Available Cash through the third year end following such Removal Event…; provided, that if the basis of such Removal Event was termination of employment with the Partnership or any Affiliate Employer for cause…such partner shall automatically forfeit its right to any further compensation or consideration for its Partnership Interest."

Because Highland stated that Terry was terminated for cause, ACIS and ACIS GP invoked the provided clause and deemed all of Terry's limited partnership interest and entitlement to payout as forfeit. Thus, ACIS and ACIS GP claim to owe Terry nothing for his 25% limited partnership interest in ACIS, as Terry claims he is contractually owed twelve million nine hundred and eight two thousand dollars for his 25% limited partnership interest in ACIS.

The evidence establishes that ACIS and ACIS GP did not just simply rely on Highland's statement of terminating Terry for cause. ACIS and ACIS GP became part of Highland's and

Dondero's efforts to construct a pretext of "for cause" termination so Terry could be denied the value of his limited partnership interest in ACIS. ACIS and ACIS GP knowingly and willingly pretextually characterized Terry's termination from Highland as a "for cause" termination to deny Terry the value of his limited partnership interest, all in contractual breach of the ACIS LPA and in breach of fiduciary duty to Terry as its limited partner. ACIS and ACIS GP have no employees. All who act for ACIS and ACIS GP are officers or employees of Highland and perform multiple roles.

The evidence establishes that Highland's termination of Terry was, in fact, pre-textual, without basis of cause and only because Dondero wanted him gone. Terry's opposition to Dondero's Trussway/Targa plan was not self-dealing and not a breach of fiduciary duty. Terry's opposition to Dondero's plan to not pay investors and extend past due and near due notes was appropriate and was ultimately accepted by all to be the correct approach to complete the Trussway/Targa acquisition. Dondero was simply angry and realized Terry was not a "yes man" willing to let Dondero have his wrongheaded way, so Dondero fired Terry on the spot and later sought to characterize Terry's termination of employment as "for cause."

Respondents' offer to prove that Terry's termination was "for cause" is not persuasive. The contrasts between the true facts and their temporal relationship to Terry's termination, as those "facts" are characterized by Respondents as a predicate for his "for cause" termination, are not credible. The CCO's memo to Terry's file of September 1, 2016 was the first documentation of his alleged breach of fiduciary duty or self-dealing as a justification for his "for cause" termination.

There is no credible evidence that anyone ever discussed any prior sexual relationship between Terry and a co-worker, other than Terry in a "father/son" talk with Dondero in January 2015. That admitted relationship had ended months earlier, was not significant to Dondero and he told Terry there was no need to report the relationship to Human Resources. Respondents alleged

other sexual relationships between Terry and co-workers which are denied by Terry. One is alleged to have occurred in 2011, but there is no credible evidence that it even occurred. It is simply not credible that a rumored relationship four years prior was any motivation for or could be any justification for Terry's "for cause" termination. Respondents' allegation that Terry had a sexual relationship with a Highland junior attorney is most offensive, as the relationship did not occur and was denied by both Terry and the junior attorney. This allegation was based solely on someone's fantasy related to costumes they wore at an office Halloween party and their common attendance at a business conference. It is not credible that a sophisticated CCO and H/R director would reasonably rely on such as a basis for Terry's "for cause" termination and resulting forfeiture of the value of his limited partnership interest in ACIS. The evidence establishes that Terry did not have a sexual relationship with the junior attorney, and the Respondents or others, in good faith, could not have reasonably believed he did.

The Panel is persuaded that the Respondents, feeling need to find motive for the junior attorney's assistance of Terry and her involvement in the CLOVF restructure, sponsored these allegations to support their claims that Terry was seeking the restructure of the CLOVF out of self-interest and in breach of his fiduciary duties, and establish the motives of the junior attorney in "knowingly" facilitating Terry's alleged breach of duty. This is a pretextual construct of the CCO and is simply not credible.

The proposed restructure of the CLOVF began in early 2015 and was always known by Dondero, Highland's legal department and CCO. The CLOVF was small, only had a few investors, was subject to investor redemption requests, had been co-opted to be supported by Highland employee's investment of their retirement accounts and not structured in a way to attract a target

group of investors. The proposal was to restructure the CLOVF to make it more "hedge fund like", and grow the CLOVF with new investors.

The CLOVF routinely paid profit distributions to its investors. This is not "hedge fund like" because profits were distributed rather than retained to be reinvested for growth. The two primary investors, referred to as Rampart and Kyser did not require routine distributions and sought growth. Highland employees had access to investing in the CLOVF by investing in its ITA retirement accounts, which were basically IRAs. Employee investors who wished to invest more in their ITA retirement accounts were required to invest in the CLOVF's interest bearing notes at a ratio of 80% notes to support 20% investment in their ITA retirement accounts. If the CLOVF was to no longer distribute profits to accomplish "hedge fund like" reinvestment for growth, no distributions would be available to pay interest on the employee investment notes and the notes would need to be paid off. If there was no longer a vehicle to support aggressive employee investment in the CLOVF (the four to one ratio), the ITA did not need to continue to exist. The employee's retirement accounts could simply be redeemed or transferred to other IRAs.

Terry was the portfolio manager of the CLOVF and its third largest investor. Like other investors, Terry had rights to redeem his investment, but he did not seek to redeem and continued to invest in CLOVF notes and he and his wife continued to invest their retirement funds in the ITA. Nonetheless, Respondents allege that a dichotomy of interest led Terry to lie and scheme to have his investment in the CLOVF paid while others were encouraged to invest. This is the substance of Respondents' allegations of Terry's self-dealing and breach of fiduciary duty, supporting both their allegations of "for cause" termination and Highland's claims for damages and offset in the District Court suit. As noted, these claims were never documented or disclosed to Terry prior to the CCO's memo of September 1, 2016, and Highland's District Court suit.

As noted, the proposed restructure of CLOVF began in early 2015 and continued for a year thereafter. The business purpose of the restructure was well known to Dondero and the CCO. As early as the fall of 2015, Dondero and Terry were discussing the appropriateness of continuing the CLOVF without new investors. Dondero did not want to close the CLOVF and suggested that the DAF would become a major investor. The DAF (Donor Advised Fund), CLO Hold Co is the Parties' reference to a group of charitable foundations which were invested in Highland managed CLOs. The DAF's trustee is a Highland employee and Dondero's former college roommate. Apparently, Dondero knew he could direct the DAF's investment in the CLOVF and support its continuation. Dondero and the Highland CCO were aware of the planned restructure and its consequential effect on the ITA and the employee investor notes supporting the employee's retirement investments in the ITA. By December 2015, Dondero approves the restructure plan, payment of employee investor notes and the windup of the ITA. The Highland CCO expresses concern that Rampart's and Kyser's written approval is necessary for the CLOVF to stop paying profit distributions. Later the necessary approval is documented, apparently to the CCO's satisfaction, and the restructure plan proceeds. The DAF contributes sixteen million six hundred thousand dollars of Highland managed assets to the CLOVF, employee investor notes are paid and the ITA is wound up by the end of April 2016.

Following Terry's termination and later notice of "for cause" termination, Terry requested redemption of his and his wife's remaining investments in the CLOVF. Five weeks later, on July 27, 2016, he is advised that his investment has no value. Apparently, when the ITA was wound up in late April, Terry's and his wife's retirement investments were somehow re-characterized as Terry's capital account in the ACIS CLO Value Master Fund II, L.P. or his capital account in the CLOVF.

On or about July 19, 2106, Highland rescinded the DAF contributions to the CLOVF and returned the contributed assets to the DAF. Respondents state this rescission was necessary because they had "recently discovered (a) conflict of interest regarding an ex-employee." However, the Rescission Agreement itself recites that, "the Parties have each determined that it is in their respective best interests of each of the Parties to rescind and cancel the Contribution."

Incident to the rescission, the CLOVF returned all of the contributed assets to the DAF and paid in cash or transfer of additional assets the total value of seven hundred and eight thousand dollars, "to make the DAF whole", and economically in the same position as before its contribution to the CLOVF.

The "recently discovered conflict of interest" is the CCO's recent epiphany that Terry must have lied when he advised that the CLOVF investors Rampart and Kyser "requested" that distributions be terminated to accommodate reinvestment growth. The CCO's testimony that he called these investors and confirmed this lie is not persuasive and begs credibility. The only documented evidence are the investors written approvals which the CCO required.

The July 27, 2016 advice that Terry's and his wife's retirement accounts had no value is only accurate because the value was taken and used to pay the DAF following the rescission. In the District Court suit, Highland states a claim for damages and offset for the additional value paid to the DAF. Respondents' witness testified that the retirement fund's value was in Terry's capital account and it was swept pursuant to Section 3.5(c) of the ACIS CLO Value Master Fund II, L.P.'s limited partnership agreement.

Terry is a limited partner in the CLOVF and the CLOVF is a limited partner in the ACIS CLO Value Master Fund II (CLOVMF) but the evidence does not show Terry to be a partner in the CLOVMF. Assuming that Terry is a partner, as referenced in Section 3.5(c), Respondents' claimed

authority to sweep the accounts in satisfaction of or offset of damage or loss is directly dependent upon a nexus in causation between the alleged damage or loss and the conduct of Terry.

The evidence establishes that the CCO's claims of "recently discovered conflict of interest" is yet another construct and pretext to support Respondents' denial of limited partnership value based on a "for cause" termination and was not in fact the reason for the DAF rescission. It would make little difference to Highland which of its CLOs managed the DAF investments. Dondero simply reconsidered his decision to support the continuation of the CLOVF with Highland managed funds and realized, that in fact, as Terry had advised, the fund would be too small to manage without significant investors. The CLOVF was ultimately closed out because Dondero did not see benefit to its continuation. The evidence establishes that no conduct of Terry was a cause of damage or loss to the CLOVMF or the CLOVF.

Section 3.10(a) of the ACIS LPA limits compensation and reimbursement of expenses payable to the General Partner and any Affiliate of the General Partner to an amount not to exceed 20% of Revenues without the consent of all members of the Founding Partner Group. There is no dispute that Terry is a member of the Founding Partner Group. There is no evidence that Terry offered written consent to any expenses paid by ACIS in excess of 20% of Revenues. It is undisputed that ACIS habitually paid more than 20% of Revenues to Highland for providing ACIS with overhead and administration. Respondents' evidence and arguments that Terry waived or consented to ACIS's payment of excess expenses is not persuasive. At most, Terry accepted his ACIS distributions without regard to the expenses paid to Highland. This is not consent contemplated by the ACIS LPA. Highland is owned 75% by Dondero and 25% by Okada and Terry is not a partner in Highland. Terry had no reason to consent to excess expenses being paid to Highland. Additionally, the ACIS LPA has an express waiver clause at Section 6.09 which states,

"Waiver. No failure by any party to insist upon strict performance of any covenant, duty, agreement, or condition of this Agreement or exercise of any right or remedy consequent upon breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition."

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

The Panel next addresses Terry's claim for conversion of the ITA retirement accounts stated against Highland, ACIS and ACIS GP.

Without again reciting the convoluted structure and history of the ITA retirement accounts in issue, it is established that there is no remaining value to the accounts because its value was swept and used by Highland or CLOVF to pay the DAF incident to the DAF rescission. It is noted that Respondents argue and offer to prove that Terry has no standing to state a claim for conversion of three of the five accounts because his wife is the trustee and owner of those three accounts. She is the trustee and owner of those accounts. Yet those accounts too were swept to pay the DAF and construct a pretextual damage and offset claim for having paid the DAF. While this establishes conversion of the accounts to the damage of Terry and his wife, the converters (CLOVF, CLOVMF, ACIS CLO VF GP), are not parties to this arbitration. The claims for breach of contract and conversion and damages should be stated against those parties or others, elsewhere.

The Panel next addresses Terry's claims for reputational damages and fraudulent transfer stated against Highland, ACIS and ACIS GP.

The evidence establishes that Highland and not ACIS or ACIS GP was the publisher of any false or defamatory statements. Whether those statements in pleadings or press release to Law360 are actionable against Highland is a matter deferred for the District Court suit. Terry's claims for reputational damages stated against ACIS or ACIS GP are not proved.

Terry states a claim against Highland, ACIS and ACIS GP for the fraudulent transfer or conveyance of assets under the Texas Fraudulent Transfer Act. In October 2016, ACIS sold to Highland a participation interest in ACIS's Service Fees (management fees) which ACIS would receive between November 2016 and through August 2019. This sale of a participation interest represents near one-half of ACIS revenues during the covered period. Highland is to pay, in cash and promissory note with interest at 3%, ACIS a total of thirteen million three hundred and thirty three thousand dollars, plus interest for the participation interest. Highland's payment is scheduled as follows:

- October 7, 2016 - $666,655.00 – cash at closing
- May 31, 2017 - $3,370,694.00 – principal and interest
- May 31, 2018 - $5,286,243.00 – principal and interest
- May 31, 2019 - $4,677,690.00 – principal and interest

The transactional documents recite business purpose and reasonable consideration for the sale. Terry offers no evidence that ACIS did not receive reasonable equivalent value in the transaction or that ACIS made the transfer with "actual intent to hinder, delay or defraud." Terry has not proved a claim for fraudulent transfer or conveyance.

The Panel next addresses Terry's claims for wrongful termination and resulting damages stated against Highland.

Terry's employment with Highland was "At Will" and he could have been terminated for any reason other than an unlawful reason. Terry did not prove that the sole reason for his termination was his refusal to commit an illegal act, as is required under Sabine Pilot. The evidence establishes that Dondero terminated Terry because he was angry with Terry's opposition to his Trussway/Targa acquisition plan and he wanted Terry gone. "At Will" employment contemplates that if the boss wishes, one's employment is terminated and the termination is not actionably wrongful. Even as an "At Will" employee, Terry may have claims for damages against Highland for his unpaid severance, unused vacation, deferred compensation and unreimbursed expenses, but these claims are a matter deferred for the District Court suit. Terry's claims stated against Highland for Sabine Pilot wrongful termination are not proved.

Although Trust and Okada are limited partners in ACIS and are named as Respondents in this arbitration, Terry has failed to offer any evidence of actionable claims against Trust or Okada. All claims stated by Terry in this arbitration against Trust or Okada are not proved.

The Panel next addresses Highland's claims for breach of employment agreement, theft/theft of trade secrets and breach of fiduciary duty stated against Terry.

Although Highland is a party to the District Court suit Ordered to arbitration, Highland is not a party to an arbitration agreement and has stated claims against Terry with the above noted reservation, "subject to and without waiver." To the extent these claims are stated in this Arbitration in affirmative avoidance of Terry's claims stated against ACIS and ACIS GP they are addressed in this Award.

The evidence does not establish that Terry breached his employment agreement or any fiduciary duty to Highland, ACIS or ACIS GP or that Terry self-dealt in anyway. On the contrary, Terry's actions in opposing Dondero's Trussway/Targa acquisition plan and his efforts to restructure

the CLOVF were reasonable and appropriate and as his portfolio manager duties required. These claims are not proved and are not an affirmative defense or avoidance available to ACIS or ACIS GP.

The evidence does not establish that Terry is guilty of theft or theft of trade secrets. Respondents offered no evidence of a trade secret or a protectable trade secret interest in the documents in issue. Although Highland's claim for turnover is overreaching, it was heard in this Arbitration at Respondents' insistence and the record and all evidence admitted in that preliminary hearing was offered and admitted in the final hearing. This claim is not proved and is not an affirmative defense or avoidance available to ACIS or ACIS GP. Otherwise, the Panel issues its turnover decision in this Award.

The evidence does not establish that any disparaging remarks of Terry were ever communicated to Dondero prior to Terry's termination or that the alleged remarks could have been a reason for Terry's "for cause" termination. All of Respondents' alleged bases of "for cause" termination of Terry's employment are not proved and none are an affirmative defense or avoidance available to ACIS or ACIS GP.

ANALYSIS OF TERRY'S DAMAGES

The Panel only addresses proved claims stated against appropriate Parties to this Arbitration.

Terry has proved his claims stated against ACIS and ACIS GP for breach of contract and claims stated against ACIS GP for breach of fiduciary duty incident to their payment of excess expenses to Highland and their wrongful forfeiture of Terry's contractual right to be paid for his ACIS limited partnership interest.

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

The best evidence of the value of the Section 4.04 limited partnership payout is Terry's June 13, 2016 calculations, which he communicated to Dondero within days of his termination. Terry was the portfolio manager of ACIS and as such was most aware of ACIS's financial performance and expected performance within the payout period. The calculations do not include an assumed growth rate of ACIS revenues and are not burdened by Highland's after termination manipulations of ACIS managed assets or ACIS revenues.

The evidence establishes that Terry's ACIS limited partnership payout upon termination had a total value of $5,688,351.00.

Because ACIS and ACIS GP breached the ACIS LPA and ACIS GP breached its fiduciary duty in June 2016 when they repudiated their obligations to their limited partner, Terry's contractual entitlement to payout under the ACIS LPA is liquidated, accelerated and is now fully due.

Additionally, Terry is entitled to pre-award interest at the rate of five percent (5%) per annum from the date of commencement of this Arbitration, September 20, 2016, until entry of Final Award in the amount of $372,192.00.00.

FINDINGS AND CONCLUSIONS

Based upon the Parties' offers of proof, evidence submitted and argument of counsel, the following facts and conclusions are found by these Arbitrators to be established by the evidence to be true and necessary to this Award. To the extent these findings and conclusions differ from any Parties' position that is the result of these Arbitrators determinations as to credibility, relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

The Arbitration Panel finds and concludes as follows:

1. This dispute is arbitrable pursuant to the Parties' agreement to arbitrate and prior Court Order in Cause No. DC-16-11396, 162nd Judicial District Court, Dallas County, Texas.
2. The Arbitration panel has jurisdiction to resolve all disputes presented and not deferred to the 162nd District Court.
3. JAMS Comprehensive Arbitration Rules and Procedures govern the resolution of this dispute with the law of the States of Texas and Delaware.
4. Prior to his termination on June 9, 2016, Terry was an at will employee of Highland and a 25% limited partner in ACIS.
5. Highland's termination of Terry's employment was not, in fact, "for cause." Highland's stated "for cause" termination of Terry's employment was, in fact, pretextual and for purpose of denying Terry benefits of employment payable at his termination and as a basis for the forfeiture of the value of Terry's limited partnership interest in ACIS.

6. ACIS and ACIS GP knowingly and willingly invoked Highland's false pretext of "for cause" termination to deny Terry the value of his 25% limited partnership in ACIS.
7. ACIS and ACIS GP paid Highland expenses in excess of the contractual limit imposed by Section 3.10(a) of the ACIS LPA.
8. ACIS and ACIS GP wrongfully denied Terry his contractual rights to payment for his limited partnership interest in ACIS and are liable for and owe Terry for same.
9. In breach of contract and fiduciary duties, ACIS and ACIS GP are liable to and owe Terry his ACIS profits distributions which were payable but for the wrongful payment of excess expenses to Highland.
10. ACIS GP's actions were willful and wanton breaches of their fiduciary duties to Terry as their limited partner.
11. All claims stated by Highland, "subject to and without waiver" against Terry are not proved and as such none are an affirmative defense or avoidance of Terry's claims stated against ACIS and ACIS GP.
12. All claims stated by Terry against Trust and Okada are not proved and are denied.
13. All claims stated by Terry against ACIS and ACIS GP for fraudulent transfer or conveyance are not proved and are denied.
14. Terry's fraud claims stated against ACIS and ACIS GP are not proved and are denied.
15. All claims, not denied or awarded, are deferred to the 162nd District Court, Dallas County, Texas or other appropriate venue.

16. ACIS's and ACIS GP's breaches of contract and ACIS GP's breach of fiduciary duties have injured Terry and resulted in damages, together with pre-award interest in the total amount of Seven Million Eight Hundred Sixteen Thousand Twenty-Four Dollars and No/100 ($7,816,024.00).
17. The Parties' agreement to arbitrate does not allow the award of prevailing party attorneys' fees. All claims for attorneys' fees are denied.
18. The Parties' agreement to arbitrate allows the Panel discretion to award the prevailing party costs of arbitration. Terry is entitled to recover his JAMS arbitration cots.
19. Terry is awarded One Hundred Thirty Three Thousand, Seven Hundred Twenty Five and 15/100 Dollars ($133,725.15) for his JAMS arbitration costs.
20. Terry is entitled to recover post-award interest on all amounts awarded herein.

AWARD

TURNOVER:

Claimant, Joshua N. Terry may retain: all recordings of conversations to which he is a party; all agreements to which he is a signatory; all "track record" documents regarding his performance; all documents in the public domain; all documents relating to his investment in or ownership of any Highland affiliated entity; all personal notes or memoranda derived from conversations to which he is a party; all notes or memoranda prepared for and offered to his attorneys.

Except for attorney work product, claimant's attorneys Clouse Dunn LLP may retain copies of all documents which were admitted into evidence in this Arbitration until five business days following the latter of, issuance of this Final Award or final confirmation of this Final Award, no longer subject to appeal. At such time, Clouse Dunn LLP shall turnover these documents to Respondents' attorneys and verify the destruction of electronically formatted documents turned over.

Otherwise, Claimant, Terry, shall turnover all documents, not subject to his awarded right of retention, related to Highland affiliated entities within five business days of entry of this Final Award.

MONETARY AWARD:

Claimant, Joshua N. Terry is Awarded and shall have and recover jointly and severally against Respondents, ACIS Capital Management, LP and ACIS Capital Management GP, LLC, the total sum of Seven Million, Nine Hundred Forty Nine Thousand, Seven Hundred Forty Nine and 15/100 Dollars ($7,949,749.15).

All sums payable by the terms of this Final Award shall accrue post-award interest at the legal rate until fully paid.

All claims for relief, not awarded herein or deferred to the Court, are denied.

Dated: October 20, 2017

Hon. Harlan Martin
Panel Chair

Dated: October 20, 2017

Hon. Glen M. Ashworth (Ret.)
Arbitrator

Dated: October 20, 2017

Hon. Mark Whittington (Ret.)
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Terry, Joshua N. vs. Highland Capital Management, LP., et al.
Reference No. 1310022713

I, Judy Stephenson, not a party to the within action, hereby declare that on October 20, 2017, I served the attached Cover Letter, Final Award and Proof of Service on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Dallas, TEXAS, addressed as follows:

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ACIS Capital Management, LP
Highland Capital Management, LP
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Parties Represented:
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Highland Capital Management, LP
James D. Dondero as trustee/The Dugaboy Inve
Mark K. Okada

I declare under penalty of perjury the foregoing to be true and correct. Executed at Dallas, TEXAS on October 20, 2017.

Judy Stephenson

Judy Stephenson
jstephenson@jamsadr.com

EXHIBIT K

CAUSE NO. DC-17-15244

JOSHUA N. TERRY,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	OF DALLAS COUNTY, TEXAS
	§	
ACIS CAPITAL MANAGEMENT, L.P. and ACIS CAPITAL MANAGEMENT GP, LLC,	§	
	§	
Defendants.	§	44th JUDICIAL DISTRICT

ORDER CONFIRMING ARBITRATION AWARD

On December 13, 2017, came on to be heard the Petition to Confirm Arbitration Award and Enter Judgment on Same (the "Petition") filed by Plaintiff Joshua N. Terry ("Terry"), seeking confirmation of the arbitration award entered in JAMS Arbitration No. 1310022713 on October 20, 2017 (the "Award"). After considering the Petition and other pleadings, any evidence timely presented at the hearing, and the argument of counsel, the Court believes that it is proper to enter an order confirming the Award.

IT IS THEREFORE ORDERED that the Award is confirmed. All relief not expressly granted herein is hereby denied.

Signed this 18th day of December, 2017.

PRESIDING JUDGE

EXHIBIT L

CAUSE NO. DC-17-15244

JOSHUA N. TERRY,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	OF DALLAS COUNTY, TEXAS
	§	
ACIS CAPITAL MANAGEMENT, L.P. and ACIS CAPITAL MANAGEMENT GP, LLC,	§	
	§	
Defendants.	§	44th JUDICIAL DISTRICT

FINAL JUDGMENT

On December 13, 2017, came on to be heard the Petition to Confirm Arbitration Award and Enter Judgment on Same (the "Petition") filed by Plaintiff Joshua N. Terry ("Terry"), seeking judgment against Defendants Acis Capital Management, L.P. ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP") on the arbitration award entered in JAMS Arbitration No. 1310022713 on October 20, 2017 (the "Award"). Terry, Acis LP and Acis GP appeared by and through counsel. After considering the Petition and other pleadings, any evidence timely presented at the hearing, and the argument of counsel, the Court believes that it is proper to enter judgment on the Award.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Joshua N. Terry shall have judgment against Acis Capital Management, L.P. and Acis Capital Management GP, LLC, jointly and severally, in the amount of seven million nine hundred forty-nine thousand seven hundred forty-nine and 15/100 dollars ($7,949,749.15), together with interest at five percent (5%) per annum from and after October 20, 2017, until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Terry shall h ave judgment for its costs of court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Terry has all writs of process and orders necessary to execute this Judgment.

All relief not expressly granted herein is hereby denied. This final judgment disposes of all parties and all claims. This is a final and appealable judgment.

Signed this 18th day of December, 2017.

PRESIDING JUDGE

EXHIBIT M

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

Signed April 13, 2018

United States Bankruptcy Judge

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

IN RE:	§	
	§	
ACIS CAPITAL MANAGEMENT, L.P.,	§	**CASE NO. 18-30264-SGJ-7**
	§	
Alleged Debtor.	§	

IN RE:	§	
	§	
ACIS CAPITAL MANAGEMENT GP, L.L.C.,	§	**CASE NO. 18-30265-SGJ-7**
	§	
Alleged Debtor.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDERS FOR RELIEF ISSUED AFTER TRIAL ON CONTESTED INVOLUNTARY BANKRUPTCY PETITIONS

Joshua N. Terry (the "Petitioning Creditor" or "Mr. Terry") filed involuntary bankruptcy petitions (the "Involuntary Petitions") against each of the two above-referenced related

companies (the "Alleged Debtors") on January 30, 2018.[1] The Involuntary Petitions were contested, and the court held a multi-day trial (the "Trial") spanning March 21, 22, 23, 27, and March 29, 2018.[2] This constitutes the court's findings of fact, conclusions of law and ruling, pursuant to Fed. Rs. Bankr. Proc. 7052 and 9014.[3] As explained below, the court has decided that Orders for Relief are legally required and appropriate as to each of the Alleged Debtors.

I. FINDINGS OF FACT

A. Introduction.

1. The Alleged Debtors—Acis Capital Management, L.P. ("Acis LP"), a Delaware limited partnership, and ACIS Capital Management GP, L.L.C. ("Acis GP/LLC"), a Delaware limited liability company—are two entities in the mega-organizational structure of a company that is known as Highland Capital Management, L.P. ("Highland").

2. Highland is a Dallas, Texas-based company that is a Registered Investment Advisor. Highland was founded in 1993 (changing its original name from "Protective Asset Management" to Highland in 1997) by James D. Dondero ("Mr. Dondero"), originally with a

[1] Exhs. 50 & 51.

[2] Shortly after the Involuntary Petitions were filed, the court held hearings on February 6-7, 2018, on the Petitioning Creditor's Emergency Motion to Abrogate or Modify 11 U.S.C. § 303(f), Prohibit Transfer of Assets, and Import, Inter Alia, 11 U.S.C. § 363 [DE # 3] (the "303(f) Motion") and the Alleged Debtors' Emergency Motion to Seek Emergency Hearing on the Alleged Debtors' Motion to Dismiss Involuntary Petitions and Request for Award of Fees, Costs, and Damages [DE # 9] (the "Emergency Motion to Set Hearing on Motion to Dismiss"). The court ultimately granted the 303(f) Motion and denied the Emergency Motion to Set Hearing on Motion to Dismiss. Both the Petitioning Creditor and the Alleged Debtors have proposed that the court should consider the evidence it heard at the hearings held on February 6-7, 2018, in determining whether it should enter orders for relief. The court has, accordingly, considered such evidence in this ruling.

[3] Bankruptcy subject matter jurisdiction exists in this contested matter, pursuant to 28 U.S.C. § 1334(b). This is a core proceeding over which the bankruptcy court may exercise subject matter jurisdiction, pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O) and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. This bankruptcy court has Constitutional authority to issue a final order or judgment in this matter, as it arises under a bankruptcy statute—11 U.S.C. § 303. Venue is proper in this district, pursuant to 28 U.S.C. § 1409(a), as the Alleged Debtors have their business headquarters in this district.

75% ownership interest, and Mark K. Akada ("Mr. Akada"), originally with a 25% ownership interest.[4]

3. Both Mr. Dondero and Mr. Akada provided witness testimony at the Trial on the Involuntary Petitions, and their names are mentioned numerous times herein—since they were generally the subject of significant evidence and argument presented at the Trial. Mr. Dondero is the chief executive officer for Highland and Mr. Akada is the chief investment officer. Mr. Dondero is also the president of each of the two Alleged Debtors.

4. Highland, through its organizational structure of approximately 2,000 separate business entities, manages approximately $14-$15 billion of investor capital in vehicles ranging from: collateral loan obligation funds ("CLOs"); private equity funds; and mutual funds.

5. Highland's CLO business was front-and-center at the Trial on the Involuntary Petitions. The Alleged Debtor, Acis LP, for approximately the past seven years, has been the vehicle through which Highland's CLO business has been managed.

6. The Petitioning Creditor, Mr. Terry, became an employee of Highland in the year 2005, starting as a portfolio analyst, promoting to a loan trader, then ultimately becoming the portfolio manager for (and 25% limited partner in) Highland's CLO business—specifically, Mr. Terry was the human being who was acting for the CLO manager, Acis LP.

7. Mr. Terry was highly successful in his role in the CLO business, managing billions of dollars of assets during his tenure, but Mr. Terry and Mr. Dondero had a bitter parting of ways on June 9, 2016. Specifically, Mr. Terry's employment was terminated on that date (for

[4] Mr. Dondero testified at the Trial that, three years ago, Messrs. Dondero and Akada sold their interests in Highland to a charitable remainder trust in exchange for a 15 year note receivable.

reasons that have been highly disputed) and his 25% limited partnership interest in Acis LP was deemed forfeited without any payment of consideration to him.

8. In September 2016, Highland sued Mr. Terry in the 162nd Judicial District Court of Dallas County, Texas ("State Court 1") for breach of fiduciary duty/self-dealing, disparagement, breach of contract, and various other causes of action and theories. Mr. Terry asserted his own claims against Highland, and also claims against the two Alleged Debtors, Mr. Dondero, and others and demanded arbitration. On September 28, 2016, State Court 1 stayed the litigation and ordered the parties to arbitrate. The parties participated in ten days of arbitration in September 2017 before JAMS. On October 20, 2017, Mr. Terry obtained an Arbitration Award (herein so called),[5] jointly and severally against both of the Alleged Debtors in the amount of $7,949,749.15, plus post-award interest at the legal rate, which was based on theories of breach of contract and breach of fiduciary duties.

9. There are still claims pending between and among the Petitioning Creditor, Highland, and others (not including the Alleged Debtors) in State Court 1.

10. A Final Judgment (herein so called) confirming the Arbitration Award was entered by the 44th Judicial District Court of Dallas County, Texas ("State Court 2") on December 18, 2017, in the same amount as that contained in the Arbitration Award—$7,949,749.15.[6]

11. Mr. Terry began pursuing post-judgment discovery soon after obtaining his Arbitration Award and even more so after entry of the Final Judgment. Mr. Terry undertook a UCC search on November 8, 2017, to investigate whether there were any liens on the Alleged

[5] Exh. 1.

[6] Exh. 105.

Debtors' assets (none appeared).[7] Mr. Terry also pursued a garnishment of an Acis LP bank account (at a time when there was only around $2,000 in the account). Mr. Terry's counsel deposed Highland's General Counsel Scott Ellington (who sat for the deposition as a representative of Acis, LP) on January 26, 2018, and asked numerous questions about: (a) how many creditors the Alleged Debtors had, [8] and (b) whether Acis LP was able to pay its debts as they became due,[9] but did not receive meaningful answers.

12. Mr. Terry requested a temporary restraining order ("TRO") from State Court 2, on January 24, 2018, after discovering certain transactions and transfers involving Acis LP's interests, that he believed were pursued without any legitimate business purpose and with the purpose of denuding Acis LP of its assets and to make it judgment proof. Most particularly, it appeared as though Highland was engaged in a scheme to transfer certain fee-generating CLO management contracts of Acis LP away from it and into a Cayman Island affiliate of Highland.[10] At a January 24, 2018 hearing on the request for a TRO, Acis LP agreed and State Court 2 ordered that, between that hearing and a later hearing on a request for a temporary injunction, no CLO management contracts would be transferred away from Acis LP and that no monies would be diverted from it.[11]

13. Then, on January 29, 2018, the Controller of and CPA for Highland (David Klos) submitted a Declaration to State Court 2 concerning the net worth of the Alleged Debtors, stating

[7] Exh. 84.

[8] Exh. 25, pp. 7-9.

[9] *Id.* at pp. 102-04.

[10] Exh. 27.

[11] Exh. 28.

that Acis GP/LLC had a net worth of $0 and that Acis LP might have a net worth, at best, of $990,141.[12] Mr. Terry thought this was preposterous—given the management fees that Acis LP was entitled to and the receivables that should be owing to it. Mr. Terry believes that the collateral management agreements on which Acis LP receives management fees have a present value of $30 million (about $6 million for each of the five CLOs which Acis LP has been managing).

14. On January 29, 2018, the Alleged Debtors filed a motion for leave to post a supersedeas bond in the amount of **$495,070.50** with State Court 2 (purportedly half of the net worth of the two Alleged Debtors—as stated in the David Klos Declaration), so that they could suspend enforcement of the Final Judgment while they appealed it.[13] Although there is a very stringent standard for appealing an Arbitration Award, the Alleged Debtors apparently believe they have an argument that State Court 2 lacked the subject matter jurisdiction to confirm the Arbitration Award (a motion to vacate the Final Judgment based on this argument has previously been denied by State Court 2).[14]

15. Meanwhile, Mr. Terry was learning of more transactions and transfers involving Acis LP's assets and interests. On January 29, 2018, Mr. Terry filed supplemental pleadings with State Court 2, alleging that further shenanigans (*i.e.,* transfers and transactions that would amount to fraudulent transfers) were underway at Acis LP and seeking a receiver.[15] Also, at

[12] Exh. 26.

[13] Exh. 73.

[14] *See* DE # 35, in Case No. 18-30264 and DE # 34 in Case No. 18-30265. Unless otherwise noted, references to "DE #" herein refer to the docket entry number at which a pleading appears in the docket maintained with the Bankruptcy Clerk in the Acis Capital Management L.P. bankruptcy case (Case No. 18-30264).

[15] Exhs. 28-31.

some point, in the weeks leading up to this, an Acis LP lawyer represented to Mr. Terry's counsel that the Alleged Debtors were "judgment proof."[16]

16. At approximately 11:57 p.m. on January 30, 2018 (on the evening before a scheduled temporary injunction hearing in State Court 2—at which time State Court 2 presumably might have considered the Alleged Debtors' request to post the $495,070.50 supersedeas bond to stay enforcement of the Final Judgment), Mr. Terry filed the Involuntary Petitions, as a sole petitioning creditor, against both Acis LP and Acis GP/LLC.

17. For purposes of this Trial (and this Trial only), the Alleged Debtors do not dispute that Mr. Terry has standing to be a petitioning creditor pursuant to Bankruptcy Code section 303(b)—in other words, they do not dispute that Mr. Terry is a holder of a claim against the Alleged Debtors that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount and that aggregates at least $15,775 in unsecured amount. However, the Alleged Debtors argue that: (a) the Alleged Debtors have ***12 or more creditors*** and, thus, three or more petitioning creditors were required to prosecute the Involuntary Petitions pursuant to Bankruptcy Code section 303(b)(1); (b) the Petitioning Creditor did not establish, pursuant to Bankruptcy Code section 303(h)(1), that the Alleged Debtors are not ***generally paying their debts as such debts become due*** unless such debts are the subject of a bona fide dispute as to liability or amount; (c) regardless of whether the Petitioning Creditor has met the statutory tests in sections 303(b)(1) and (h)(1), the Petitioning Creditor has acted in ***bad faith***—which serves as an equitable basis for dismissal of the Involuntary Petitions; and (d) if the court disagrees with the Alleged Debtors and determines that the section 303(b) and (h) statutory tests are met, and also determines that the Petitioning Creditor has not acted in bad faith, the court should

[16] Exh. 27 (exhibit 3 thereto).

nevertheless ***abstain*** in this matter, pursuant to Bankruptcy Code ***section 305***, since this is essentially a two-party dispute and the interests of creditors and the debtor would be better served by dismissal.

18. The Petitioning Creditor argues that he has met the statutory tests of sections 303(b) and (h) but, even if he has not, there is a ***"special circumstances"*** exception to the section 303 statutory requirements, whenever a petitioning creditor establishes fraud, trick, scheme, artifice or the like on the part of an alleged debtor—which "special circumstances," Mr. Terry alleges, have been established here. Moreover, the Petitioning Creditor argues that the facts here ***do not warrant section 305 abstention*** because the interests of creditors and the Alleged Debtors would not be better served by dismissal.

19. As further explained below, the court finds and concludes that the Petitioning Creditor has met his burden of proving by a preponderance of the evidence that the statutory tests of sections 303(b) and (h) are met here. Thus, the court does not need to reach the question of whether there is a ***"special circumstances"*** exception to the section 303 statutory requirements, whenever a petitioning creditor establishes fraud, trick, scheme, artifice or the like on the part of an alleged debtor, and—if so—whether the exception is applicable here.[17]

20. Moreover, the Alleged Debtors have not shown by a preponderance of the evidence that the Petitioning Creditor acted in bad faith, such that the Involuntary Petitions should be dismissed.

[17] *See e.g., In re Norriss Bros. Lumber Co.*, 133 B.R. 599 (Bankr. N.D. Tex. 1991); *In re Moss*, 249 B.R. 411 (Bankr. N.D. Tex. 2000); *In re Smith*, 415 B.R. 222 (Bankr. N.D. Tex. 2009).

21. Finally, the Alleged Debtors also have ***not shown facts here that warrant section 305 abstention*** because they have not shown that the interests of creditors and the Alleged Debtors would be better served by dismissal.

B. The CLO Business: Understanding the Alleged Debtors' Business Operations, Structure, and What Creditors and Interest Holders They Actually Have.

22. Highland set up its first CLO in the year 1996. Highland was one of the early participants in the CLO industry.

23. The Alleged Debtors were formed in 2011 to be the new "brand" or face of the Highland CLO business, after Highland's name had suffered some negative publicity in the marketplace.

24. Acis LP has acted as the portfolio manager of Highland's CLOs since 2011. Acis LP currently has a contractual right to CLO portfolio management fees on five CLOs[18] which were referred to at the Trial as CLO 2013-1; CLO 2014-3; CLO 2014-4; CLO 2014-5; and CLO 2016-6. CLOs typically have an 8-12 year life. Thus, there are still several years of life left on these CLOs (since the oldest one was established in the year 2013).

25. The key "players" in and features with regard to the Highland CLOs, during the time period relevant to the issues adjudicated at the Trial, have been:

(a) <u>The CLO manager.</u> As mentioned earlier, the CLO manager is the Alleged Debtor, Acis LP. Acis LP, has collateral management agreements (hereinafter, the "CLO Collateral Management Agreements") with the CLOs (which CLOs were set up as special purpose entities) and, pursuant thereto, receives

[18] There is still another Highland CLO (CLO 2017-7), set up in April 2017, as to which Acis LP's contractual right to manage was terminated shortly before the Petition Date, as will be further described herein.

management fees[19] from the CLOs in exchange for managing the pool of assets within the CLOs and communicating with investors in the CLOs.[20] As mentioned earlier, Mr. Terry was the human being that performed the management function at Acis LP until Highland fired him on June 9, 2016 and also terminated his limited partnership interest in Acis LP. Mr. Terry, and all employees who have ever provided services to the CLO manager, are Highland employees—which were provided to Acis LP through shared and sub-advisory services agreements—as further explained below. Thus, to be clear, Acis LP has always essentially subcontracted its CLO managerial function out to Highland.

(b) The pool of assets. Within each CLO that the CLO manager manages is a basket of loans that the CLO manager purchases. The basket of loans typically consists of approximately 200 loans-payable (or portions of loans payable), on which large well-known companies typically are the makers/obligors (and which loans, collectively, provide a variable rate of interest).[21] The CLO manager can typically decide to buy and sell different loans to go into the pool of assets, with certain restrictions, during a four or five year reinvestment time period.

[19] These fees typically include "senior fees" (*e.g.,* 15 basis points); additional "subordinate fees" (*e.g.,* 25 basis points) if the CLOs are passing certain tests; and perhaps even an "incentive fee" beyond a certain hurdle rate (*e.g.,* after the equity in the CLO received an internal rate of return of 10%, the CLO manager would get 15% of the excess). Exh. 82, p. 59, lines 14-25.

[20] *See*, as an example, Exh. 3 (the collateral management agreement between Acis LP and CLO 2014-3). Note that the document is entitled "Portfolio Management Agreement" but, to avoid confusion with other similarly titled documents and to highlight the true nature of the agreement, the court uses the defined term "CLO Collateral Management Agreement," which terminology the lawyers also sometimes used at the Trial.

[21] Exh. 8.

(c) The CLO investors (*i.e.,* CLO note holders). These may be any number of persons or entities, including pension funds, life insurance companies, or others who decide to invest in the CLOs and contribute capital to fund the purchase of a CLO's loan pool, and, in return, receive fixed rate notes payable—the ratings on which can range anywhere from Triple-A to Single-B, depending upon the risk option the investor chooses. There are typically five or six traunches of notes issued by the CLO (with the top AAA-rated traunche being the least risky and the bottom traunche being the most risky) and—to be clear—the CLO itself (again, in each case, the CLO is a special purpose vehicle) is the obligor. As the CLO manager receives income from the pool of loans in the CLO, he distributes that income to the CLO investors, in accordance with their note indentures,[22] starting with the top traunche of notes and then down to the other traunches. The top traunche of notes (AAA-rated) is considered the "controlling" class and a majority of holders in this class can terminate the CLO manager (*i.e.,* Acis LP) for cause on 45 days' notice, although all parties seem to agree this would be a rare event.

(d) The CLO equity holder. The CLO equity holder actually is a holder of subordinated notes issued by the CLOs (*i.e.,* the bottom traunche of notes on which the CLO special purpose entity is obligated), and has voting rights and is itself a capital provider, but it takes the most risk and receives the very last cash

[22] The indenture trustee on the CLO notes may actually operate as a payment agent in some cases, for purposes of making the quarterly note payments to holders.

flow from the CLOs. It, in certain ways, controls the CLO vehicle[23]—for example, by virtue of having the ability to make a redemption call after a certain "no-call" period—which would force a liquidation of the basket of loans in the CLO, with the proceeds paying down the traunches of notes, starting at the top with the Triple A's). Note that, until recently, a separate entity known as Acis Loan Funding, Ltd. ("ALF"), which was incorporated under the laws of the island nation of Guernsey,[24] was the CLO equity holder. To be clear, ***ALF was essentially the equity owner in the CLO special purpose entities—not the equity owner of Acis LP***. Acis LP was a party to a separate portfolio management agreement with ALF (hereinafter, the "ALF Portfolio Management Agreement"—not to be confused with the CLO Collateral Management Agreements that Acis LP separately has with the special purpose CLOs). No fees were paid from ALF to Acis LP pursuant to the ALF Portfolio Management Agreement (rather, fees are only paid to Acis LP on the CLO Collateral Management Agreements). The complicated structure of the CLO business—all parties seemed to agree—has been developed, among other reasons, to comply with "risk-retention requirements" imposed by the U.S. Congress's massive Dodd-Frank financial reform legislation[25] enacted in year 2010, in response to the financial crisis and recession that first began in 2008.

[23] The top traunche of AAA notes also has certain control—such as the ability to terminate the portfolio manager for cause, on notice.

[24] Guernsey is located in the English Channel. ALF was created in August 2015.

[25] Simply put, one of the results of the Dodd-Frank legislation (*i.e.*, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173, 124 Stat. 1376-2223, 111th Congress, effective July 21, 2010), which was implemented over a period of several years, was that, ***subsequent to December 2016***, managers of securitizations needed to retain at least a 5% interest in that securitization. Thus, if a $400 million CLO were to be

(e) The Equity Owners of ALF. Until recently (*i.e.,* until October 24, 2017—four days after the Arbitration Award), Acis LP itself, as required for a CLO manager, had a 15% indirect ownership in ALF, in order to be regulatory compliant.[26] The parties sometimes refer to ALF (and the web of ownership between it and Acis LP) as the "risk retention structure."[27] The evidence at the Trial revealed that ALF (which has recently been renamed), now, has three equity owners: (i) a 49% equity owner that is a charitable fund (*i.e.,* a donor advised fund or "DAF") that was seeded with contributions from Highland, is managed/advised by Highland, and whose independent trustee is a long-time friend of Highland's chief executive officer, Mr. Dondero; (ii) 2% is owned by Highland employees; and (iii) finally, ALF ***may*** be 49% owned by a third-party institutional investor based in Boston that Highland believed it was required to keep anonymous at the Trial. Not only is the court unaware of who this independent third-party is, but the evidence seems to suggest that it may have acquired its interest fairly recently or may have simply committed to invest recently.[28]

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issued, the CLO manager would need to retain at least 5% or $20 million of the assets in the CLO (which 5% could be either all at the equity level or vertically, up and down the note traunches). There are multiple ways to accomplish this 5% retention (*i.e.,* with either the CLO manager directly investing in at least 5% of the CLO or doing it through a controlled subsidiary). This particular rule was announced in ***December 2014*** and the SEC thereafter issued a no action letter stating that ***if a CLO was issued prior to December 2014***, then any refinancing of such CLO that happens within four years can be done without risk retention in place. Resets of any CLO (*i.e.,* changes in terms and maturity—as opposed to mere changes in interest rates), on the other hand, must have risk retention in place. ***Four of Acis LP's current CLOs were issued prior to December 2014***. Thus, these four CLOs are still technically able to do a refinancing without a risk retention structure in place. In any event, by early-to-middle 2017, Acis LP was risk retention compliant. Exh. 82, pp. 65-69 & 75. That was recently changed—on October 24, 2017—four days after the Arbitration Award—as later explained herein.

[26] *See* n.23, *supra*.

[27] *See* Demonstrative Aid No. 3.

[28] *See* Exh. 173, which seems to suggest that the only equity owners of ALF just prior to October 24, 2017 were Acis LP and the DAF, until Acis LP's interest in ALF was sold back to ALF on October 24, 2017. *See also* Exh. 82, p. 162, lines 2-7.

(f) The underwriter for the CLO notes. As with any publicly traded notes, there is an underwriter for the CLO notes which solicits investors for the CLO notes (examples given at the Trial: Mizuho Securities USA, LLC; Merrill Lynch; JP Morgan Chase).[29] The CLO notes are traded on the Over-the-Counter Market.

(g) The independent indenture trustee for the CLO notes. As also with any issuance of publicly traded notes, there is an indenture trustee (example given at the Trial: U.S. Bank).[30]

26. Mr. Terry, the Petitioning Creditor, as earlier mentioned, began working for Highland in 2005 until his employment was terminated on June 9, 2016.

27. Acis LP and Acis GP/LLC have never had any employees. Rather, all employees that work for any of the Highland family of companies (including Mr. Terry) have, almost without exception, been employees of Highland itself. Highland has approximately 150 employees in the United States. Highland provides employees to entities in the organizational structure, such as Acis LP and Acis GP/LLC, through both the mechanism of: (a) a Shared Services Agreement (herein so called),[31] which provides "back office" personnel—such as human resources, accounting, legal and information technology to the Highland family of companies; and (b) a Sub-Advisory Agreement (herein so called),[32] which provides "front office" personnel to entities—such as the managers of investments like Mr. Terry. The evidence indicated that this is typical in the CLO industry to have such agreements. The court notes that

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[29] *See* Exh. 193.

[30] *See* Exh. 7.

[31] Exhs. 17, 99, 179 & 5.

[32] Exhs. 18, 178 & 4.

all iterations of the Shared Services Agreements and Sub-Advisory Agreements between Acis LP and Highland were signed by Mr. Dondero both as President of Acis LP and as President of the General Partner of Highland.

28. Because Acis LP essentially subcontracts out all of its functions to Highland pursuant to the Shared Services Agreement and the Sub-Advisory Agreement, Acis LP has very few vendors or creditors. Rather Highland incurs expenses and essentially bills them to Acis LP through these two agreements.[33] In other words, Highland is one of Acis LP's largest and most frequent creditor.

29. The evidence reflected that at all times Mr. Dondero has been the President of both of the Alleged Debtors, and there have been, at all times, very few, if any, other officers. It appears that the only other officer of Acis GP/LLC that ever existed was Frank Waterhouse, Treasurer.[34] It also appears that the only other officer of Acis LP that ever existed was Frank Waterhouse, Treasurer, Mr. Terry as Portfolio Manager, and someone named Patrick Boyce as Secretary at one time.[35]

30. Mr. Dondero testified that he has decision making authority for the Alleged Debtors but usually delegates that authority to Highland's in-house lawyers, Scott Ellington (General Counsel, Chief Legal Officer, and Partner of Highland) and Isaac Leventon (Assistant General Counsel of Highland) and is rarely involved in "nitty gritty negotiations." Sometimes instructions will come to him from the compliance group headed up by Chief Compliance Officer Thomas Surgent. Additionally, he testified that he signs hundreds of documents per

[33] Exh. 83, pp. 228 (line 8)-230 (line 14).

[34] *See, e.g.*, Exh. 10 & Exh. 173, p.3

[35] Exhs. 14 & 15.

week, and much of what he signs is on advice of counsel and he sometimes even delegates to his assistant the authority to sign his name. As set forth above, Mr. Ellington (who ***did not*** testify at the Trial)[36] and Mr. Leventon (who ***did*** testify at the Trial) are not officers, directors, or employees of the Alleged Debtors. Mr. Leventon is designated to be the representative for the Alleged Debtors (and testified as a Rule 30(b)(6) witness during pre-Trial discovery)—he explained that this representative-authority derives from the Shared Services Agreement. Mr. Leventon testified that he takes his instructions generally through his direct supervisor, Mr. Ellington, although Highland partners can ask him to perform legal services for any of Highland's 2,000 entities.

C. Transfers and Transactions Involving the Alleged Debtors Since the Litigation with Mr. Terry Commenced—and Especially After the Arbitration Award.

31. Below is a listing of some (but not necessarily all) of the transfers and transactions that the Alleged Debtors, Highland, and related parties undertook ***after*** the litigation with Mr. Terry commenced.

(a) Acis LP's Sale to Highland of a "Participation Interest" in its CLO Cash Flow Stream. On October 7, 2016 (approximately one month after the litigation arose among Mr. Terry, Highland, and the Alleged Debtors), Acis LP sold to Highland a participation interest in its expected future cash flow from the CLO Collateral Management Agreements—specifically, it sold a portion of the cash flow it expected to earn from November 2016 to August 2019 (not the full life of the CLOs), for $666,655 cash, plus a $12,666,446 note payable from Highland to

[36] Mr. Ellington did testify at a hearing in the bankruptcy court on February 6, 2018—which the parties asked this court to take judicial notice of—and also provided deposition testimony that was submitted into evidence. *See* Exh. 25.

Acis LP (hereinafter, the "Acis LP Note Receivable from Highland"). Mr. Dondero signed the purchase and sale agreement for both purchaser and seller.[37] Mr. Dondero signed the Acis LP Note Receivable from Highland, which accrued interest at 3% per annum. It appears that the $666,665 cash down payment was actually paid, and a payment required on the Acis LP Note Receivable from Highland of $3,370,694 on May 31, 2017, was actually made. The Acis LP Note Receivable from Highland was payable in three installments, with a $5,286,243 payment required on May 31, 2018, and a $4,677,690 payment required on May 31, 2019. When viewed in complete isolation, this transaction does not necessarily appear problematic. Although there was evidence that Acis LP had been managing the five CLOs for about $10 million per year of fees, some of the recitals in the purchase and sale agreement suggest that there may have been a sound business reason for the transaction and the arbitration panel,[38] viewing this transaction in isolation, did not think it was necessarily problematic or actionable. In any event, Highland is adamant it was a net neutral transaction.

(b) Transfer of Acis LP's interest in ALF. Recall that ALF was the entity that held equity (*i.e.,* the subordinated notes) in the CLO special purpose vehicles, and held voting rights and was a capital provider to the overall risk retention structure supporting the CLOs. And Acis LP, in turn, held a 15% indirect interest in ALF. On October 24, 2017 (***four days after the Arbitration Award***), Acis, LP entered into an agreement with ALF whereby ALF acquired back the shares that Acis LP

[37] Exhs. 14 & 15.

[38] Exh. 1, p. 18.

indirectly held in ALF (966,679 shares) for the sum of $991,180.13.[39] No credible business justification was offered for this transaction, other than mostly uncorroborated (and self-serving) statements from Highland witnesses that Acis LP was "toxic" in the market place (due to the litigation with Mr. Terry) and this was a step in the process of extricating Acis LP from the CLO business.[40] The court finds the testimony about Acis LP's toxicity in the marketplace to not be credible or at all convincing. For one thing, a new CLO (Acis CLO 2017-7, Ltd.) was closed on April 10, 2017 with Acis LP as the portfolio manager. Moreover, Acis LP subcontracts all of its CLO management function to Highland—and there was no evidence to suggest that anyone in the marketplace at this juncture differentiates between Acis LP (whose president is Mr. Dondero) and Highland (whose president is Mr. Dondero). ***In any event, the October 24, 2017 transaction had the highly consequential effect of making Acis LP "noncompliant" or unable to continue serving as a CLO manager for regulatory purposes for any new CLOs or reset CLOs (or for a refinancing of any of the Highland CLOs that had been created after December 2014)***[41] ***because aspects of the federal Dodd Frank legislation require CLO managers to have "skin in the game" with regard to the CLOs they manage (i.e., they must retain at least 5% of CLOs they manage).*** Mr. Akada, who testified that he had been involved with the CLO business from the beginning and that the CLO team

[39] Exh. 173.

[40] There were also a few hearsay-laden emails offered, that the court did not find probative. Exhs, 19-22.

[41] *See* n.23 *supra*.

reported to him (including Mr. Terry before his termination), testified that he had no knowledge of this particular transaction. The document effectuating this transaction was signed by Frank Waterhouse, Treasurer for and on behalf of Acis LP, acting by its general partner, Acis GP/LLC.[42]

(c) ALF Next Decides to Jettison Acis, LP as its Portfolio Manager and Replace it with a new Highland Cayman Island Entity. On October 27, 2017 (seven days after the Arbitration Award), ALF—having purchased back the ownership interest that Acis LP had in it, just three days earlier—decided that it would no longer use Acis LP as its portfolio manager and entered into a new portfolio management agreement to supersede and replace the ALF Portfolio Management Agreement. Specifically, on October 27, 2017, ALF entered into a new Portfolio Management Agreement with a Cayman Island entity called Highland HCF Advisor, Ltd., replacing Acis LP in its role with ALF.[43] This agreement appears to have been further solidified in a second portfolio management agreement dated November 15, 2017.[44]

(d) The Acis LP Note Receivable from Highland is Transferred from Acis LP to Yet Another Highland Cayman Island Entity. On November 3, 2017 (10 days after the Arbitration Award), Acis LP assigned and transferred its interests in the Acis LP Note Receivable from Highland—which at that point had a balance owing of over $9.5 million—to a Highland Cayman Island entity known as Highland CLO

[42] Exh. 173, p. 3.

[43] Exh. 43.

[44] Exh. 168.

Management Ltd. which apparently was created sometime recently to be the new collateral manager of the CLOs (in other words, the new Acis LP).[45] The Assignment and Transfer Agreement memorializing this transaction is signed by Mr. Dondero for Acis LP and Mr. Dondero for Highland and some undecipherable name for Highland CLO Management Ltd.[46] The document recites that (i) Highland is no longer willing to continue providing support services to Acis LP, (ii) Acis LP, therefore, can no longer fulfill its duties as a collateral manager, and (iii) Highland CLO Management Ltd. agrees to step into the collateral manager role if Acis LP will assign to it the Acis LP Note Receivable from Highland. One more thing: since Acis LP was expected to potentially incur future legal and accounting/administrative fees, and might not have the ability to pay them when due, ***Highland CLO Management Ltd.*** agreed to reimburse Acis LP (or pays its vendors directly) up to $2 million of future legal expenses and up to $1 million of future accounting/administrative expenses.[47]

(e) Various Additional Transactions that further Transitioned CLO Management and Fees Away from Acis LP to Highland Cayman Island Entity. On December 19, 2017—just one day after the Arbitration Award was confirmed with the entry of the Final Judgment—the vehicle that can most easily be described as the Acis LP "risk retention structure" (necessitated by federal Dodd Frank law) was transferred away from Acis LP and into the ownership of Highland CLO

[45] Exh. 16.

[46] *Id.* at p.6.

[47] *Id.* at pp. 1 & 2.

Holdings, Ltd. (yet another Cayman Island entity, incorporated on October 27, 2017[48]).

(f) In addition to transferring Acis LP's interest in the Acis LP risk retention structure on December 19, 2017, Acis LP also transferred its contractual right to receive management fees for Acis CLO 2017-7, Ltd. (which had just closed April 10, 2017), which Mr. Terry credibly testified had a combined value of $5 million, to Highland CLO Holdings, Ltd., another Cayman entity, purportedly in exchange for forgiveness of a $2.8 million receivable that was owed to Highland under the most recent iteration of the Shared Services Agreement and Sub-Advisory Agreement for CLO-7.[49] In conjunction with this transfer, Highland CLO Holdings, Ltd. then entered into new Shared Services and Sub-Advisory Agreements with Highland.[50]

(g) Change of Equity Owners of the Alleged Debtors. When Acis LP was first formed, it was owned by one general partner (Acis GP/LLC, with a .1% interest) and it had three limited partners: (a) Dugaboy Investment Trust (a Dondero family trust of which either Mr. Dondero or his sister, Nancy Dondero, have been the Trustee at all relevant times) with a 59.9% interest; (b) Mr. Terry with a 25% interest; and (c) Mr. Akada with a 15% interest. When Acis GP/LLC was formed

[48] Exh. 157.

[49] *See* Ex. 45 (the Transfer Document); *see also* Exh. 4 (the March 17, 2017 Third Amended and Restated Sub-Advisory Agreement between Acis LP and Highland); Exh. 5 (the March 17, 2017 4th Amended & Restated Shared Services Agreement between Acis LP and Highland); Exh. 165 (March 17, 2017 Staff and Services Agreement between Acis CLO Management, LLC and Acis LP); Exh. 166 (March 17, 2017 Master Sub-Advisory Agreement between Acis CLO Management, LLC and Acis LP).

[50] *See* Exhs. 161 & 162.

(*i.e.,* the .1% owner of Acis LP), its sole member was the Dugaboy Investment Trust. After Mr. Terry was terminated by Highland, his 25% limited partnership interest in Acis LP was forfeited and divided among the two remaining limited partners: Mr. Akada (increasing his interest by 10% up to 25%), and Dugaboy Investment Trust (increasing its interest by 15% up to 74.9%). But, more importantly, on the day after entry of Mr. Terry's Final Judgment (*i.e.,* on December 18, 2017), both Mr. Akada and Dugaboy Investment Trust conveyed their entire limited partnership interests in Acis LP—25% and 74.9%, respectively—to a Cayman Island entity called Neutra, Ltd., a Cayman Islands exempted company. Dugaboy Investment Trust also conveyed its 100% membership interest in Acis GP/LLC to Neutra, Ltd. Mr. Akada testified that he did this on advice of counsel. He also did not dispute that he had made millions of dollars of equity dividends from his equity investment in Acis LP in recent years[51]—which he conveyed away for no consideration on December 18, 2017.

(h) The Intended Reset of Acis CLO 2014-3. With all of the above maneuverings having been accomplished, Highland was posed to do a reset on Acis CLO 2014-3 in February 2018 (until Mr. Terry filed the Involuntary Petitions). The investment bank Mizuho Securities USA, LLC was engaged November 15, 2017[52] and a final offering circular was issued in January 2018[53]—contemplating a reset of Acis CLO 20-14-3 with the recently created Highland CLO Management Ltd.

[51] Exh. 23, p.3.

[52] Exh. 104.

[53] Exh. 31.

Identified as the new portfolio manager, rather than Acis LP. The act of implementing a reset on the CLO was not in itself suspect. However, the reset would, of course, have the effect of depriving Acis LP from a valuable asset—an agreement that could realistically be expected to provide millions of dollars of future collateral management fees—coincidentally (or not) just after Mr. Terry obtained his large judgment.

D. Findings Regarding Credibility of Witnesses.

32. The court found the testimony of Mr. Terry to be very credible. He was very familiar with the financial condition of the Alleged Debtors, since he presided over the business of the Alleged Debtors from their inception until June 9, 2016, and has also closely followed publicly available information regarding the companies since his termination. Mr. Terry credibly testified that the Alleged Debtors have never had a significant number of creditors, since most of the Alleged Debtors' vendors are engaged by and send their invoices to Highland, and Highland simply obtains reimbursement from the Alleged Debtors (and other entities in the Highland family), as its in-house lawyers determine is appropriate, through the Shared Services Agreement and Sub-Advisory Agreement. Thus, Highland should at all times be the Alleged Debtors' main creditor. The court finds that Mr. Terry had a good faith belief that the Alleged Debtors had only a handful of creditors (maybe four or so) besides him and Highland. The court also finds that Mr. Terry—at the time he filed the Involuntary Petitions—had a good faith belief that the Alleged Debtors and those controlling them were engaged in an orchestrated, sophisticated effort to denude the Alleged Debtors of their assets and value (*i.e.*, transferring assets and rights for

less than reasonably equivalent value), which started with intensity after issuance of the Arbitration Award (if not sooner).[54]

33. The court found the testimony of almost all of the witnesses for the Alleged Debtors to be of questionable reliability and, oftentimes, there seemed to be an effort to convey plausible deniability. For example, sometimes business decisions concerning the Alleged Debtors were said to have been made by a "collective," and other times the in-house Highland lawyers (who, of course, are not themselves officers or employees of Acis LP and Acis GP/LLC) stressed that Mr. Dondero (the president and manager of the two entities) had ultimate decision making authority for them. Meanwhile, Mr. Dondero testified that, while he has decision making authority at Acis LP, he usually delegates to Highland's in-house lawyers Scott Ellington and Isaac Leventon. He testified that he signs hundreds of documents per week and often must rely on information of others when signing. Additionally, Mr. Dondero (again, the President of each of the Alleged Debtors) testified that he had never even read the Arbitration Award. While Mr. Dondero is the chief executive of a multi-billion dollar international investment company, and naturally has widespread responsibilities and must delegate to and rely upon others including lawyers, this court simply does not believe that he never read the Arbitration Award. The court perceived the animosity between Mr. Dondero and Mr. Terry to be rather enormous and Mr. Dondero even testified (as did others) that the litigation with Mr. Terry was hurting Acis LP and Highland in the CLO marketplace (*i.e.,* no investors or underwriters wanting to be associated

[54] The court also found that the deposition testimony of Brian Shaw and Rahkee Patel (counsel for Mr. Terry) was also credible and did not demonstrate any bad faith on their parts in filing the Involuntary Petitions on behalf of Mr. Terry.

with the Acis brand).[55] If that were the case, it strains credulity to suggest Mr. Dondero never even read the Arbitration Award.

34. As mentioned earlier, in December 2017, Acis GP/LLC became 100% owned by a Cayman Island entity known as Neutra, Ltd. (whose beneficial owner is a Dondero family trust) and Acis LP became 99.9% owned by Neutra, Ltd. The directors of Acis GP/LLC and Acis LP are provided to it now by an entity known as "Maples Fiduciary Services"—another Cayman Island entity, but the Highland Assistant General Counsel could not remember the names of those directors provided to Acis GP/LLC and Acis LP, except for perhaps one. Mr. Dondero, when questioned about some of the recent transactions pertaining to Acis LP, testified that there were tax reasons—tax lawyers recommended the recent transactions and transfers. No tax lawyers testified. Mr. Dondero also testified that certain transactions were at the directive of the Thomas Surgent group (the Highland chief compliance officer). Neither Mr. Surgent nor anyone else from the compliance group testified.

35. Meanwhile, Mr. Akada, who, while testifying, seemed like a generally lovely person and seemed as knowledgeable as a human being could possibly be on the topic of CLOs generally, had no idea if he was an officer or director of the Alleged Debtors, nor did he know whom its officers were. He could not testify as to the meaning of certain transactions in which Acis LP had engaged in during recent weeks and said that he signed certain documents on advice of counsel. He also could not even testify as to whether Highland was opposing the Involuntary Petitions.

36. Again, there was a lot of plausible deniability at Trial as to the "whos" and "whys" for the recent maneuverings involving the Alleged Debtors assets and rights in the weeks

[55] No such investors or underwriters provided testimony.

since the Arbitration Award. The one thing that the court was wholly convinced of was that conflicts of interest among Highland and the Alleged Debtors abound, and no one is looking out for the interests of the Alleged Debtors as a fiduciary should.

E. Evidence Regarding the Number of Creditors of the Alleged Debtors.[56]

37. The Alleged Debtors do not dispute Mr. Terry's claim for the purposes of counting creditors under section 303(b) of the Bankruptcy Code. However, Mr. Terry asserts that the Alleged Debtors have fewer than 12 creditors, and the Alleged Debtors dispute this fact. Specifically, the Alleged Debtors initially filed on January 31, 2018, a Notice of List of Creditors Pursuant to Fed. R. Bankr. P. 1003(b) signed by Mr. Dondero listing 18 creditors (the "Original Notice of Creditors").[57] The Alleged Debtors subsequently filed on February 5, 2018, a First Amended Notice of List of Creditors Pursuant to Fed. R. Bankr. P. 1003(b) signed by Mr. Leventon listing 19 creditors (the "First Amended Notice of Creditors").[58] Finally, the Alleged Debtors filed on March 6, 2018, a Second Amended Notice of List of Creditors Pursuant to Fed. R. Bank. P. 1003(b) signed by Mr. Leventon listing 20 creditors (the "Second Amended List of Creditors").[59] The following chart summarizes the name, amount, and nature of the 20 creditors listed by the Alleged Debtors in their Second Amended List of Creditors.

[56] The court notes that neither Mr. Terry nor the Alleged Debtors attempted to differentiate between the creditors of Acis GP/LLC versus the creditors of Acis LP, but rather presented evidence regarding the collective number of creditors for both of the Alleged Debtors. This seems legally appropriate, since Acis LP is the entity that incurred most of the debt, and ACIS GP/LLC would be liable on such debt as the general partner of Acis LP.

[57] *See* DE # 7 in Case No. 18-30264 & DE # 7 in Case No. 18-30265.

[58] *See* DE # 17 in Case No. 18-30264 & DE # 16 in Case No. 18-30265.

[59] *See* DE # 39 in Case No. 18-30264 & DE # 38 in Case No. 18-30265.

Creditor No.	Creditor Name	Nature of Claim	Total Indebtedness[60]
1	Andrews Kurth	Legal Fees	$211,088.13
2	Case Anywhere, LLC	Law Firm Vendor	$417.20
3	CSI Global Deposition Services	Law Firm Vendor	$38,452.56
4	David Langford	Court Reporter/Law Firm Vendor	$550
5	Drexel Limited	Fee Rebate	$6,359.96
6	Elite Document Technology	Data Hosting/Law Firm Vendor	$199.72
7	Highfield Equities, Inc.	Fee Rebate	$2,510.04
8	Highland Capital Management, L.P.	Advisory and Participation Fees	$2,770,731.00
9	JAMS, Inc.	Law Firm Vendor	$1,352.27
10	Jones Day	Legal Fees	$368.75
11	Joshua Terry	Judgment Creditor	$8,060,827.84
12	KPMG LLP	Auditor Fees	$34,000
13	Lackey Hershman LLP	Legal Fees	$236,977.54
14	McKool Smith, P.C.	Legal Fees	$70,082.18
15	Reid Collins & Tsai LLP	Legal Fees	$17,383.75
16	Stanton Advisors LLC	Testifying Expert Fees/Law Firm Vendor	$10,000
17	Stanton Law Firm	Legal Fees	$88,133.99
18	The TASA Group. Inc.	Testifying Expert Fees/Law Firm Vendor	$14,530.54
19	CT Corporation	Report Filing Representation	$517.12
20	David Simek	Expense Reimbursement	$1,233.19

38. First, the court believes it necessary to remove certain insider creditor claims, which are required not to be counted pursuant to section 303(b)(2) of the Bankruptcy Code.[61] This would clearly include Highland (the Alleged Debtors do not dispute this).

[60] The dollar amounts listed here are based upon the amounts listed in the Second Amended List of Creditors.

[61] *In re Moss*, 249 B.R. 411, 419 n. 6 (Bankr. N.D. Tex. 2000).

39. Additionally, there were certain creditors that filed sworn statements saying they were not creditors of the Alleged Debtors or were subsequently removed from the creditor list by agreement of the Alleged Debtors. These creditors would include Case Anywhere, CSI Global Deposition Services,[62] Elite Document Technology, JAMS, Inc.,[63] Stanton Advisors LLC,[64] and the TASA Group, Inc..[65] Thus, the updated chart now shows 13 creditors of the Alleged Debtors.

Creditor No.	Creditor Name	Nature of Claim	Total Indebtedness
1	Andrews Kurth	Legal Fees	$211,088.13
~~2~~	~~Case Anywhere, LLC~~	~~Law Firm Vendor~~	~~$417.20~~
~~3~~	~~CSI Global Deposition Services~~	~~Law Firm Vendor~~	~~$38,452.56~~
4	David Langford	Court Reporter/Law Firm Vendor	$550
5	Drexel Limited	Fee Rebate	$6,359.96
~~6~~	~~Elite Document Technology~~	~~Data Hosting/Law Firm Vendor~~	~~$199.72~~
7	Highfield Equities, Inc.	Fee Rebate	$2,510.04
~~8~~	~~Highland Capital Management, L.P.~~	~~Advisory and Participation Fees~~	~~$2,770,731.00~~
~~9~~	~~JAMS, Inc.~~	~~Law Firm Vendor~~	~~$1,352.27~~
10	Jones Day	Legal Fees	$368.75
11	Joshua Terry	Judgment Creditor	$8,060,827.84
12	KPMG LLP	Auditor Fees	$34,000
13	Lackey Hershman LLP	Legal Fees	$236,977.54
14	McKool Smith, P.C.	Legal Fees	$70,082.18
15	Reid Collins & Tsai LLP	Legal Fees	$17,383.75

[62] CSI Global Deposition Services was removed as a creditor by the agreement of the Alleged Debtors.

[63] JAMS, Inc. was removed as a creditor by agreement of the Alleged Debtors.

[64] Stanton Advisors LLC was removed as a creditor by agreement of the Alleged Debtors.

[65] *See* Exh. 40B, Exh. 186, Exh. 92, and Exh. 94.

~~16~~	~~Stanton Advisors LLC~~	~~Testifying Expert Fees/Law Firm Vendor~~	~~$10,000~~
17	Stanton Law Firm	Legal Fees	$88,133.99
~~18~~	~~The TASA Group. Inc.~~	~~Testifying Expert Fees/Law Firm Vendor~~	~~$14,530.54~~
19	CT Corporation	Report Filing Representation	$517.12
20	David Simek	Expense Reimbursement	$1,233.19

40. Next, the court finds that there are certain creditors included in the "Law Firm Vendor" category (*e.g.*, experts, data hosting, document managers, court reporters) that are really creditors of the individual law firms and/or Highland, and that these law firm vendor creditors should not be considered creditors of the Alleged Debtors. For these, there was no evidence of a direct contractual obligation on the part of either the Alleged Debtors or Highland—although the court certainly understands that, when the law firms would retain vendors, they would bill these to either the Alleged Debtors or Highland as an expense to be reimbursed. Most of these were already eliminated with agreement of the Alleged Debtors but, from the remaining list of creditors, this would include David Langford (a Dallas County court reporter).[66] To be clear, while the individual law firm creditors may ultimately have a right to reimbursement for these vendor expenses from Highland (who may then potentially have a right to reimbursement from the Alleged Debtors via the Shared Services and Sub-Advisory Agreements), the court does not find this vendor to have a claim ***directly*** against the Alleged Debtors for purposes of section 303(b) of the Bankruptcy Code.

[66] *See* Exh. 40D, Exh. 187, Exh. 40O.

41. Next, as to the Stanton Law Firm, the court finds that this creditor should also be removed from the pool of creditors that "count," for section 303(b) purposes, since this claim appears to be the subject of a "bona fide dispute as to liability or amount,"[67] based on the evidence presented at the Trial. First, there was no engagement letter between either of the Alleged Debtors and the Stanton Law Firm produced.[68] Second, the heavily redacted invoice of the Stanton Law Firm dated October 18, 2016 shows only that it was relating to the "Joshua Terry Matter" and that it was billed to Highland.[69] Third, the Responses and Objections to Mr. Terry's Notice of Intention to Take Depositions by Written Questions sent to the Stanton Law Firm[70] provides the following responses:

> **Question No. 11**: What is the total amount of debt Acis Capital Management L.P. to the Firm. is liable to the Firm.
>
> **Answer**: Acis Capital Management L.P.'s debt to the Firm is unknown at this time.
>
> **Question No. 12**: What is the total amount of debt Acis Capital Management GP, LLC is liable for to the firm?
>
> **Answer**: Acis Capital Management GP, LLC to the Firm is unknown at this time.
>
> **Question No. 13**: Is any other party also liable for the debt of Acis Capital Management L.P. to the Firm? If so, please state the liable party and portion of Acis Capital Management L.P. debt the other party is liable for to the Firm.

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[67] *See Credit Union Liquidity Servs., L.L.C. v. Green Hills Dev. Co., L.L.C. (In re Green Hills Dev. Co., L.L.C.)*, 741 F.3d 651, 655 (5th Cir. 2014) (a claimholder does not have standing to file a petition under section 303(b) if its claim is "the subject of a bona fide dispute as to liability or amount"); *In re Smith*, 415 B.R. 222, 237 (Bankr. N.D. Tex. 2009) (only "a holder of a claim ... that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount" is counted in determining the number of creditors necessary to file an involuntary petition).

[68] Rather, there is only an engagement letter between Lackey Hershman LLP (acting on behalf of its client, Highland) and Stanton Advisors LLC to act as an expert in the Terry litigation. *See* Exh. 144. As previously noted, the claim of Stanton Advisors LLC was removed from the creditor list by agreement of the Alleged Debtors.

[69] *See* Exh. 40R.

[70] The court notes that these responses were actually signed by James Michael Stanton, attorney for Stanton LLP. *See* Exh. 139.

> **Answer**: Whether any other party is also liable to the firm for the debt of Acis Capital Management, L.P. is unknown at this time.
>
> **Question No**. **14**: Is any other party also liable for the debt of Acis Capital Management GP, LLC to Firm? If so, please state the liable party and portion of Acis Capital Management GP, LLC debt the other party is liable for to the Firm.
>
> **Answer**: Whether any other party is also liable for the debt of Acis Capital Management GP, LLC is unknown at this time. . . .
>
> **Question No. 21**: Does the Firm currently represent Acis Capital Management, L.P.? If so, please state the representation.
>
> **Answer**: Based on Acis's assertion that this question calls for information protected by the attorney-client privilege, the Firm cannot answer this question at this time.
>
> **Question No. 22**: Does the Firm currently represent Acis Capital Management GP, LLC? If so, please state the representation?
>
> **Answer**: Based on Acis's assertion that this question calls for information protected by the attorney-client privilege, the Firm cannot answer this question at this time. . . .[71]

The court finds that this evidence demonstrates that the claim of the Stanton Law Firm is the subject of a bona fide dispute as to either liability or amount and should not be counted since there is no real way of even knowing who the Stanton Law Firm was engaged by and, thus, whether the Alleged Debtors are even responsible for these alleged legal fees. The court would also specifically refer to the testimony of Mr. Leventon, the in-house lawyer employed by Highland who was in charge of allocating all of the bills that came into Highland's legal invoicing system, where he described a process in which all legal bills relating to the "Terry Matter" would automatically be assigned to the Alleged Debtors, without any real regard to whether the particular law firm had even been engaged by the Alleged Debtors or if whether the

[71] *See* Exhibit 139.

representation was actually relating to one of the other parties in the Terry litigation (*e.g.*, Highland, Mr. Dondero, etc.). Accordingly, the court finds that there is a bona fide dispute as to whether the Alleged Debtors are actually liable for the Stanton Law Firm legal fees and that they should not be counted as a creditor for purposes of section 303(b) of the Bankruptcy Code.[72]

42. Thus, it appears, at most, that there are 11 creditors[73] of the Alleged Debtors as set forth in the chart below:

Creditor No.	Creditor Name	Nature of Claim	Total Indebtedness
1	Andrews Kurth	Legal Fees	$211,088.13
~~2~~	~~Case Anywhere, LLC~~	~~Law Firm Vendor~~	~~$417.20~~
~~3~~	~~CSI Global Deposition Services~~	~~Law Firm Vendor~~	~~$38,452.56~~
~~4~~	~~David Langford~~	~~Court Reporter/Law Firm Vendor~~	~~$550~~
5	Drexel Limited	Fee Rebate	$6,359.96
~~6~~	~~Elite Document Technology~~	~~Data Hosting/Law Firm Vendor~~	~~$199.72~~
7	Highfield Equities, Inc.	Fee Rebate	$2,510.04
~~8~~	~~Highland Capital Management, L.P.~~	~~Advisory and Participation Fees~~	~~$2,770,731.00~~
~~9~~	~~JAMS, Inc.~~	~~Law Firm Vendor~~	~~$1,352.27~~
10	Jones Day	Legal Fees	$368.75

[72] *See also In re CorrLine Int'l, LLC*, 516 B.R. 106, 152 (Bankr. S.D. Tex. 2014) (bankruptcy court found that creditors contained in the alleged debtor's list of creditors with uncertain or unknown amounts could not be counted towards the numerosity requirement of section 303(b)).

[73] The court notes that, in all likelihood, the list of creditors that should be tallied for purposes of section 303(b) may actually be less than 11, because certain of the remaining creditors (*i.e.*, Drexel Limited, Highfield Equities, Inc., Lackey Hershman LLP, and David Simek) received payments during the 90 days preceding the Petition Date—and, thus, arguably should not be counted as creditors pursuant to section 303(b) of the Bankruptcy Code (which instructs that transferees of voidable transfers should not be counted). *See, e.g.,* Exh. 124 & Exh. 131. Additionally, certain of the remaining law firm creditors that are owed legal fees are also creditors of Highland and Highland-affiliates, not just the Alleged Debtors. To elaborate, many of these law firm creditors were employed to represent not only the Alleged Debtors, but also Highland and Highland-affiliates, so there may be an actual dispute as to the allocation of these legal fees among Highland and the Alleged Debtors (thus there could be bona fide disputes as to the amounts allocated by Highland's in-house lawyers to the Alleged Debtors). *See, e.g.*, Ex. 123 (McKool Smith, P.C. engagement letter referencing representation of numerous parties) & Exhibit 90 (Reid Collins & Tsai's Answers and Objections to Mr. Terry's Deposition by Written Questions, questions 13 & 14, stating that based upon allocation determinations to be made by Highland, other individuals may be liable for the full amount of the debt including Acis LP, Highland, Mr. Dondero, and Mr. Okada).

11	Joshua Terry	Judgment Creditor	$8,060,827.84
12	KPMG LLP	Auditor Fees	$34,000
13	Lackey Hershman LLP	Legal Fees[74]	$236,977.54
14	McKool Smith, P.C.	Legal Fees	$70,082.18
15	Reid Collins & Tsai LLP	Legal Fees	$17,383.75
~~16~~	~~Stanton Advisors LLC~~	~~Testifying Expert Fees/Law Firm Vendor~~	~~$10,000~~
~~17~~	~~Stanton Law Firm~~	~~Legal Fees~~	~~$88,133.99~~
~~18~~	~~The TASA Group. Inc.~~	~~Testifying Expert Fees/Law Firm Vendor~~	~~$14,530.54~~
19	CT Corporation	Report Filing Representation	$517.12
20	David Simek	Expense Reimbursement	$1,233.19

43. Finally, on the topic of creditor numerosity, the court further finds that the evidence strongly suggested hurried manufacturing of creditors on the part of the Alleged Debtors and Highland, in order to bolster an argument that having a sole petitioning creditor was legally inadequate in this case.[75] For example, the Klos Declaration and other information, that was provided to State Court 2 and in discovery, only days before the Involuntary Petitions were filed,

[74] Mr. Terry has also argued that certain of the law firm creditors (McKool Smith, P.C., Lackey Hershman, LLP, and Reid Collins & Tsai) are "insiders" that must be excluded from the creditor list pursuant to section 303(b) of the Bankruptcy Code. While there may be some support in case law for such an argument, Mr. Terry would ultimately need to show by a preponderance of the evidence that the law firms exercised such control or influence over the Alleged Debtors as to render their transactions not at arm's length. *See In re CorrLine Intern., LLC*, 516 B.R. 106, 157-58 (Bankr. S.D. Tex. 2014) (citing to *Kepler v. Schmalbach (In re Lemanski)*, 56 B.R. 981, 983 (Bankr.W.D.Wis.1986)). *See also In re Holloway*, 955 F.2d 1008, 1011 (5th Cir. 1992) (in evaluating whether insider status existed for purposes of evaluating alleged fraudulent conveyance court considered (1) the closeness of the relationship between the transferee and the debtor; and (2) whether the transactions between the transferee and the debtor were conducted at arm's length). Because there was no evidence suggesting abuse or control by these law firm creditors, nor was there any evidence that would suggest that their dealings with the Alleged Debtors were anything but arm's length, the court finds that these law firm creditors should not be excluded from the creditor list as "insiders" pursuant to section 303(b) of the Bankruptcy Code.

[75] *See* the Original Notice of Creditors, the First Amended Notice of Creditors, and the Second Amended Notice of Creditors.

seemed to show only a small number of creditors of Acis LP—Mr. Terry credibly testified that he thought there were less than 12 creditors based on his review of such information, as well as his understanding of the Alleged Debtors' business. Yet, only a few days later, the Alleged Debtors filed their Original Notice of Creditors, which showed 18 creditors, which was amended twice to add another creditor and then yet another. This simply does not jive in the court's mind and supports this court's belief that the Alleged Debtors were scurrying to determine which Highland creditors might cogently be painted as Acis LP creditors—so as to preclude Mr. Terry from being able to file the Involuntary Petitions as the single, petitioning creditor.

F. Evidence Regarding Whether the Alleged Debtors are Generally Not Paying Debts as They Become Due (Unless Such Debts are the Subject of a Bona Fide Dispute as to Liability or Amount).

44. The evidence submitted reflects that, for the 11 creditors identified above, 9 out of 11 have unpaid invoices that were more than 90 days old. The remaining 2 of the 11 were McKool Smith, P.C. (current counsel for the Alleged Debtors) and the Petitioning Creditor.[76] The court makes findings with regard to each of the 11 creditors below—focusing specifically on whether the Alleged Debtors have been paying these creditors as their debts have become due.

45. First, with regard to Andrews Kurth & Kenyon ("AKK"), the evidence reflected that out of the $211,088.13 allegedly owed by Acis LP to AKK, the great majority of it—$173,448.42—was invoiced on November 16, 2016[77] (more than 14 months before the Petition Date). Other, smaller amounts were invoiced on a monthly basis in each of the months August 2017, September 2017, October 2017, November 2017, and December 2017. Although requested in discovery, no engagement letter for AKK was produced and AKK represented in

[76] Exhs. 40 & 54.

[77] Exh. 40.

written discovery that, to its knowledge, none existed.[78] The court notes anecdotally that AKK's invoices (although allegedly related to Acis LP legal matters) were addressed to Highland.[79] In any event, AKK represented that both the Alleged Debtors and Highland are jointly and severally liable for the fees owed to it.[80] AKK also represented that, to its knowledge, the amounts owing to it by Acis LP and Highland are not disputed.[81] AKK also represented that it has not provided legal work on a contingency basis for the Alleged Debtors or Highland.[82] The court makes a logical inference that AKK expected timely payment of its invoices—the largest of which was dated more than 14 months prior to the Petition Date—and, thus, it has generally not been paid timely.

46. Next, with regard to Drexel Limited, the Petitioning Creditor concedes that its $6,359.96 indebtedness (which is a fee rebate owing to it) is not past-due.

47. Next, with regard to Highfield Equities, Inc., the Petitioning Creditor concedes that its $2,510.04 indebtedness (which is also a fee rebate owing to it) is not past-due.

48. Next, with regard to the Jones Day law firm, the $368.75 indebtedness owed to it is well more than 90 days old. Specifically, there is a six-and-a-half-month old invoice dated July 19, 2017 invoice in the amount of $118.75, and two five-month old invoices dated August 30, 2017 (both in the amount of $150).[83] The court makes a logical inference that Jones Day

[78] Exh. 98, Requests 1-2.

[79] Exh. 98, pp. AKK000061-AKK000060.

[80] Exh. 98, Question 13.

[81] Exh. 98, Questions 52-55.

[82] Exh. 98, Questions 73-75.

[83] Exh. 40K.

expected timely payment of its invoices prior to the Petition Date and, thus, it has generally not been paid timely.

49. Next with regard to the Petitioning Creditor, Mr. Terry, the court notes that his liquidated claim in the amount of $8,060,827.84 first arose with the final Arbitration Award on October 20, 2017 (although such award was not confirmed by State Court 2 until December 18, 2017). The judgment was unstayed as of the January 30, 2018 Petition Date, although the Alleged Debtors state that they still desire to appeal it—as difficult as that is in the situation of an arbitration award. The court makes a logical inference that the Alleged Debtors had, on the Petition Date, no intention of paying this claim any time soon based on their conduct after the Arbitration Award—although the Arbitration Award had only been in existence for three-and-a-half months as of the Petition Date. The cash in the Alleged Debtors' bank accounts is wholly insufficient to cover the Arbitration Award and, meanwhile, corporate transactions have been ongoing to ensure that no cash streams will be coming into Acis LP in the future in the same way that they have in the past. Thus, this court finds that this large claim, as of the Petition Date, was not being paid timely.

50. Next with regard to KPMG LLP, the $34,000 indebtedness owed to it was for the service of auditing Acis LP's financial statements, pursuant to an engagement letter with it dated March 1, 2017.[84] KPMG's engagement letter reflected a $40,000 flat fee was agreed to by Acis LP for the service, of which 40% was due October 2017 (*i.e.,* $16,000), with another 45% was due in January 2018 ($18,000), and the remaining 15% would be due at the time that a final bill was sent. Acis LP has only paid $6,000 of the agreed upon amount—meaning $28,000 was overdue as of the January 30, 2018 Petition Date (with $10,000 of that being four months past

[84] Exh. 40M.

due). The court makes a logical inference that KPMG LLP expected payment of its audit fees in accordance with its engagement letter and, thus, it has generally not been paid timely.

51. Next with regard to Lackey Hershman LLP, the $236,977.54 indebtedness owed to it was for legal services provided to the Alleged Debtors and Highland in connection with the arbitration and litigation with Mr. Terry. No engagement letter was provided, but the invoices for their services are all directed to Highland.[85] The evidence reflected that three invoices had not been paid as of the Petition Date: an October 31, 2017 invoice in the amount of $56,909.53; a November 30, 2017 invoice setting forth new fees in the amount of $84,789.83; and a December 31, 2017 invoice setting forth new fees in the amount of $95,278.18.[86] The court makes a logical inference that Lackey Hershman LLP expected prompt payment on its invoices (if nothing else, the statement on its invoice indicating "Total now due")[87] and, thus, it has generally not been paid timely.

52. Next with regard to Reid Collins & Tsai LLP, the $17,383.75 indebtedness owed to it was billed in an invoice dated August 31, 2017, indicating an August 31, 2017 "Due Date" (five months before the Petition Date).[88] Although requested in discovery, no engagement letter for this firm was produced and Reid Collins & Tsai LLP in fact represented in written discovery that none existed.[89] Moreover, written discovery propounded on the law firm indicated that, while Acis LP was liable on this debt, other parties including Acis GP/LLC, Highland, Mr.

[85] Demonstrative Aid No. 1 (Lackey Hershman tab).

[86] Exh. 40, p. 3.

[87] Demonstrative Aid No. 1 (Lackey Hershman tab).

[88] Exh. 40P; Exh. 130, pp. 7-8.

[89] Exh. 90, Requests 1 & 2; Ex. 130, Requests 1 & 2.

Dondero, the Dugaboy Trust, and Mr. Akada might also be liable for the full amount of the debt—subject to Highland's allocation determinations.[90] Based on this evidence, the court makes a logical inference that Reid Collins & Tsai LLP generally has not been paid timely.

53. Next with regard to CT Corporation and the $517.12 indebtedness that the Alleged Debtors represent is owed, CT Corporation asserts that $4,074.84 is, in fact, owed to it by Acis LP and Acis GP/LLC.[91] CT Corporation also believes Highland has liability for the Alleged Debtors' indebtedness.[92] CT Corporation also believes the amount owed to it is undisputed.[93] CT Corporation further represents that its invoices are due upon receipt.[94] CT Corporation produced several invoices in discovery, all showing due upon receipt, and one was dated as far back as December 31, 2016 (in the amount of $932).[95] Based on this evidence, the court makes a logical inference that CT Corporation expected prompt payment on its invoices and, thus, has not been paid timely.

54. Next with regard to David Simek, the Petitioning Creditor concedes that his $1,233.19 indebtedness (which is apparently an expense reimbursement relating to some consulting) is not past-due.

[90] Exh. 90, Questions 13 & 14; Exh. 130, Questions 13-14.

[91] Exh. 143, Questions 12 & 13.

[92] *Id.* at Question 14.

[93] *Id.* at Questions 22 & 23.

[94] *Id.* at Question 30.

[95] *Id.* at p. 8; Exh. 40T.

55. In summary, the evidence reflects that the creditors of the Alleged Debtors are generally not being paid timely (except for perhaps four that are relatively insignificant and which may also be able to look to Highland for payment).[96]

56. Further on the topic of timeliness, Mr. Leventon (Highland's in-house Assistant General Counsel) testified that 96% of bills submitted get paid more than 90 days after they are submitted, that approximately 70% of bills are later than 120 days after they are submitted, and some are even later than 150 days. Mr. Leventon testified that this was a result of Acis LP receiving cash on a quarterly basis from the CLOs. He further elaborated and testified that, for example, if Acis LP got cash on say February 1st, and it received a legal bill on that same day, that he would probably not approve it and allocate it until say February 8th. By that time, Acis LP would have already used up all its cash, and that particular creditor would need to wait until the next quarterly payment was received in order to be paid. He further testified that he explained this to law firms before their engagements and that, if they wanted the business, they would need to understand the process. There are several things the court finds problematic about this testimony. First, no testimony was offered showing that this was, in fact, the understanding of the law firms or other creditors, and, moreover, none of the engagement letters or invoices submitted into evidence reflect such payment terms. Without this additional evidence, the court believes that the Alleged Debtors' testimony regarding how it paid invoices was mostly self-serving and did not support a finding that the Alleged Debtors were generally paying their debts

[96] Courts have also held that a debtor is generally not paying its debts as they become due when a debtor is found to have been transferring assets so as to avoid paying creditors. *See, e.g., In re Moss*, 249 B.R. 411, 423 (Bankr. N.D. Tex. 2000) (bankruptcy court determined that an alleged debtor was not paying its debts as they came due when the alleged debtor "attempted to delay creditors through the transfers of assets she has made," concluding that "[the alleged debtor's] overall conduct of her financial affairs has been poor"). This court has also found that there may have been significant transfers of the Alleged Debtors' assets prior to the filing of the Involuntary Petitions to potentially avoid paying creditors (*i.e.*, Mr. Terry) and this may provide further support for the court's finding that the Alleged Debtors are generally not paying their debts as they become due under section 303(h).

as they became due.[97] Second, to the extent Mr. Leventon's testimony demonstrates that creditors of the Alleged Debtors expected to be paid on a quarterly basis (at the latest), certain of the remaining 11 creditors have debts that are significantly older than four months (*i.e.*, CT Corporation, Jones Day, AKK, and possibly even Reid Collins & Tsai LLP). Third, the Financial Statements of Acis LP submitted into evidence do not support the notion that the cash balances at Acis LP were only sufficient enough to pay vendors once every quarter.[98] For example, the balance sheet for January 31, 2017 shows a cash balance in Acis LP bank accounts of $1,061,663.19; the balance sheet for February 28, 2017 shows a cash balance in Acis LP bank accounts of $905,212.36; the balance sheet for March 31, 2017 shows a cash balance in Acis LP bank accounts of $525,626.59; the balance sheet for April 30, 2017 shows a cash balance in Acis LP bank accounts of $117,885.96; the balance sheet for May 31, 2017 shows a cash balance in Acis LP bank accounts of $62,733.31; the balance sheet for June 30, 2017 shows a cash balance in Acis LP bank accounts of $10,329.15; the balance sheet for July 31, 2017 shows a cash balance in Acis LP bank accounts of $701,904.39; the balance sheet for August 31, 2017 shows a cash balance in Acis LP bank accounts of $332,847.05.[99] In summary, while there may be cash fluctuations with Acis LP, there is not a clear pattern of Acis LP being only able to pay vendors once every quarter.

[97] *See In re Trans-High Corp.*, 3 B.R. 1, 2-3 (Bankr. S.D.N.Y. 1980) (bankruptcy court found that evidence showing that the petitioning creditor gave the debtor generous terms of payment (90 days) which were substantially better than the terms set forth in the actual writings between the parties supported finding that the alleged debtors were generally paying debts as they became due and that the involuntary petition must be dismissed).

[98] Exh. 147.

[99] *Id.*

II. Conclusions of Law

Section 303 of the Bankruptcy Code sets forth the various requirements for initiating an involuntary bankruptcy case. First, pursuant to section 303(b) of the Bankruptcy Code, an involuntary case may be filed against a person by the filing with the bankruptcy court of a petition under Chapter 7—

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount ... [that] aggregate at least $15,775 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $15,775 of such claims . . .[100]

Thus, if there are twelve or more eligible creditors holding qualified claims on the Petition Date, three or more entities must participate in the involuntary filing and must hold unsecured claims aggregating $15,775.00. If there are less than twelve creditors, a single creditor with an unsecured claim of $15,775.00 may file the involuntary petition. To the extent a bankruptcy court finds that the requisite number of petitioning creditors have commenced the involuntary case, the court shall order relief against the debtor under the chapter under which the petition was filed only if "the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount."[101]

Here, as noted earlier, the Alleged Debtors have made four arguments as to why an order for relief should not be entered against the Alleged Debtors: (1) the Alleged Debtors have 12 or

[100] 11 U.S.C.A § 303(b) (West 2018).

[101] 11 U.S.C.A § 303(h) (West 2018).

more creditors, and, thus, with Mr. Terry being the sole petitioning creditor, the Involuntary Petitions were not commenced by the requisite number of creditors; (2) the Alleged Debtors are generally paying their debts as they become due; (3) the Involuntary Petitions were filed in bad faith by Mr. Terry; (4) the interests of creditors and the debtors would be better served by dismissal and the court should abstain pursuant to section 305 of the Bankruptcy Code.

A. Have the Requisite Number of Creditors Commenced the Involuntary Proceedings?

Pursuant to section 303(b)(2) of the Bankruptcy Code, a sole petitioning creditor holding at least $15,775 in claims can initiate an involuntary bankruptcy case so long as the alleged debtors have fewer than 12 creditors. After the Second Amended List of Creditors was filed, Mr. Terry had the burden, by a preponderance of the evidence, of showing that the Alleged Debtors actually had less than 12 qualified creditors.[102] Here, the court has found that the Alleged Debtors have, ***at most***, 11 qualified creditors.[103] Accordingly, Mr. Terry has met his burden of showing that the Alleged Debtors have less than 12 creditors for section 303(b) purposes, and that he, as the sole petitioning creditor, was permitted to file the Involuntary Petitions. While Mr. Terry has made additional arguments as to why certain of these 11 creditors should not be counted as creditors for purposes of section 303(b) of the Bankruptcy Code, the court does not believe it necessary to address these arguments at this time.[104]

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[102] *See In re Moss*, 249 B.R. 411, 419 n. 6 (Bankr. N.D. Tex. 2000); *In re Smith*, 415 B.R. 222, 229 (Bankr. N.D. Tex. 2009).

[103] To be clear, the court believes that even on these 11, there are likely bona fide disputes as to the liability or amount that ***Acis LP*** has—as opposed to the liability or amount that Highland or other insiders bear responsbility.

[104] Moreover, as previously stated, since the court has determined there are fewer than 12 creditors, the court need not address whether there is a "special circumstances" exception to the statutory requirements of section 303, in situations where an alleged debtor may have engaged in fraud, schemes, or artifice to thwart a creditor or creditors. *See, e.g., In re Norriss Bros. Lumber Co.*, 133 B.R. 599 (Bankr. N.D. Tex. 1991); *In re Moss*, 249 B.R. 411 (Bankr. N.D. Tex. 2000); *In re Smith*, 415 B.R. 222 (Bankr. N.D. Tex. 2009).

B. Are the Alleged Debtors Generally Paying Their Debts as They Become Due?

Section 303(h) of the Bankruptcy Code requires that a court shall enter order for relief in an involuntary case "if … (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount . . . ."[105] Again, the burden is on the Petitioning Creditor to prove this element by a preponderance of the evidence.[106] The determination is made as of the filing date of the Involuntary Petitions.[107] In determining whether an alleged debtor is generally paying its debts as they come due, courts typically look to four factors: (i) the number of unpaid claims; (ii) the amount of such claims; (iii) the materiality of the non-payments; and (iv) the nature of the debtor's overall conduct in its financial affairs.[108] No one factor is more meritorious than another; what is most relevant depends on the facts of each case.[109] Courts typically hold that "generally not paying debts" includes regularly missing a significant number of payments ***or*** regularly missing payments which are significant in amount in relation to the size of the debtor's operation.[110]

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[105] 11 U.S.C.A § 303(h) (West 2018).

[106] *See Norris v. Johnson (In re Norris)*, No. 96-30146, 1997 WL 256808, at *3-*4 (5th Cir. Apr. 11, 1997) (unpublished).

[107] *Subway Equip. Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 222 (5th Cir. 1993).

[108] *See, e.g., In re Moss*, 249 B.R. 411, 422 (Bankr. N.D. Tex. 2000) (citing *In re Norris*, 183 B.R. 437, 456-57 (Bankr. W.D. La. 1995)).

[109] *In re Bates*, 545 B.R. 183, 186 (Bankr. W.D. Tex. 2016) (also noting that petitioning creditors' counsel consistently argued that the final prong—overall conduct in financial affairs—should be afforded more weight than the other factors, and the court found no authority to support this assertion).

[110] *See, e.g., In re All Media Props., Inc.*, 5 B.R. 126, 143 (Bankr. S.D. Tex. 1980). See also *Concrete Pumping Serv., Inc. v. King Constr. Co. (In re Concrete Pumping Serv., Inc.)*, 943 F.2d 627, 630 (6th Cir.1991) (a debtor was not paying his debts as they became due where the debtor was in default on 100% of its debt to only one creditor); *Knighthead Master Fund, L.P. v. Vitro Packaging, LLC (In re Vitro Asset Corp.)*, No. 3:11–CV–2603–D (N.D.Tex. Aug. 28, 2012) (district court found error in bankruptcy court ruling that the debtors were generally paying their debts as they became due, where bankruptcy court had relied on the fact that the alleged debtors had a significant number of third-party creditors/trade vendors, which had been continually paid, even though the unpaid debts to the petitioning creditors far exceeded the paid debts in terms of dollar amount; petitioning creditors were holders of promissory notes that were guaranteed by the alleged debtors, as to which the primary obligor and alleged

Furthermore, any debt which the alleged debtor is not current on as of the petition date should be considered as a debt not being paid as it became due.[111]

Here, the court concludes that the creditors of the Alleged Debtors—what few there are—are generally not being paid as their debts have become due (except for perhaps four[112] that are relatively insignificant and which may also be able to look to Highland for payment). Mr. Terry has met his burden by a preponderance of the evidence as to section 303(h) of the Bankruptcy Code.

C. With the Section 303 Statutory Requirements Being Met by the Petitioning Creditor, Should the Court, Nonetheless, Dismiss the Involuntary Petitions Because They Were Filed in Bad Faith?

Despite Mr. Terry meeting the necessary statutory requirements for this court to enter orders for relief as to the Alleged Debtors pursuant to section 303 of the Bankruptcy Code, the Alleged Debtors have argued that the Involuntary Petitions must, nonetheless, be dismissed because they were filed in "bad faith" by Mr. Terry. As support for this argument, the Alleged Debtors rely primarily on the Third Circuit's decision in *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328 (3d Cir. 2015). While the court certainly acknowledges that authority exists in other circuits that suggests that dismissal of an involuntary bankruptcy case may be appropriate—even when section 303's statutory requirements have been met—based upon an

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debtors had ceased making interest payments; the unpaid debts represented 99.9% of the total dollar amount of debt of each of the alleged debtors); *Crown Heights Jewish Cmty. Council, Inc. v. Fischer (In re Fischer)*, 202 B.R. 341, 350–51 (E.D.N.Y. 1996) (even though the debtor only had two outstanding debts, the total dollar amount failed to establish that, in terms of dollar amounts, the debtor was paying anywhere close to 50% of his liabilities, so he was not generally paying his debts as they became due); *In re Smith*, 415 B.R. 222, 231 (Bankr. N.D. Tex. 2009) (while the debtor was paying small recurring debts, he was not paying 99 percent of his debts in the aggregate amount and thus was not generally paying his debts as they became due).

[111] *In re Bates*, 545 B.R. 183, 188 (Bankr. W.D. Tex. 2016).

[112] Those four are: Drexel Limited ($6,359.96); Highfield Equities ($2,510.04); David Simek ($1,233.19); and McKool Smith ($70,082.18).

independent finding of "bad faith," the court need not ultimately decide the efficacy or applicability of such authority, because the court does not believe that the evidence demonstrated any "bad faith" on the part of Mr. Terry (or his counsel) in filing the Involuntary Petitions. Indeed, the evidence suggested that Mr. Terry and his counsel filed the Involuntary Petitions out of a legitimate concern that Highland was dismantling and denuding Acis LP of all of its assets and value and that a bankruptcy filing was the most effective and efficient way to preserve value for the Acis LP creditors. The court concludes that Mr. Terry was wholly justified in pursuing the Involuntary Petitions.

D. Should This Court, Nonetheless, Abstain and Dismiss the Involuntary Petitions Pursuant to Section 305 of the Bankruptcy Code?

Section 305(a)(1) of the Bankruptcy Code provides that:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; . . .[113]

Courts construing section 305(a)(1) of the Bankruptcy Code have found that abstention in a properly filed bankruptcy case is an ***extraordinary remedy***.[114] Moreover, granting an abstention motion pursuant to section 305(a)(1) of the Bankruptcy Code requires more than a simple balancing of harm to the debtor and creditors; rather, the interests of ***both*** the ***debtor*** and its ***creditors*** must be served by granting the request to abstain.[115] The moving party bears the

[113] 11 U.S.C.A. § 305(a)(1) (West 2018).

[114] *In re AMC Investors, LLC*, 406 B.R. 478, 487 (Bankr. D. Del. 2009); *see also In re Compania de Alimentos Fargo, S.A.*, 376 B.R. 427, 434 (Bankr. S.D.N.Y. 2007); *In re 801 S. Wells St. Ltd. P'ship*, 192 B.R. 718, 726 (Bankr. N.D. Ill. 1996).

[115] *In re Smith*, 415 B.R. 222, 238-39 (Bankr. N.D. Tex. 2009) (citing to *AMC Investors, LLC*, 406 B.R. at 488).

burden to demonstrate that dismissal benefits the debtor and its creditors.[116] Courts must look to the individual facts of each case to determine whether abstention is appropriate.[117]

Case law has set forth a litany of factors to be considered by the court to gauge the overall best interests of the creditors and the debtor for section 305(a)(1) purposes:

> (1) the economy and efficiency of administration;
> (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;
> (3) whether federal proceedings are necessary to reach a just and equitable solution;
> (4) whether there is an alternative means of achieving an equitable distribution of assets;
> (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
> (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and
> (7) the purpose for which bankruptcy jurisdiction has been sought.[118]

While all factors are considered, not all are given equal weight in every case and the court should not conduct a strict balancing.[119]

i. Factor 1: The Economy and Efficiency of Administration.

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[116] *In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 462-63 (Bankr. S.D.N.Y. 2008).

[117] *In re Spade*, 258 B.R. 221, 231 (Bankr. D. Colo. 2001).

[118] *Monitor Single Lift I, Ltd.*, 381 B.R. at 464-65 (citing to *In re Paper I Partners, L.P.*, 283 B.R. 661, 679 (Bankr. S.D.N.Y. 2002)); *see also Smith*, 415 B.R. at 239; *AMC Investors, LLC*, 406 B.R. at 488; *In re Euro-American Lodging Corp.*, 357 B.R. 700, 729 (Bankr. S.D.N.Y. 2007); *but see Spade*, 258 B.R. at 231-32 (Bankr. D. Colo. 2001) (applied a four criteria test in evaluating section 305 abstention which included: (1) the motivation of the parties who sought bankruptcy jurisdiction; (2) whether another forum was available to protect the interests of both parties or there was already a pending proceeding in state court; (3) the economy and efficiency of administration; and (4) the prejudice to the parties). The Alleged Debtors cite to the case of *In re Murray*, 543 B.R. 484 (Bankr. S.D.N.Y. 2016), in particular, as support for why this court should abstain under section 305(a) of the Bankruptcy Code and dismiss the Involuntary Petitions. However, in *Murray*, Judge Gerber was analyzing dismissal of an involuntary proceeding pursuant to section 707 of the Bankruptcy Code, more specifically for "cause," and not based upon abstention under section 305(a) of the Bankruptcy Code. Thus, the court is not convinced *Murray* is relevant to this court's section 305 abstention analysis.

[119] *In re TPG Troy, LLC*, 492 B.R. 150, 160 (Bankr. S.D.N.Y. 2013) (citing *Monitor Single Lift*, 381 B.R. at 464).

The economy and efficiency of administering a case in the bankruptcy court is routinely evaluated in considering abstention under section 305 of the Bankruptcy Code. Here, the evidence suggests that the most economical and efficient forum for these parties to resolve their disputes is the bankruptcy court. The court heard ample evidence that the Alleged Debtors are already, essentially, in the process of being liquidated by Highland. This is not a situation where an ably-functioning, going-concern business is being foisted in disruptive fashion into a bankruptcy.[120] Because of the fact that the Alleged Debtors are already in the process of being liquidated, the bankruptcy court (and not a state court) is the most efficient and economical forum to complete this liquidation and distribute whatever assets remain to creditors in accordance with the distribution scheme set forth in the Bankruptcy Code and with the oversight of a neutral third-party trustee. Thus, with the bankruptcy court being the more economic and efficient forum for administering this case, this factor goes against abstention.

ii. *Factors 2, 3, 4, 5, and 6: Whether Another Forum is Available to Protect the Interests of Both Parties or There is Already a Pending Proceeding in State Court; Whether Federal Proceedings are Necessary to Reach a Just and Equitable Solution; Whether There is an Alternative Means of Achieving an Equitable Distribution of Assets; Whether the Debtor and the Creditors are Able to Work Out a Less Expensive Out-of-Court Arrangement Which Better Serves All Interests in the Case; and Whether a Non-Federal Insolvency Has Proceeded so Far in Those Proceedings That it Would Be Costly and Time Consuming to Start Afresh With the Federal Bankruptcy Process.*

[120] *See, e.g., In re The Ceiling Fan Distrib., Inc.*, 37 B.R. 701 (Bankr. M.D. La. 1983) (noting that while the dissection of a living business may not properly be the business of a bankruptcy court, the division of a "carcass" and the reclamation of pre-petition gouging may well be); *In re Bos*, 561 B.R. 868, 898-99 (Bankr. N.D. Fla. 2016) (citing as one of the reasons to abstain under section 305 of the Bankruptcy Code the fact that entities and subsidiaries under the alleged debtor's umbrella were still operating successful businesses and had employed more than 500 people); *but see Remex Elecs. Ltd. v. Axl Indus., Inc. (In re Axl Indus., Inc.)*, 127 B.R. 482, 484-86 (S.D. Fla. 1991) (in affirming the bankruptcy court's decision to dismiss an involuntary bankruptcy case, the district court also found that "the interests of a defunct business enterprise would be little affected by the pendency of a bankruptcy proceeding," which the district court believed favored abstention).

The court believes that factors 2-6 should be grouped together for purposes of its abstention analysis, since all of these factors specifically touch on the availability of an alternative forum to achieve an ***equitable*** distribution.[121] By way of example, where bringing a case into the bankruptcy court would simply add an additional layer of expense to the resolution of a two-party dispute and another forum already provides a suitable place to resolve the dispute, some courts have found that abstention is the more appropriate choice since keeping the case would transform the bankruptcy process into a collection device.[122] Here, the Alleged Debtors have repeatedly argued that, because there is already pending state court litigation involving Mr. Terry, Highland, and the Alleged Debtors, these cases should be dismissed and the parties should go back to state court to resolve their issues. The court does not agree for several reasons.

First, it is worth noting that this court has already heard multiple days of evidence in this case (including almost five days just for the Trial) and would certainly not be "starting afresh" by any means if things go forward in the bankruptcy court. Additionally, while the Alleged Debtors have argued that a significant amount of attorney's fees have already been spent litigating this case in state court (which they believe supports abstention), the court surmises that these fees have not been wasted dollars, as the money expended by the parties developed discovery of facts that could assist a bankruptcy trustee in pursuing avoidance actions that may be viable and might lead to value that could pay creditors' claims.[123]

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[121] *See, e.g., In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 460-70 (Bankr. S.D.N.Y. 2008).

[122] *AMC Investors, LLC*, 406 B.R. at 488; *see also Axl Indus., Inc.*, 127 B.R. at 484-86.

[123] *See, e.g., The Ceiling Fan Distributor, Inc.*, 37 B.R. at 703 (the court noted that, despite there being significant legal expenses in the state court, such expenses were not wasted since the legal work done to date would be quite helpful to a trustee).

Second, this court heard considerable evidence involving potentially voidable transfers that may have occurred involving the Alleged Debtors and Highland/Highland-affiliates and, while the state court certainly provides a forum for eventually bringing fraudulent transfer claims, the court also heard evidence that none of these claims have actually been brought in the state court.[124] Moreover, to the extent fraudulent transfer claims were to be pursued in state court and were successful, the state court would still need the ability to reach the assets of alleged fraudulent transfer recipients (which, in this situation, include certain Highland-affiliates located in the Cayman Islands). The bankruptcy court has concerns whether a state court process could efficiently accomplish this task.[125] Similarly, it is worth noting that, while a request for a receiver was filed in the state court by Mr. Terry, such request had not yet been heard and decided by the state court. Thus, at the present time, it does not appear that there is an alternative forum to address the pertinent issues in this case, without the necessity of significant, additional steps being taken by the parties in the state court.

Third, this court believes that a federal bankruptcy proceeding is necessary in order to achieve an equitable result in this case. Specifically, the court heard evidence from the Alleged Debtors that, if this court chose to abstain and dismiss the Involuntary Petitions, the Alleged Debtors would ultimately pay all of their creditors in full, except for Mr. Terry. This clearly demonstrates how keeping the case in the bankruptcy court is necessary to allow an equitable

[124] *See, e.g., In re Texas EMC Mgmt., LLC,* Nos. 11-40008 & 11-40017, 2012 WL 627844, at *3 (Bankr. S.D. Tex. 2012) (noting that one of the reasons abstention was proper under section 305 of the Bankruptcy Code was because the issues to be litigated amongst the parties were already joined in the state court litigation); *Spade*, 258 B.R. at 236 (court held that one of the reasons abstention was warranted under section 305 of the Bankruptcy Code was because the petitioning creditors had already filed and had pending a "collection case" in the state court).

[125] *See, e.g.*, *Smith*, 415 B.R. at 239 (the bankruptcy court held that there "are remedies under the Bankruptcy Code that are not available to Rhodes under state law, due to Mr. Smith's transfer of the majority of his assets to the Cook Island Trust," and "federal proceedings may be necessary to reach a just and equitable solution").

distribution to ***all creditors***, including Mr. Terry. Additionally, a federal bankruptcy court has certain tools available to it that are not available to a state court such as the ability to invalidate potential *ipso facto* clauses in contracts pursuant to section 365 of the Bankruptcy Code, sell assets free and clear of liens, claims and encumbrances pursuant to section 363 of the Bankruptcy Code, and impose the automatic stay pursuant to section 362 of the Bankruptcy Code. These are all useful tools available to the Alleged Debtors in a bankruptcy case that would be lost if this court were to ultimately abstain.

Finally, there was more than enough evidence showing the acrimonious and bitter relationship that exists between Mr. Terry and Mr. Dondero. Thus, the availability of an out-of-court arrangement being obtained in this case is, in this court's mind, slim to none.

In summation, the court finds that all of the factors above support this case staying with the bankruptcy court.

iii. Factor 7: The Purpose for Which Bankruptcy Jurisdiction Has Been Sought.

The Alleged Debtors have repeatedly argued that Mr. Terry filed this case in bad faith and as a litigation tactic to gain some sort of advantage in the state court proceedings. The court has already found above that these cases were not filed in bad faith and that Mr. Terry has met the necessary statutory requirements of section 303 of the Bankruptcy Code. Moreover, it is worth noting that at least one court has stated that the filing of an involuntary bankruptcy petition is always a "litigation tactic," but whether the filing is inappropriate for abstention purposes is a fact-dependent determination.[126] Here, the facts show that there was no inappropriateness

[126] *In re Marciano*, 459 B.R. 27, 50 (B.A.P. 9th Cir. 2011) (noting that while the filing of the involuntary bankruptcy was a litigation tactic, the bankruptcy court did not abuse its discretion in denying the alleged debtor's motion to dismiss based upon the bankruptcy court's primary concern that the issue of equality of distribution would not effectively be dealt with in another forum).

behind Mr. Terry's decision to file the Involuntary Petitions. Specifically, Mr. Terry repeatedly and credibly testified that the purpose for filing the Involuntary Petitions was to ensure that creditors (including him) were treated fairly and received an equal distribution from the Alleged Debtors' assets, not to gain some sort of advantage in the state court. This testimony was absolutely consistent with additional evidence showing that, since the entry of the arbitration award, there has been a calculated effort (largely by Highland) to effectively liquidate the Alleged Debtors. Unlike the bankruptcy court in *In re Selectron Mgmt. Corp.*,[127] which had no evidence or "smoking gun" showing that steps were being taken by the alleged debtor to evade payment on the petitioning creditor's judgment, thereby necessitating abstention, this court has heard ample evidence showing that the Alleged Debtors, with the aid of Highland, were transferring assets away from the Alleged Debtors, so that Mr. Terry would have nowhere to look at the end of the day.

In light of the court's analysis of all the seven factors above, the Alleged Debtors have not credibly shown how both the Alleged Debtors and the creditors are better served outside of bankruptcy. If this matter were to remain outside of bankruptcy, there seems to be a legitimate prospect that the Alleged Debtors and Highland will continue dismantling the Alleged Debtors, to the detriment of Acis LP creditors. Abstention would fly in the face of fundamental fairness and the principles underlying the Bankruptcy Code.

Beyond just addressing the factors above, the Alleged Debtors have also argued that, if this court were to not abstain under section 305 of the Bankruptcy Code, there would be

[127] *In re Selectron Mgmt. Corp.*, No. 10-75320-DTE, 2010 WL 3811863, at *6-7 (Bankr. E.D.N.Y. Sept. 27, 2010); *see also In re White Nile Software, Inc.*, No. 08–33325–SGJ–11, 2008 WL 5213393, at *4 (Bankr. N.D. Tex. Sept. 16, 2008) (finding that where the filing of a voluntary chapter 11 did not appear to be about insuring a distribution to creditors or winding down or giving a soft landing to a business or avoiding dismantling and dissipation of valuable assets or preserving avoidance actions, but rather was about changing the forum of ongoing litigation between the parties, abstention under section 305 was proper).

significant harm to the "equity" of the Alleged Debtors. Specifically, the Alleged Debtors have argued that, if this court were to enter orders for relief, the equity would be forced to "call" and ultimately liquidate CLO 2014-3 (and perhaps all of the CLOs Acis LP manages), resulting in substantial losses to the equity on their investments. First, to be clear, the current equity of the Alleged Debtors is being held by a Highland-affiliate called Neutra, Ltd., which actually only became the equity of the Alleged Debtors on December 19, 2017. But this is not the "equity" being referred to by the Alleged Debtors in its argument. Rather, the so-called "equity," about which the Alleged Debtors seemed so concerned, is actually ***certain parties that own the equity of the entity that owns the equity in the CLOs***—which includes (a) an unnamed third-party investor out of Boston (49%),[128] (b) a charitable foundation managed by a Highland-affiliate (49%), and (c) Highland employees (2%). However, abstention under section 305 of the Bankruptcy Code does not require this court to look at what is in the best interests of these third-parties (who are not current creditors or interest holders of the Alleged Debtors), but rather what is in the best interests of the Alleged Debtors and the creditors. Accordingly, the Alleged Debtors' effort to argue potential harm to these parties is misplaced for purposes of evaluating abstention under section 305 of the Bankruptcy Code, and, if anything, further highlights who the Alleged Debtors are really out to protect—Highland and Highland-affiliates. Moreover, the court would note that, even if there were to be a "call" and liquidation of CLO 2014-3, thereby ending the Alleged Debtors' right to receive future management fees, there would still be potential assets for a chapter 7 trustee to administer such as chapter 5 causes of action (which include fraudulent transfers) as well as the Alleged Debtors' contingent claim for approximately

[128] Notably, this entity never appeared at the Trial or filed papers stating that it would be harmed by entry of orders for relief in these cases.

$3 million in expense reimbursement owing by Highland CLO Management Ltd., as part of the November 3, 2017 transfer of the Acis LP Note Receivable from Highland. Thus, even if the so-called doomsday scenario of an equity call on CLO 2014-3 (or other CLOs) were to happen, there is still a potential benefit to creditors if this court chooses not to abstain.

III. CONCLUSION

In conclusion, these involuntary proceedings were appropriately filed under section 303, and orders for relief will be issued forthwith. This court declines to exercise its discretion to abstain, because a chapter 7 trustee appears necessary to halt the post-Arbitration Award transactions and transfers of value out of Acis LP, as discussed above. A chapter 7 trustee appears necessary to resolve the inherent conflicts of interest between the Alleged Debtors and Highland. A chapter 7 trustee will have tools available to preserve value that a state court receiver will not have. The bankruptcy court is single handedly the most efficient place to administer property of the estate for creditors. This is not just a two party dispute between Mr. Terry and the Alleged Debtors, and even if it were, dismissal or abstention is clearly not warranted.

###END OF FINDINGS OF FACT AND CONCLUSIONS OF LAW###

EXHIBIT N

Fill in this information to identify the case:	
Debtor name	Acis Capital Management GP, LLC
United States Bankruptcy Court for the:	NORTHERN DISTRICT OF TEXAS
Case number (if known)	18-30265

☐ Check if this is an amended filing

Official Form 207
Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy

04/16

The debtor must answer every question. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known).

Part 1: Income

1. **Gross revenue from business**

■ None.

Identify the beginning and ending dates of the debtor's fiscal year, which may be a calendar year	Sources of revenue Check all that apply	Gross revenue (before deductions and exclusions)

2. **Non-business revenue**
Include revenue regardless of whether that revenue is taxable. *Non-business income* may include interest, dividends, money collected from lawsuits, and royalties. List each source and the gross revenue for each separately. Do not include revenue listed in line 1.

■ None.

Description of sources of revenue	Gross revenue from each source (before deductions and exclusions)

Part 2: List Certain Transfers Made Before Filing for Bankruptcy

3. **Certain payments or transfers to creditors within 90 days before filing this case**
List payments or transfers--including expense reimbursements--to any creditor, other than regular employee compensation, within 90 days before filing this case unless the aggregate value of all property transferred to that creditor is less than $6,425. (This amount may be adjusted on 4/01/19 and every 3 years after that with respect to cases filed on or after the date of adjustment.)

■ None.

Creditor's Name and Address	Dates	Total amount of value	Reasons for payment or transfer *Check all that apply*

4. **Payments or other transfers of property made within 1 year before filing this case that benefited any insider**
List payments or transfers, including expense reimbursements, made within 1 year before filing this case on debts owed to an insider or guaranteed or cosigned by an insider unless the aggregate value of all property transferred to or for the benefit of the insider is less than $6,425. (This amount may be adjusted on 4/01/19 and every 3 years after that with respect to cases filed on or after the date of adjustment.) Do not include any payments listed in line 3. *Insiders* include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(31).

■ None.

Insider's name and address Relationship to debtor	Dates	Total amount of value	Reasons for payment or transfer

5. **Repossessions, foreclosures, and returns**
List all property of the debtor that was obtained by a creditor within 1 year before filing this case, including property repossessed by a creditor, sold at a foreclosure sale, transferred by a deed in lieu of foreclosure, or returned to the seller. Do not include property listed in line 6.

Debtor **Acis Capital Management GP, LLC** Case number (if known) **18-30265**

■ None

Creditor's name and address	Describe of the Property	Date	Value of property

6. **Setoffs**
List any creditor, including a bank or financial institution, that within 90 days before filing this case set off or otherwise took anything from an account of the debtor without permission or refused to make a payment at the debtor's direction from an account of the debtor because the debtor owed a debt.

■ None

Creditor's name and address	Description of the action creditor took	Date action was taken	Amount

Part 3: Legal Actions or Assignments

7. **Legal actions, administrative proceedings, court actions, executions, attachments, or governmental audits**
List the legal actions, proceedings, investigations, arbitrations, mediations, and audits by federal or state agencies in which the debtor was involved in any capacity—within 1 year before filing this case.

☐ None.

	Case title Case number	Nature of case	Court or agency's name and address	Status of case
7.1.	Joshua N. Terry v. Acis Capital Management, L.P. and Acis Capital Management GP, LLC DC-17-15244	Petition to confirm arbitration award	44th District Court Hon. Bonnie Lee Goldstein, Presiding George L. Allen, Sr. Courts Building 600 Commerce Street, 5th Floor New Tower Dallas, TX 75202	☐ Pending ■ On appeal ☐ Concluded
7.2.	Joshua N. Terry v. Highland Capital Management, L.P., Acis Capital Management, L.P., Acis Capital Management GP, LLC, James Dondero, as trustee of The Dugaboy Investment Trust, and Mark K. Okada JAMS Arbitration No. 1310022713	Wrongful termination, breach of contract, conversion, fraud, breach of fiduciary duty	JAMS 8401 N. Central Expressway, Suite 610 Dallas, TX 75202	☐ Pending ☐ On appeal ■ Concluded

8. **Assignments and receivership**
List any property in the hands of an assignee for the benefit of creditors during the 120 days before filing this case and any property in the hands of a receiver, custodian, or other court-appointed officer within 1 year before filing this case.

■ None

Part 4: Certain Gifts and Charitable Contributions

9. **List all gifts or charitable contributions the debtor gave to a recipient within 2 years before filing this case unless the aggregate value of the gifts to that recipient is less than $1,000**

■ None

Recipient's name and address	Description of the gifts or contributions	Dates given	Value

Part 5: Certain Losses

10. **All losses from fire, theft, or other casualty within 1 year before filing this case.**

Debtor **Acis Capital Management GP, LLC** Case number *(if known)* **18-30265**

■ None

Description of the property lost and how the loss occurred	Amount of payments received for the loss If you have received payments to cover the loss, for example, from insurance, government compensation, or tort liability, list the total received. List unpaid claims on Official Form 106A/B *(Schedule A/B: Assets – Real and Personal Property)*.	Dates of loss	Value of property lost

Part 6: Certain Payments or Transfers

11. **Payments related to bankruptcy**
List any payments of money or other transfers of property made by the debtor or person acting on behalf of the debtor within 1 year before the filing of this case to another person or entity, including attorneys, that the debtor consulted about debt consolidation or restructuring, seeking bankruptcy relief, or filing a bankruptcy case.

■ None.

Who was paid or who received the transfer? Address	If not money, describe any property transferred	Dates	Total amount or value

12. **Self-settled trusts of which the debtor is a beneficiary**
List any payments or transfers of property made by the debtor or a person acting on behalf of the debtor within 10 years before the filing of this case to a self-settled trust or similar device.
Do not include transfers already listed on this statement.

■ None.

Name of trust or device	Describe any property transferred	Dates transfers were made	Total amount or value

13. **Transfers not already listed on this statement**
List any transfers of money or other property by sale, trade, or any other means made by the debtor or a person acting on behalf of the debtor within 2 years before the filing of this case to another person, other than property transferred in the ordinary course of business or financial affairs. Include both outright transfers and transfers made as security. Do not include gifts or transfers previously listed on this statement.

■ None.

Who received transfer? Address	Description of property transferred or payments received or debts paid in exchange	Date transfer was made	Total amount or value

Part 7: Previous Locations

14. **Previous addresses**
List all previous addresses used by the debtor within 3 years before filing this case and the dates the addresses were used.

■ Does not apply

Address	Dates of occupancy From-To

Part 8: Health Care Bankruptcies

15. **Health Care bankruptcies**
Is the debtor primarily engaged in offering services and facilities for:
- diagnosing or treating injury, deformity, or disease, or
- providing any surgical, psychiatric, drug treatment, or obstetric care?

■ No. Go to Part 9.
☐ Yes. Fill in the information below.

Debtor **Acis Capital Management GP, LLC** Case number *(if known)* **18-30265**

Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care

Part 9: Personally Identifiable Information

16. **Does the debtor collect and retain personally identifiable information of customers?**

- ■ No.
- ☐ Yes. State the nature of the information collected and retained.

17. **Within 6 years before filing this case, have any employees of the debtor been participants in any ERISA, 401(k), 403(b), or other pension or profit-sharing plan made available by the debtor as an employee benefit?**

- ■ No. Go to Part 10.
- ☐ Yes. Does the debtor serve as plan administrator?

Part 10: Certain Financial Accounts, Safe Deposit Boxes, and Storage Units

18. **Closed financial accounts**
Within 1 year before filing this case, were any financial accounts or instruments held in the debtor's name, or for the debtor's benefit, closed, sold, moved, or transferred?
Include checking, savings, money market, or other financial accounts; certificates of deposit; and shares in banks, credit unions, brokerage houses, cooperatives, associations, and other financial institutions.

■ None

Financial Institution name and Address	Last 4 digits of account number	Type of account or instrument	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer

19. **Safe deposit boxes**
List any safe deposit box or other depository for securities, cash, or other valuables the debtor now has or did have within 1 year before filing this case.

■ None

Depository institution name and address	Names of anyone with access to it Address	Description of the contents	Do you still have it?

20. **Off-premises storage**
List any property kept in storage units or warehouses within 1 year before filing this case. Do not include facilities that are in a part of a building in which the debtor does business.

■ None

Facility name and address	Names of anyone with access to it	Description of the contents	Do you still have it?

Part 11: Property the Debtor Holds or Controls That the Debtor Does Not Own

21. **Property held for another**
List any property that the debtor holds or controls that another entity owns. Include any property borrowed from, being stored for, or held in trust. Do not list leased or rented property.

■ None

Part 12: Details About Environment Information

For the purpose of Part 12, the following definitions apply:
Environmental law means any statute or governmental regulation that concerns pollution, contamination, or hazardous material, regardless of the medium affected (air, land, water, or any other medium).

Debtor **Acis Capital Management GP, LLC** Case number *(if known)* **18-30265**

Site means any location, facility, or property, including disposal sites, that the debtor now owns, operates, or utilizes or that the debtor formerly owned, operated, or utilized.

Hazardous material means anything that an environmental law defines as hazardous or toxic, or describes as a pollutant, contaminant, or a similarly harmful substance.

Report all notices, releases, and proceedings known, regardless of when they occurred.

22. **Has the debtor been a party in any judicial or administrative proceeding under any environmental law? Include settlements and orders.**

■ No.
☐ Yes. Provide details below.

Case title Case number	Court or agency name and address	Nature of the case	Status of case

23. **Has any governmental unit otherwise notified the debtor that the debtor may be liable or potentially liable under or in violation of an environmental law?**

■ No.
☐ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice

24. **Has the debtor notified any governmental unit of any release of hazardous material?**

■ No.
☐ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice

Part 13: Details About the Debtor's Business or Connections to Any Business

25. **Other businesses in which the debtor has or has had an interest**
List any business for which the debtor was an owner, partner, member, or otherwise a person in control within 6 years before filing this case. Include this information even if already listed in the Schedules.

☐ None

Business name address	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN. Dates business existed
25.1. **Acis Capital Management, L.P.** **300 Crescent Ct., Ste 700** **Dallas, TX 75201**	**Registered Investment Adviser**	**EIN: 27-2756329** **From-To 5/27/2010 - Present**

26. **Books, records, and financial statements**
26a. List all accountants and bookkeepers who maintained the debtor's books and records within 2 years before filing this case.

☐ None

Name and address	Date of service From-To
26a.1. **Highland Capital Management, L.P.** **300 Crescent Court** **Suite 700** **Dallas, TX 75201**	**1/1/2011 - current**

Debtor **Acis Capital Management GP, LLC** Case number *(if known)* **18-30265**

	Name and address	Date of service From-To
26a.2.	James Dondero 300 Crescent Court Suite 700 Dallas, TX 75201	1/1/2011 - current
26a.3.	Frank Waterhouse 300 Crescent Court Suite 700 Dallas, TX 75201	1/20/2012 - current

26b. List all firms or individuals who have audited, compiled, or reviewed debtor's books of account and records or prepared a financial statement within 2 years before filing this case.

■ None

26c. List all firms or individuals who were in possession of the debtor's books of account and records when this case is filed.

■ None

Name and address	If any books of account and records are unavailable, explain why

26d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom the debtor issued a financial statement within 2 years before filing this case.

■ None

Name and address

27. Inventories
Have any inventories of the debtor's property been taken within 2 years before filing this case?

■ No
☐ Yes. Give the details about the two most recent inventories.

Name of the person who supervised the taking of the inventory	Date of inventory	The dollar amount and basis (cost, market, or other basis) of each inventory

28. List the debtor's officers, directors, managing members, general partners, members in control, controlling shareholders, or other people in control of the debtor at the time of the filing of this case.

Name	Address	Position and nature of any interest	% of interest, if any
Neutra, Ltd.	PO Box 309 Ugland House Grand Cayman KY1-1104, Cayman Islands	Sole Member	100
James Dondero	300 Crescent Ct., Ste 700 Dallas, TX 75201	President	N/A
Frank Waterhouse	300 Crescent Ct., Ste 700 Dallas, TX 75201	Treasurer	N/A

29. Within 1 year before the filing of this case, did the debtor have officers, directors, managing members, general partners, members in control of the debtor, or shareholders in control of the debtor who no longer hold these positions?

Debtor **Acis Capital Management GP, LLC** Case number *(if known)* **18-30265**

☐ No
■ Yes. Identify below.

Name	Address	Position and nature of any interest	Period during which position or interest was held
James Dondero	300 Crescent Ct., Ste 700 Dallas, TX 75201	Sole Member	10/14/2015 - 12/19/2017

30. **Payments, distributions, or withdrawals credited or given to insiders**
Within 1 year before filing this case, did the debtor provide an insider with value in any form, including salary, other compensation, draws, bonuses, loans, credits on loans, stock redemptions, and options exercised?

■ No
☐ Yes. Identify below.

Name and address of recipient	Amount of money or description and value of property	Dates	Reason for providing the value

31. **Within 6 years before filing this case, has the debtor been a member of any consolidated group for tax purposes?**

☐ No
■ Yes. Identify below.

Name of the parent corporation	Employer Identification number of the parent corporation
Immediately Prior to 12/19/2017 Federal: The Dugaboy Investment Trust	EIN: N/A
Immediately Prior to 12/19/2017 State (TX): Highland Capital Management, L.P.*	EIN: 75-2716725
From 12/19/2017 Forward Federal: Neutra, Ltd.	EIN: 98-1090422
From 12/19/2017 Forward State (TX): Highland Capital Management, L.P.*	EIN: 75-2716725

32. **Within 6 years before filing this case, has the debtor as an employer been responsible for contributing to a pension fund?**

■ No
☐ Yes. Identify below.

Name of the pension fund	Employer Identification number of the parent corporation

Note to question 31:
*Highland Capital Management, L.P. is not technically the parent of the Acis entities shown. However, the combined TX Franchise report for the entire group is filed under the name of Highland Capital Management, L.P.

Debtor **Acis Capital Management GP, LLC** Case number *(if known)* **18-30265**

Part 14: Signature and Declaration

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

I have examined the information in this *Statement of Financial Affairs* and any attachments and have a reasonable belief that the information is true and correct.

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

Executed on **April 30, 2018**

Signature of individual signing on behalf of the debtor

Isaac Leventon
Printed name

Position or relationship to debtor Authorized Signatory

Are additional pages to *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207) attached?

■ No
☐ Yes

EXHIBIT O

Fill in this information to identify the case:

Debtor name Acis Capital Management, L.P.

United States Bankruptcy Court for the: NORTHERN DISTRICT OF TEXAS

Case number (if known) 18-30264

☐ Check if this is an amended filing

Official Form 207

Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy 04/16

The debtor must answer every question. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known).

Part 1: Income

1. **Gross revenue from business**

☐ None.

Identify the beginning and ending dates of the debtor's fiscal year, which may be a calendar year	Sources of revenue Check all that apply	Gross revenue (before deductions and exclusions)
From the beginning of the fiscal year to filing date: From 1/01/2018 to Filing Date	■ Operating a business ☐ Other	$1,057,615.91
For prior year: From 1/01/2017 to 12/31/2017	■ Operating a business ☐ Other	$13,542,943.20
For year before that: From 1/01/2016 to 12/31/2016	■ Operating a business ☐ Other	$14,473,422.41

2. **Non-business revenue**
Include revenue regardless of whether that revenue is taxable. *Non-business income* may include interest, dividends, money collected from lawsuits, and royalties. List each source and the gross revenue for each separately. Do not include revenue listed in line 1.

☐ None.

	Description of sources of revenue	Gross revenue from each source (before deductions and exclusions)
From the beginning of the fiscal year to filing date: From 1/01/2018 to Filing Date	Interest, external legal and admin support	$70,673.08
For prior year: From 1/01/2017 to 12/31/2017	Interest, external legal and admin support	$748,474.74
For year before that: From 1/01/2016 to 12/31/2016	Interest	$102,738.89

Part 2: List Certain Transfers Made Before Filing for Bankruptcy

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

3. **Certain payments or transfers to creditors within 90 days before filing this case**
List payments or transfers--including expense reimbursements--to any creditor, other than regular employee compensation, within 90 days before filing this case unless the aggregate value of all property transferred to that creditor is less than $6,425. (This amount may be adjusted on 4/01/19 and every 3 years after that with respect to cases filed on or after the date of adjustment.)

☐ None.

	Creditor's Name and Address	Dates	Total amount of value	Reasons for payment or transfer *Check all that apply*
3.1.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75208	11/2/2017	$234,013.63	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__
3.2.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75208	11/3/2017	$941,958.57	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__
3.3.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75208	12/8/2017	$89,655.14	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__
3.4.	David Simek 31 Woodacres Road Brookville, NY 11545	11/15/2017	$2,068.13	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__
3.5.	David Simek 31 Woodacres Road Brookville, NY 11545	11/30/2017	$24,266.71	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__
3.6.	David Simek 31 Woodacres Road Brookville, NY 11545	12/12/2017	$1,718.79	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__
3.7.	David Simek 31 Woodacres Road Brookville, NY 11545	12/29/2017	$25,000.00	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

	Creditor's Name and Address	Dates	Total amount of value	Reasons for payment or transfer Check all that apply
3.8.	FINRA 1735 K Street, NW Washington, DC 20006	11/22/2017	$70.00	☐ Secured debt ☐ Unsecured loan repayments ■ Suppliers or vendors ☐ Services ☐ Other__
3.9.	Highland CLO Management, Ltd. PO Box 309, Ugland House Grand Cayman, KY1-1104, Cayman Islands	12/19/2017	$2,830,459.22	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ■ Services ☐ Other__

4. **Payments or other transfers of property made within 1 year before filing this case that benefited any insider**
List payments or transfers, including expense reimbursements, made within 1 year before filing this case on debts owed to an insider or guaranteed or cosigned by an insider unless the aggregate value of all property transferred to or for the benefit of the insider is less than $6,425. (This amount may be adjusted on 4/01/19 and every 3 years after that with respect to cases filed on or after the date of adjustment.) Do not include any payments listed in line 3. *Insiders* include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(31).

☐ None.

	Insider's name and address Relationship to debtor	Dates	Total amount of value	Reasons for payment or transfer
4.1.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	2/1/2017	$976,688.47	Contractual payment
4.2.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	2/1/2017	$1,096,033.37	Services
4.3.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	2/2/2017	$3,574.80	Expense reimbursement
4.4.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	2/14/2017	$67.44	Expense reimbursement
4.5.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	4/17/2017	$315,574.30	Services
4.6.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	4/18/2017	$438,497.51	Services
4.7.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	4/18/2017	$375,855.01	Contractual payment

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

	Insider's name and address Relationship to debtor	Dates	Total amount of value	Reasons for payment or transfer
4.8.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	4/19/2017	$330,249.69	Services
4.9.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	5/1/2017	$974,426.41	Services
4.10.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	5/1/2017	$974,426.41	Contractual Payment
4.11.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	5/31/2017	$2,809,518.47	Unsecured loan repayments incl interest
4.12.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	5/31/2017	$581,036.15	Services
4.13.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	7/18/2017	$373,167.08	Contractual payment
4.14.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	8/1/2017	$971,603.02	Contractual payment
4.15.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	8/7/2017	$1,339,422.12	Services
4.16.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	8/16/2017	$53.41	Expense reimbursement
4.17.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	10/18/2017	$372,872.82	Contractual payment
4.18.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	10/18/2017	$728,702.26	Services
4.19.	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	10/24/2017	$501,979.18	Unsecured loan repayments including interest

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

	Insider's name and address Relationship to debtor	Dates	Total amount of value	Reasons for payment or transfer
4.20	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	10/25/2017	$46,648.82	Expense reimbursement
4.21	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	10/25/2017	$67,966.85	Expense reimbursement
4.22	Highland Capital Management, L.P. 300 Crescent Court Suite 700 Dallas, TX 75201	11/1/2017	$967,223.91	Contractual payment

5. **Repossessions, foreclosures, and returns**
List all property of the debtor that was obtained by a creditor within 1 year before filing this case, including property repossessed by a creditor, sold at a foreclosure sale, transferred by a deed in lieu of foreclosure, or returned to the seller. Do not include property listed in line 6.

■ None

Creditor's name and address	Describe of the Property	Date	Value of property

6. **Setoffs**
List any creditor, including a bank or financial institution, that within 90 days before filing this case set off or otherwise took anything from an account of the debtor without permission or refused to make a payment at the debtor's direction from an account of the debtor because the debtor owed a debt.

■ None

Creditor's name and address	Description of the action creditor took	Date action was taken	Amount

Part 3: Legal Actions or Assignments

7. **Legal actions, administrative proceedings, court actions, executions, attachments, or governmental audits**
List the legal actions, proceedings, investigations, arbitrations, mediations, and audits by federal or state agencies in which the debtor was involved in any capacity—within 1 year before filing this case.

☐ None.

	Case title Case number	Nature of case	Court or agency's name and address	Status of case
7.1.	Joshua N. Terry v. Acis Capital Management, L.P. and Acis Capital Management GP, LLC DC-17-15244	Petition to confirm arbitration award	44th District Court Hon. Bonnie Lee Goldstein, Presiding George L. Allen, Sr. Courts Building 600 Commerce Street, 5th Floor New Tower Dallas, TX 75202	☐ Pending ■ On appeal ☐ Concluded

Debtor **Acis Capital Management, L.P.** Case number (if known) **18-30264**

	Case title Case number	Nature of case	Court or agency's name and address	Status of case
7.2.	Joshua N. Terry v. Highland Capital Management, L.P., Acis Capital Management, L.P., Acis Capital Management GP, LLC, James Dondero, as trustee of The Dugaboy Investment Trust, and Mark K. Okada JAMS Arbitration No. 1310022713	Wrongful termination, breach of contract, conversion, fraud, breach of fiduciary duty	JAMS 8401 N. Central Expressway, Suite 610 Dallas, TX 75225	☐ Pending ☐ On appeal ■ Concluded

8. Assignments and receivership
List any property in the hands of an assignee for the benefit of creditors during the 120 days before filing this case and any property in the hands of a receiver, custodian, or other court-appointed officer within 1 year before filing this case.

■ None

Part 4: Certain Gifts and Charitable Contributions

9. List all gifts or charitable contributions the debtor gave to a recipient within 2 years before filing this case unless the aggregate value of the gifts to that recipient is less than $1,000

■ None

Recipient's name and address	Description of the gifts or contributions	Dates given	Value

Part 5: Certain Losses

10. All losses from fire, theft, or other casualty within 1 year before filing this case.

■ None

Description of the property lost and how the loss occurred	Amount of payments received for the loss If you have received payments to cover the loss, for example, from insurance, government compensation, or tort liability, list the total received. List unpaid claims on Official Form 106A/B *(Schedule A/B: Assets – Real and Personal Property)*.	Dates of loss	Value of property lost

Part 6: Certain Payments or Transfers

11. Payments related to bankruptcy
List any payments of money or other transfers of property made by the debtor or person acting on behalf of the debtor within 1 year before the filing of this case to another person or entity, including attorneys, that the debtor consulted about debt consolidation or restructuring, seeking bankruptcy relief, or filing a bankruptcy case.

■ None.

Who was paid or who received the transfer? Address	If not money, describe any property transferred	Dates	Total amount or value

12. Self-settled trusts of which the debtor is a beneficiary
List any payments or transfers of property made by the debtor or a person acting on behalf of the debtor within 10 years before the filing of this case to a self-settled trust or similar device.
Do not include transfers already listed on this statement.

■ None.

Name of trust or device	Describe any property transferred	Dates transfers were made	Total amount or value

Debtor **Acis Capital Management, L.P.** Case number *(if known)* **18-30264**

13. **Transfers not already listed on this statement**
List any transfers of money or other property by sale, trade, or any other means made by the debtor or a person acting on behalf of the debtor within 2 years before the filing of this case to another person, other than property transferred in the ordinary course of business or financial affairs. Include both outright transfers and transfers made as security. Do not include gifts or transfers previously listed on this statement.

■ None.

Who received transfer? Address	Description of property transferred or payments received or debts paid in exchange	Date transfer was made	Total amount or value

Part 7: Previous Locations

14. **Previous addresses**
List all previous addresses used by the debtor within 3 years before filing this case and the dates the addresses were used.

■ Does not apply

Address	Dates of occupancy From-To

Part 8: Health Care Bankruptcies

15. **Health Care bankruptcies**
Is the debtor primarily engaged in offering services and facilities for:
- diagnosing or treating injury, deformity, or disease, or
- providing any surgical, psychiatric, drug treatment, or obstetric care?

■ No. Go to Part 9.
☐ Yes. Fill in the information below.

Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care

Part 9: Personally Identifiable Information

16. **Does the debtor collect and retain personally identifiable information of customers?**

☐ No.
■ Yes. State the nature of the information collected and retained.

The borrowing base of the CLOs is determined at the time of issuance. Because the securities trade in the 144a markets, the debtor is unable to determine the current holders of such securities once the securities are traded in the secondary market. However, some of the debtor's affiliates hold equity positions in the CLOs and therefore, the debtor is privy to the affiliates' information.

Does the debtor have a privacy policy about that information?
☐ No
■ Yes

17. **Within 6 years before filing this case, have any employees of the debtor been participants in any ERISA, 401(k), 403(b), or other pension or profit-sharing plan made available by the debtor as an employee benefit?**

■ No. Go to Part 10.
☐ Yes. Does the debtor serve as plan administrator?

Part 10: Certain Financial Accounts, Safe Deposit Boxes, and Storage Units

18. **Closed financial accounts**
Within 1 year before filing this case, were any financial accounts or instruments held in the debtor's name, or for the debtor's benefit, closed, sold, moved, or transferred?
Include checking, savings, money market, or other financial accounts; certificates of deposit; and shares in banks, credit unions, brokerage houses,

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

cooperatives, associations, and other financial institutions.

☐ None

	Financial Institution name and Address	Last 4 digits of account number	Type of account or instrument	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
18.1.	Jefferies LLC 520 Madison Avenue New York, NY 10022	XXXX-0897	☐ Checking ☐ Savings ☐ Money Market ■ Brokerage ☐ Other__	7/2017	$0.00

19. **Safe deposit boxes**
List any safe deposit box or other depository for securities, cash, or other valuables the debtor now has or did have within 1 year before filing this case.

☐ None

Depository institution name and address	Names of anyone with access to it Address	Description of the contents	Do you still have it?
Jefferies LLC 520 Madison Avenue New York, NY 10022	Highland Accounting 300 Crescent Court, Ste 700 Dallas, TX 75201	No physical assets held at the time of closing	■ No ☐ Yes

20. **Off-premises storage**
List any property kept in storage units or warehouses within 1 year before filing this case. Do not include facilities that are in a part of a building in which the debtor does business.

■ None

Facility name and address	Names of anyone with access to it	Description of the contents	Do you still have it?

Part 11: Property the Debtor Holds or Controls That the Debtor Does Not Own

21. **Property held for another**
List any property that the debtor holds or controls that another entity owns. Include any property borrowed from, being stored for, or held in trust. Do not list leased or rented property.

☐ None

Owner's name and address	Location of the property	Describe the property	Value
Acis CLO 2013-1, Ltd. Clifton House 75 Fort Street, P.O. Box 1350 Grand Cayman, KY1-1108, Cayman Islands	n/a - contract	Management agreement	$0.00
Owner's name and address	Location of the property	Describe the property	Value
Acis CLO 2014-3, Ltd. PO Box 1093 Boundary Hall, Cricket Square Grand Cayman, KY1-1102, Cayman Islands	n/a - contract	Management agreement	$0.00

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

Owner's name and address	Location of the property	Describe the property	Value
Acis CLO 2014-4, Ltd. PO Box 1093 Boundary Hall, Cricket Square Grand Cayman, KY1-1102, Cayman Islands	n/a - contract	Management agreement	$0.00
Owner's name and address	Location of the property	Describe the property	Value
Acis CLO 2014-5, Ltd. PO Box 1093 Boundary Hall, Cricket Square Grand Cayman, KY1-1102, Cayman Islands	n/a - contract	Management agreement	$0.00
Owner's name and address	Location of the property	Describe the property	Value
Acis CLO 2015-6, Ltd. PO Box 1093 Boundary Hall, Cricket Square Grand Cayman, KY1-1102, Cayman Islands	n/a - contract	Management agreement	$0.00
Owner's name and address	Location of the property	Describe the property	Value
BayVK R2 Lux S.A. 15, rue de Flaxweile L-6776 Grevenmacher, Luxembourg	n/a - contract	Management agreement	$0.00
Owner's name and address	Location of the property	Describe the property	Value
Hewett's Island CLO I-R, Ltd. PO Box 1093GT, Queensgate House South Church St., George Town Grand Cayman, KY1-1102, Cayman Islands	n/a - contract	Management agreement	$0.00

Part 12: Details About Environment Information

For the purpose of Part 12, the following definitions apply:

Environmental law means any statute or governmental regulation that concerns pollution, contamination, or hazardous material, regardless of the medium affected (air, land, water, or any other medium).

Site means any location, facility, or property, including disposal sites, that the debtor now owns, operates, or utilizes or that the debtor formerly owned, operated, or utilized.

Hazardous material means anything that an environmental law defines as hazardous or toxic, or describes as a pollutant, contaminant, or a similarly harmful substance.

Report all notices, releases, and proceedings known, regardless of when they occurred.

22. Has the debtor been a party in any judicial or administrative proceeding under any environmental law? Include settlements and orders.

■ No.
☐ Yes. Provide details below.

Case title Case number	Court or agency name and address	Nature of the case	Status of case

23. Has any governmental unit otherwise notified the debtor that the debtor may be liable or potentially liable under or in violation of an environmental law?

■ No.
☐ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

24. Has the debtor notified any governmental unit of any release of hazardous material?

■ No.
☐ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice

Part 13: Details About the Debtor's Business or Connections to Any Business

25. Other businesses in which the debtor has or has had an interest
List any business for which the debtor was an owner, partner, member, or otherwise a person in control within 6 years before filing this case. Include this information even if already listed in the Schedules.

☐ None

	Business name address	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN. Dates business existed
25.1.	Acis CLO Value Fund II GP, LLC 300 Crescent Ct., Ste 700 Dallas, TX 75201	General Partner of an investment fund	EIN: 90-0786733 From-To 7/2010 - Present
25.2.	Acis CLO Value Fund II Incentive Holding 300 Crescent Ct., Ste 700 Dallas, TX 75201	Incentive holding	EIN: N/A From-To 1/2013 - Present
25.3.	Acis CLO Value Master Fund II, L.P. 300 Crescent Ct., Ste 700 Dallas, TX 75201	Investment fund	EIN: 98-1077730 From-To 7/2010 - Present
25.4.	Highland CLO Funding, Ltd. c/o Highland HDF Advisor Ltd. 300 Crescent Ct., Ste 700 Dallas, TX 75201	Private equity fund	EIN: N/A From-To 1/9/2016 - 11/15/2017
25.5.	Acis CLO Management, LLC 300 Crescent Ct., Ste 700 Dallas, TX 75201	Relying advisor	EIN: 81-5194942 From-To 5/16/2014 - 12/19/2017
25.6.	Acis CLO Management GP, LLC 300 Crescent Ct., Ste 700 Dallas, TX 75201	General Partner of an investment fund	EIN: 36-4786631 From-To 5/16/2014 - 12/19/2017
25.7.	Acis CLO Management Holdings, L.P. PO Box 309, Ugland House Grand Cayman, KY1-1104 Cayman Islands	Investment fund	EIN: 98-1347870 From-To 1/12/2017 - 12/19/2017

Debtor **Acis Capital Management, L.P.** Case number *(if known)* **18-30264**

Business name address	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN. Dates business existed
25.8. **Acis CLO Management Intermediate Holdings I, LLC** **300 Crescent Ct., Ste 700** **Dallas, TX 75201**	**Investment holding**	**EIN: 35-2586937** **From-To 3/1/2017 - 12/19/2017**

26. Books, records, and financial statements

26a. List all accountants and bookkeepers who maintained the debtor's books and records within 2 years before filing this case.

☐ None

Name and address	Date of service From-To
26a.1. **Highland Capital Management, L.P.** **300 Crescent Court, Ste 700** **Dallas, TX 75201**	**1/1/2011 - current**
26a.2. **James Dondero** **300 Crescent Court, Ste 700** **Dallas, TX 75201**	**1/1/2011 - current**
26a.3. **Frank Waterhouse** **300 Crescent Court** **Suite 700** **Dallas, TX 75201**	**1/1/2012 - current**

26b. List all firms or individuals who have audited, compiled, or reviewed debtor's books of account and records or prepared a financial statement within 2 years before filing this case.

■ None

26c. List all firms or individuals who were in possession of the debtor's books of account and records when this case is filed.

☐ None

Name and address	If any books of account and records are unavailable, explain why
26c.1. **Highland Capital Management, L.P.** **300 Crescent Court** **Suite 700** **Dallas, TX 75201**	

26d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom the debtor issued a financial statement within 2 years before filing this case.

■ None

Name and address

27. Inventories

Have any inventories of the debtor's property been taken within 2 years before filing this case?

■ No

☐ Yes. Give the details about the two most recent inventories.

Name of the person who supervised the taking of the inventory	Date of inventory	The dollar amount and basis (cost, market, or other basis) of each inventory

28. List the debtor's officers, directors, managing members, general partners, members in control, controlling shareholders, or other people in control of the debtor at the time of the filing of this case.

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

Name	Address	Position and nature of any interest	% of interest, if any
Acis Capital Management GP, LLC	300 Crescent Ct., Ste 700 Dallas, TX 75201	General Partner	0.1

Name	Address	Position and nature of any interest	% of interest, if any
Neutra, Ltd.	PO Box 309, Ugland House Grand Cayman, KY1-1104 Cayman Islands	Limited Partner	99.9

29. Within 1 year before the filing of this case, did the debtor have officers, directors, managing members, general partners, members in control of the debtor, or shareholders in control of the debtor who no longer hold these positions?

☐ No
■ Yes. Identify below.

Name	Address	Position and nature of any interest	Period during which position or interest was held
The Dugaboy Investment Trust	300 Crescent Ct., Ste 700 Dallas, TX 75201	Limited Partner	1/21/2011 - 12/19/2017

Name	Address	Position and nature of any interest	Period during which position or interest was held
Mark Okada	300 Crescent Ct., Ste 700 Dallas, TX 75201	Limited Partner	1/21/2011 - 12/19/2017

30. Payments, distributions, or withdrawals credited or given to insiders
Within 1 year before filing this case, did the debtor provide an insider with value in any form, including salary, other compensation, draws, bonuses, loans, credits on loans, stock redemptions, and options exercised?

☐ No
■ Yes. Identify below.

	Name and address of recipient	Amount of money or description and value of property	Dates	Reason for providing the value
30.1	Highland CLO Management. Ltd. Maples Corporate Services Limited PO Box 309, Ugland House Grand Cayman, KY1-1104, Cayman Islands Relationship to debtor: Affiliate	$9,541,446.00	11/3/2017	

31. Within 6 years before filing this case, has the debtor been a member of any consolidated group for tax purposes?

☐ No
■ Yes. Identify below.

Name of the parent corporation	Employer Identification number of the parent corporation
Immediately Prior to 12/19/2017 Federal: N/A (stand alone entity)	EIN: N/A

Debtor Acis Capital Management, L.P. Case number (if known) 18-30264

Name of the parent corporation	Employer Identification number of the parent corporation
Immediately Prior to 12/19/2017 State (TX): Highland Capital Management, L.P.*	EIN: 75-2716725
From 12/19/2017 Forward Federal: Neutra, Ltd.	EIN: 98-1090422
From 12/19/2017 Forward State (TX): Highland Capital Management, L.P.*	EIN: 75-2716725

32. Within 6 years before filing this case, has the debtor as an employer been responsible for contributing to a pension fund?

■ No
☐ Yes. Identify below.

Name of the pension fund	Employer Identification number of the parent corporation

Part 14: Signature and Declaration

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

I have examined the information in this *Statement of Financial Affairs* and any attachments and have a reasonable belief that the information is true and correct.

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

Executed on April 30, 2018

Signature of individual signing on behalf of the debtor — Printed name: Isaac Leventon

Position or relationship to debtor: Authorized Signatory

Are additional pages to *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207) attached?

■ No
☐ Yes

Note to question 31:
*Highland Capital Management, L.P. is not technically the parent of the Acis entities shown. However, the combined TX Franchise report for the entire group is filed under the name of Highland Capital Management, L.P.

EXHIBIT P

FORM ADV PART 2A

March 29, 2018

300 Crescent Court, Suite 700
Dallas, Texas 75201
(972) 628-4100
www.highlandcapital.com

This brochure provides information about the qualifications and business practices of Highland Capital Management, L.P., an investment adviser registered with the Securities and Exchange Commission. If you have any questions about the contents of this brochure, please contact us at (972) 628-4100. The information in this brochure has not been approved or verified by the United States Securities and Exchange Commission or by any state securities authority. Additional information about Highland Capital Management, L.P. is also available at the Securities and Exchange Commission's website www.adviserinfo.sec.gov. Our registration as an investment adviser does not imply any level of skill or training.

ITEM 2. MATERIAL CHANGES

There were no material changes.

ITEM 3. TABLE OF CONTENTS

ITEM 4. ADVISORY BUSINESS

Highland Capital Management, L.P. ("we", "us", "our", "Company", or "Highland") is an investment adviser registered with the SEC and is one of the largest global alternative fixed income managers, specializing in bank loans, high yield credit, distressed debt, structured products, real assets, and long-short equities, with a global geographic reach. Our diversified Client base includes public pension plans, foundations and endowments, corporations, financial institutions, fund-of-funds, governments, and high net worth individuals. To best meet the different goals of these investors, we offer a variety of product types, including private equity-style funds, managed separate accounts, hedge funds, and structured product vehicles (e.g., collateralized loan obligations "CLOs").

HISTORY

1990	James Dondero and Mark Okada (the "Founders") formed a joint venture with Protective Life Insurance Corporation ("Protective Life"), specializing in senior secured loans.
1993	An agreement established Protective Asset Management Company ("PAMCO"), a SEC-registered investment advisor owned 60% by Protective Life and 40% by the Founders.
1996	PAMCO launched its first CLO, one of the first non-bank CLOs in the industry.
1997	The Founders purchased Protective Life's stake, and later that year established Ranger Asset Management, L.P., an independent investment adviser registered with the SEC.
1998	Ranger Asset Management, L.P. changed its name to Highland Capital Management, L.P.
2004	Highland acquired the Columbia Floating Rate Fund and Columbia Floating Rate Advantage Fund from Columbia Asset Management, making its entry into the mutual fund business.
2005	Highland Capital Management Europe, Ltd. was established as an FSA-registered investment adviser in London, through the acquisition of ING Capital Management, Ltd.
2012	Highland Capital Management Europe, Ltd. sells European CLO business.

OWNERSHIP OF HIGHLAND

Highland is controlled by James Dondero through his ownership of Strand Advisors, Inc., Highland's general partner. Substantially all of the non-voting, non-control limited partner interests in Highland are owned by the Hunter Mountain Investment Trust. John Honis, a former partner of Highland, who is also a director of two Highland portfolio companies and of Highland's affiliated registered investment funds, indirectly controls the Trust.

HIGHLAND REGULATORY ASSETS UNDER MANAGEMENT

Figures are in US$ millions as of 12/31/2017

Total Assets Under Management	$8,269.75

By Vehicle Type:

Discretionary

Structured Product Vehicles (Pooled Investment Vehicles)	$5,382.68
Separate Accounts	$1,458.14

Non-Discretionary

Unregistered Investment Funds	$2,428.93

OUR ADVISORY SERVICES

Highland provides investment advisory services in several different strategies and types of investment vehicles. Highland makes investment decisions with regard to bank loans, high yield credit, distressed debt, structured products, real assets, and long/short equities. Highland acts as an investment adviser or sub-adviser to structured product vehicles (including but not limited to CLOs and Collateralized Debt Obligations ("CDOs")) ("Structured Product Vehicles"), unregistered investment funds ("Unregistered Investment Funds"), single Client accounts ("Separate Accounts", together with Structured Product Vehicles, Unregistered Investment Funds, "Client Accounts" or "Clients").

TAILORING SERVICES

We tailor our investment advice to the needs of our Clients and are subject to applicable investment restrictions set forth in the governing documents for the applicable Clients.

ITEM 5. FEES AND COMPENSATION

For providing investment advisory services, Highland typically charges Clients a management fee and/or performance fee or carried interest, and other fees as necessary and agreed to (including, but not limited to, expenses related to servicing accounts, such as administration and legal services).

Under appropriate circumstances and where permitted by applicable law, the terms of an investment advisory contract, including fees, terms of payment and performance fees and termination provisions, are negotiable. In negotiating fees, Highland considers various factors, including assets under management, investment objectives, strategies and restrictions, and the resources required to meet investment objectives.

Clients incur brokerage and other transaction costs associated with Highland's management of Client Accounts. Please see the section titled Brokerage Practices of this ADV Part 2 for a discussion of Highland's brokerage practices.

FEE SCHEDULE

The following summary of fees is typically updated in this brochure annually (on or about March 31) and does not reflect subsequent changes unless expressly indicated otherwise. Fees in the below Fee Schedule are annualized.

Product	Management Fee	Performance Fee or Carried Interest	Other Fees
Structured Product Vehicles	From 0.15% to 0.85%	From 0.00% to 20.00%	None
Separate Accounts	From 0.375% to 1.25%	Up to 20.00% over IRR on some accounts	None
Unregistered Investment Funds	From 0.3% to 2.00%	From 0% to 20.00%[1]	None

Certain investment vehicles managed by Highland invest in other investment vehicles managed by Highland or our affiliates. Both investment vehicles may impose management fees, performance fees or other expenses (including administrative fees). This results in

[1] In limited circumstances where Highland and/or its related parties may agree to bare a disproportionate share of losses, if any, with respect to an account, Highland and/or such applicable related party may contract in advance with such client to receive a performance fee and/or carried interest in excess of 20%.

greater expense to a Client than if such Client had invested directly in the underlying investment vehicle. Certain companies in which Clients are invested also use the products or services, or invest in investment vehicles, offered by Highland or its affiliates and pay fees or other compensation accordingly.

FOR INSTITUTIONAL INVESTORS

Unregistered Investment Funds

As compensation for our advisory services, each Unregistered Investment Fund typically pays Highland management fees that range from 0.3% to 2.00% annually. Management fees are based upon outstanding capital accounts or amounts of committed capital and are deducted quarterly in advance or in arrears depending on the specific fund. For accounts that also provide for incentive compensation, Highland also deducts performance fees or investment profit allocations in the form of carried interest ranging from 0% to 20% of returns, which may be after the achievement of a hurdle rate, and which is typically contingent on the manager of the applicable Unregistered Investment Fund eclipsing the high-water mark. In some cases, certain investors in an Unregistered Investment Fund enter into side letter agreements with Highland, under which they may pay a different fee than others based on the terms of their agreement with Highland or may otherwise receive certain additional rights. Upon termination of the applicable Unregistered Investment Fund's advisory agreement, any management fees that have been prepaid are generally returned on a pro-rated basis.

In addition to management fees, performance fees, and brokerage and transaction costs, investors in the Unregistered Investment Funds will indirectly bear the fees and expenses paid by the Unregistered Investment Funds, including custody fees, administration, legal, audit and tax preparation fees, and certain other fees and expenses. Each Unregistered Investment Fund's offering documents include more detailed information about the fees and expenses paid by such Unregistered Investment Fund.

STRUCTURED PRODUCT VEHICLES

As compensation for our advisory services, each Structured Product Vehicle pays Highland management fees ranging from 0.15% to 0.85% annually. Management fees are based on the principal balance of the assets held in the portfolio on defined determination dates. Management fees are established during structuring and remain constant for the duration of the life of the Structured Product Vehicle. Management fees also accrue during a payment period. Highland may also charge performance fees of up to 20% of any remaining interest or principal proceeds after a hurdle rate. Fees are calculated and paid on a quarterly basis by the Trustee in accordance with the governing documents. All fees are paid in arrears on the payment date. In some cases, certain investors in a Structured Product Vehicle pay a

different fee than others based upon, without limitation, the size of the investment and Highland's overall relationship with the investors in the vehicles.

In addition to management fees, performance fees, and brokerage and transaction costs, investors in Structured Product Vehicles will indirectly bear the fees and expenses paid by the Structured Product Vehicle, including administration, legal, audit and accounting fees, and certain other fees and expenses. Each Structured Product Vehicle's governing documents include more detailed information about the fees and expenses paid by such Structured Product Vehicle.

SEPARATE ACCOUNTS

For our Separate Accounts, the agreement entered into with Highland will determine the fee structure. Typically, a Separate Account will pay Highland management fees ranging from 0.375% to 1.25% annually. Management fees are based upon the average daily net assets, which may or may not be net of investment leverage. Highland may also collect a performance fee of up to 20% after reaching an internal rate of return ("IRR").

Please see the section titled Performance-Based Fees and Side-By-Side Management of this ADV Part 2 for additional information regarding performance fees or investment profit allocations in the form of carried interest.

OTHER COMPENSATION

Client Accounts may hold significant positions, individually or collectively, in the securities issued by a company. Accordingly, Highland may have the right to appoint a board member or officer for such company. Highland may appoint an employee or a third party to such position as it sees fit in the best interest of the company and its Clients. Employees are permitted to retain all compensation received for such positions except to the extent contrary to the governing documents for one or more Client Accounts, in which case the proportion of such compensation related to such Client Account(s) will be paid to those Account(s) (generally in proportion to relative assets of the Client Account as of the date paid).

In addition, to the extent permitted by the offering and/or governing documents of the applicable advised accounts, Highland and/or its affiliates receive other fees for services provided to portfolio companies, provided such fees are on arms-length terms. See also Item 10. Other Financial Industry Activities and Affiliations.

We have established procedures designed to address possible conflicts of interest that such board or officer positions might present, including requiring authorization from the Chief Compliance Officer prior to an officer or employee serving as a board member. As a result of such activities, Highland may acquire confidential information, which may restrict Client Accounts from transacting in certain securities. As a result, we may not initiate a transaction on behalf of Clients which we otherwise might have. Additional information regarding

certain conflicts of interest we face is contained in Item 11. Code of Ethics, Participation or Interest in Client Transactions and Personal Trading.

ITEM 6. PERFORMANCE-BASED FEES AND SIDE-BY-SIDE MANAGEMENT

As described above, certain Clients pay Highland a performance fee or investment profit allocations in the form of carried interest. To the extent that Highland charges a performance-based fee, the performance-based fee will comply with the requirements of Section 205 and Rule 205-3 under the Investment Advisers Act of 1940 (the "Advisers Act"). In situations where Highland has entered into a performance fee arrangement, it has an economic incentive to make riskier investments and/or pursue riskier strategies than it might otherwise. In addition, because Highland manages both accounts with an asset-based fee and accounts with a performance fee or a combination of an asset-based fee and performance fee, we have an incentive to favor Client accounts for which we receive a performance-based fee. In addition, Highland and its principals also make investments through a number of proprietary accounts, including Highland Capital Management, L.P. In order to mitigate any such conflicts, Highland has developed allocation procedures that are intended to result in fair and equitable allocation over time. To mitigate any actual or perceived conflicts of interest, allocation of limited offering securities (such as IPOs and registered secondary offerings) to principal accounts that do not include third party investors may only be made after all other Client Account orders for the security have been filled. A more detailed summary of our allocation guidelines is available to Clients or prospective Clients upon request. Additional information regarding certain conflicts of interest we face is contained in Item 11. Code of Ethics, Participation or Interest in Client Transactions and Personal Trading.

A description of performance-based fees is included in the section titled Fees and Compensation.

ITEM 7. TYPES OF CLIENTS

Our Clients include:

- Structured Product Vehicles
- Unregistered Investment Funds
- Separate Accounts

Investment advice is provided directly to Clients and not individually to investors in a particular Client.

Highland has minimum account requirements for Unregistered Investment Funds, Structured Product Vehicles and Separate Accounts and generally requires a minimum investment of $100,000 to $50 million depending on the structure. Minimum account size may be waived for certain investors at Highland's discretion.

ITEM 8. METHODS OF ANALYSIS, INVESTMENT STRATEGIES, AND RISK OF LOSS

The items below are types of investment strategies we currently utilize although we may add or subtract from this list based on various factors including macro-economic conditions.

INVESTMENT STRATEGIES

Bank Loan Strategy

Highland's bank loan strategy seeks to generate attractive absolute returns by opportunistically making investments across the capital structure, with a core focus in senior secured bank loans. The bank loan strategy is long-biased and U.S. focused, but has the ability to invest in Canada and Europe.

The strategy may use hedging investments to manage interest rate, default, currency and systemic risks.

Multi Strategy Credit Strategy

Highland's Multi-Strategy Credit Strategy is focused across the credit markets in both private and public transactions. It seeks to deliver attractive risk-adjusted returns to its investors by investing, directly or through one or more financing or swap vehicles or other arrangements for obtaining leverage, primarily in (i) bank loans; (ii) other high yield debt; (iii) credit default swaps; (iv) debt and equity securities issued by collateralized loan obligations; and (v) special situation investments. It will take long and short positions.

Long/Short Equity Strategy

Highland's long/short equity strategy generally involves a fundamental, bottom-up stock picking style. Investments will be made in value and growth stocks with a domestic focus. The strategy aims to generate equity-like returns over an entire market cycle with less volatility, lower drawdowns, and lower correlation compared to the equity markets. There is generally a strong focus on preservation of capital and risk management. In addition to purchasing or taking "long" positions in equity securities, the strategy will include short selling, investments in derivatives, exchanged-traded funds, or fixed income securities.

Equity securities of U.S. or non-U.S. issuers in which Highland may invest include common stocks, preferred stocks, convertible securities, depositary receipts, warrants to buy common stocks and "derivatives" on any of the foregoing securities. The

exposure of the various funds will vary over time based on assessments of market conditions and other factors.

Special Situations Strategy

Highland's special situations strategy employs directional, capital structure arbitrage, relative value, and event-driven investment strategies across various credit markets where Highland holds significant investment experience, primarily the distressed, leveraged loan, high yield and structured products markets. It also utilizes an investment approach to exploit relative value and arbitrage opportunities within these markets. The objective is to maintain low correlation to the broader equity and corporate bond markets, as well as other alternative investment strategies, and to provide attractive risk-adjusted returns on capital. Highland also looks to implement selected trading strategies to exploit pricing inefficiencies across the credit markets and within an individual issuer's capital structure.

Private Equity Strategy

The private equity strategy targets investments in the fulcrum securities of distressed credits based in the U.S. and Western Europe. It seeks to capitalize on the following market dynamics: balance sheets remain over levered and companies continue to address looming maturities, while financing markets are bifurcating between good and bad credits. The strategy generally involves investing in undervalued senior secured loans and debt obligations of financially troubled companies to achieve value recoveries via refinancing, at par take-outs or conversions to equity and thereafter create value through operational and financial improvements. This strategy offers a compelling alternative to equity by providing a different downside risk while seeking positive risk-adjusted returns and upside potential in misunderstood industries and companies.

Floating Rate Loan Strategy

This strategy seeks to achieve its objective by investing, under normal market conditions, approximately 80% of its net assets in a portfolio of interests in adjustable rate senior loans, the interest rates of which float or vary periodically based upon a benchmark indicator of prevailing interests rates, to domestic or foreign corporations, partnerships and other entities that operate in a variety of industries and geographic regions. The strategy may invest all or substantially all of its assets in senior loans that are rated below investment grade and unrated senior loans of comparable quality. This strategy may also include investments in (i) high quality, short-term debt securities; (ii) warrants, equity securities and junior debt securities; (iii) senior loans of foreign issuers that are foreign currency denominated; and (iv) senior loans the interest rate of which are fixed and do not float.

Structured Finance Investments

Highland invests in various structured finance instruments, including asset-backed securities; collateralized loan obligations and collateralized debt obligations; and swaps (including total rate of return swaps) whose rates of return are determined primarily by reference to the total rate of return on one or more loans referenced in such instruments. The rate of return on the structured finance instrument may be determined by applying a multiplier to the rate of total return on the reference loan or loans. Application of a multiplier is comparable to the use of financial leverage, a speculative technique. Leverage magnifies the potential for gain and the risk of loss, because of a relatively small decline in the value of a reference loan could result in a relatively large loss for the value of a structured finance instrument.

METHOD OF ANALYSIS

For all Client Accounts, we utilize both fundamental and technical analysis methods. Our investment philosophy is rooted in a value-oriented, long-term approach, which combines bottom-up research with top-down technical market analysis. Our analysts follow a rigorous and time-tested bottom-up credit analysis for each credit we manage. We have also devised and applied an institutionalized process of credit evaluation and approval, via our Investment Committee, and have built a dedicated experienced restructuring team that has been integrated into Highland's investment process.

Highland's self-discipline is largely enforced by the ongoing monitoring of individual credit names by the responsible analyst and his or her supervisor.

Other sources of information include obtaining and reviewing due diligence packages prepared by debt issuers and underwriters of institutional private placements and meetings with management of issuers.

MATERIAL RISKS OF SIGNIFICANT STRATEGIES AND METHODS OF ANALYSIS:

In this section we summarize some of the material risks of Highland's investment strategies and methods of analysis. More complete information about the specific risks associated with each strategy or Client Account is available in the applicable offering documents. All methods of investments in securities and loans involve risk of loss including risk that a Client will lose the entire value of their investment.

Allocation of Investments

There is a risk that the allocations methodology employed by Highland will not result in optimal allocation and may disadvantage one Client Account while benefiting another Client Account. Since the process involves human input there is the risk that

human error may cause harm to a Client Account. Poor or mistaken allocation decisions could result in the loss of money for investors.

Credit Risk

Clients engage in transactions in securities and financial instruments that involve counterparties. Under certain conditions, a counterparty to a transaction could default or the market for certain securities and/or financial instruments may become illiquid. There is a risk that the issuer of a fixed income security will be unable to make timely principal and interest payments on the security. Certain Clients invest in securities rated below investment grade (which are commonly referred to as "high yield" securities or "junk" securities). These investments are regarded as predominately speculative with respect to the issuer's continuing ability to meet principal and interest payments. The downgrade of a security held by a Client Account may decrease its value. Securities are subject to varying degrees of credit risk, which are often reflected in ratings assigned by commercial rating companies such as Moody's Investor Service, Standard & Poor's Corporation, Duff & Phelps Credit Rating Co. and Fitch Investors Service.

Currency Risk

If a Client Account invests directly in non-U.S. currencies or in securities of issuers that trade in, and receive revenues in, non-U.S. currencies, or in derivatives that provide exposure to non-U.S. currencies, it will be subject to the risk that those currencies will decline in value relative to the U.S. dollar, or, in the case of hedging positions, that the U.S. dollar will decline in value relative to the currency being hedged. Currency rates in foreign countries may fluctuate significantly over short periods of time for a number of reasons, including changes in interest rates, intervention (or the failure to intervene) by U.S. or foreign governments, central banks or supranational entities such as the International Monetary Fund, or by the imposition of currency controls or other political developments in the United States or abroad. As a result, a Client's investments in foreign currency-denominated securities may reduce the returns of the Client Account.

Derivatives Risk

Derivatives, such as futures and options, are subject to the risk that changes in the value of a derivative may not correlate perfectly with the underlying asset, rate or index. Derivatives also expose the Client to the credit risk of the derivative counterparty. Derivative contracts may expire worthless and the use of derivatives may result in losses to the Client.

Frequency of Trading

Some of the strategies and techniques to be employed by Highland require frequent trades to take place and, as a consequence, portfolio turnover and brokerage commissions will be greater than for other investment vehicles of similar size that do not employ frequent trading techniques.

Hedging

Highland may (but is not required to) utilize financial instruments both for investment purposes and for risk management purposes in order to (i) protect against possible changes in the market value of a Client Account resulting from fluctuations in the markets and changes in interest rates; (ii) protect the unrealized gains in the value of a Client Account; (iii) facilitate the sale of any such investments; (iv) enhance or preserve returns, spreads or gains on any investment in a Client Account; (v) hedge against a directional trade; (vi) hedge the interest rate, credit or currency exchange rate on any of financial instruments; (vii) protect against any increase in the price of any financial instruments Highland anticipates purchasing at a later date; or (viii) act for any other reason that the Highland deems appropriate. For a variety of reasons, Highland may not seek to establish a perfect correlation between such hedging instruments and the portfolio holdings being hedged. Such imperfect correlation may prevent a Client from achieving the intended hedge or expose the Client to risk of loss. The successful utilization of hedging and risk management transactions requires skills complementary to those needed in the selection of portfolio holdings. Moreover, it should be noted that the Client Account will be exposed to certain risks that cannot be hedged.

Illiquid Securities

Highland may cause a Client to invest in a security that is illiquid. This could present a problem in realizing the prices quoted (selling a bond at or near its true value) and in effectively trading the position(s). The primary measure of liquidity is the size of the spread between the bid price and the offer price quoted by a dealer. The greater the dealer spread, the greater the liquidity risk. Liquidity risk is less relevant for investments that are intended to be held until maturity. Lack of liquidity means Highland may not be able to sell such investments at prices that reflect Highland's assessment of their value or the amount paid for such investments. Illiquidity may result from the absence of an established market for the investments as well as legal, contractual or other restrictions on their resale by Highland and other factors. Furthermore, the nature of Highland's investments, especially those in financially distressed companies, may require a long holding period prior to profitability.

Inflation Risk

Inflation risk results from the variation in the value of cash flows from a security due to inflation, as measured in terms of purchasing power. For example, if Highland purchases a 5 year bond in which it can realize a coupon rate of 5 percent, but the rate of inflation is 6 percent, then the purchasing power of the cash flow has declined. For securities other than adjustable bonds or floating rate bonds, the investment is exposed to inflation risk because the interest rate the issuer promises to make is fixed for the life of the security. To the extent that interest rates reflect the expected inflation rate, floating rate bonds have a lower level of inflation risk.

Investments in Distressed Assets

Debt obligations and other securities of distressed companies will by their nature relate to companies in unstable financial condition and entail substantial inherent risks. Consequently, many of these companies will likely have significantly leveraged capital structures, making them highly sensitive to declines in revenues and to increases in expenses and interest rates. The leveraged capital structure of such investments will increase the exposure of the portfolio companies to adverse economic factors such as downturns in the economy or deterioration in the condition of the portfolio company or its industry. Distressed investing also involves significant expenses of legal counsel, experts, consultants and other third parties.

Investments in Equity Securities

Investments in public equities are subject to the risk that stock prices will fall over short or long periods of time. In addition, common stock represents a share of ownership in a company, and rank after bonds and preferred stock in their claim on the company's assets in the event of bankruptcy.

Investments in Foreign Securities

A Client may invest a portion of its assets in securities of companies domiciled or operating in one or more foreign countries. Investing in foreign securities involves considerations and possible risks not typically involved in investing in securities of companies domiciled and operating in the U.S., including instability of some foreign governments, the possibility of expropriation, limitations on the use or removal of funds or other assets, foreign currency risk, changes in governmental administration or economic or monetary policy (in the U.S. or abroad) or changed circumstances in dealings between nations. The application of foreign tax laws (e.g., the imposition of withholding taxes on dividend or interest payments) or confiscatory taxation may also affect investment in foreign securities. Higher expenses may result from investment in foreign securities than would from investment in domestic securities because of the costs that must be incurred in connection with conversion between various currencies

and foreign brokerage commissions that may be higher than in the U.S. Foreign securities markets also may be less liquid, more volatile and subject to less governmental supervision than in the U.S., including lack of uniform accounting, auditing and financial reporting standards and potential difficulties in enforcing contractual obligations.

Investments in Structured Finance Instruments

Highland may cause Clients to invest in structured finance instruments. A portion of leveraged loans, high yield debt securities, structured finance instruments and synthetic securities (collectively the "Collateral Debt Obligations") may consist of equipment trust certificates, collateralized mortgage obligations, collateralized bond obligations, collateralized loan obligations or similar instruments. Structured finance instruments present risks similar to those of the other types of Collateral Debt Obligations in which the Client may invest and such risks may be of greater significance in the case of structured finance instruments. Moreover, investing in structured finance instruments entails a variety of unique risks, including prepayment risk. In addition, the performance of a structured finance instrument will be affected by a variety of factors, including its priority in the capital structure of the issuer thereof, the availability of any credit enhancement, the level and timing of payments and recoveries on and the characteristics of the underlying receivables, loans or other assets that are being securitized, remoteness of those assets from the originator or transferor, the adequacy of and ability to realize upon any related collateral and the capability of the servicer of the securitized assets. Each structured finance instrument to be purchased by a Client must be rated by a rating agency.

Investments in Synthetic Securities

Highland may cause Clients to invest in synthetic securities. In addition to credit risks associated with holding non-investment grade loans and high yield debt securities, with respect to synthetic securities, Highland or its Clients will usually have a contractual relationship only with the counterparty of such synthetic securities, and not the obligor on a reference obligation (the "Reference Obligor"). Such agreement generally stipulates that Highland or its Client will have no right to directly enforce compliance by the Reference Obligor with the terms of the reference obligation (defined herein as the debt security or other obligation upon which the synthetic security is based), nor any rights of set-off against the Reference Obligor, nor have any voting rights with respect to the reference obligation. In addition, in the event of insolvency of the counterparty, the Client will be treated as a general creditor of such counterparty, and will not have any claim with respect to the reference obligation. Consequently, the Client will be subject to the credit risk of the counterparty as well as that of the Reference Obligor. As a result, concentrations of synthetic securities in any one counterparty subject the notes to an additional degree

of risk with respect to defaults by such counterparty as well as by the Reference Obligor. Highland will not perform independent credit analyses of the counterparties, any such counterparty, or an entity guaranteeing such counterparty, individually or in the aggregate.

Investments in Senior Secured Loans

Senior secured loans have significant credit risks and material losses may occur. As with other debt obligations, claims and collateral may be difficult to enforce in the event of a default. No assurance can be made that full or significant recovery of principal and/or interest will be received or that any collateral recovered will be marketable or sufficient.

Leverage

When deemed appropriate by Highland and subject to applicable regulations, a Client may use leverage in its investment program, including the use of borrowed funds and investments in certain types of options, such as puts, calls and warrants, which may be purchased for a fraction of the price of the underlying securities while giving the purchaser the full benefit of movement in the market of those underlying securities. While such strategies and techniques increase the opportunity to achieve higher returns on the amounts invested, they also increase the risk of loss. To the extent a Client purchases securities with borrowed funds, its net assets will tend to increase or decrease at a greater rate than if borrowed funds are not used. The level of interest rates generally, and the rates at which such funds may be borrowed in particular, could affect the operating results of the Client. If the interest expense on borrowings were to exceed the net return on the portfolio securities purchased with borrowed funds, the Client's use of leverage would result in a lower rate of return than if the Client were not leveraged.

Maturity Risk

In certain situations, Highland may purchase a bond of a given maturity as an alternative to another bond of a different maturity. Ordinarily, under these circumstances, Highland will make an adjustment to account for the differential interest-rate risks in the two bonds. This adjustment, however, makes an assumption about how the interest rates at different maturities will move. To the extent that the yield movements deviate from this assumption, there is a yield-curve or maturity risk. Another situation where yield-curve risk should be considered is in the analysis of bond swap transactions where the potential incremental returns are dependent entirely on the parallel shift assumption for the yield curve.

Market or Interest Rate Risk

The price of most fixed income securities move in the opposite direction of the change in interest rates. For example, as interest rates rise, the price of fixed income securities fall. If a Client holds a fixed income security to maturity, the change in its price before maturity will have little impact on the Clients performance; however, if the Client has to sell the fixed income security before the maturity date, an increase in interest rates will result in a loss. Senior secured bank loans generally pay interest at rates that are determined periodically by reference to a base lending rate plus a premium. These rates often are re-determined either daily, monthly, quarterly or semi-annually. Recently, domestic and international markets have experienced a period of acute stress starting in the real estate and financial sectors and then moving to other sectors of the world economy. This stress has resulted in unusual and extreme volatility in the equity and debt markets and in the prices of individual investments. These market conditions could add to the risk of short-term volatility of investments.

Options

A Client may use a number of option strategies. Put options and call options typically have similar structural characteristics and operational mechanics regardless of the underlying instrument on which they are purchased or sold. A put option gives the purchaser of the option, upon payment of a premium, the right to sell, and the writer the obligation to buy, the underlying security, commodity, index, currency or other instrument at the exercise price. A call option, upon payment of a premium, gives the purchaser of the option the right to buy, and the seller the obligation to sell, the underlying instrument at the exercise price.

With certain exceptions, exchange listed options generally settle by physical delivery of the underlying security or currency, although in the future cash settlement may become available. Index options are cash settled for the net amount, if any, by which the option is "in-the-money" (i.e., where the value of the underlying instrument exceeds, in the case of a call option, or is less than, in the case of a put option, the exercise price of the option) at the time the option is exercised. Frequently, rather than taking or making delivery of the underlying instrument through the process of exercising the option, listed options are closed by entering into offsetting purchase or sale transactions that do not result in ownership of the new option. The Client's ability to close out its position as a purchaser or seller of a listed put or call option is dependent, in part, upon the liquidity of the option market.

Over-the-counter ("OTC") options are purchased from or sold to securities dealers, financial institutions or other parties ("Counterparties") through direct bilateral agreement with the Counterparty. In contrast to exchange listed options, which generally have standardized terms and performance mechanics, all the terms of an

OTC option, including such terms as method of settlement, term, exercise price, premium, guarantee, and security, are set by negotiation of the parties. Unless the parties provide for it, there is no central clearing or guaranty function in an OTC option. As a result, if the Counterparty fails to make or take delivery of the security, currency or other instrument underlying an OTC option it has entered into with the Client or fails to make a cash settlement payment due in accordance with the terms of that option, the Client will lose any premium it paid for the option as well as any anticipated benefit of the transaction.

If a put or call option purchased by the Client were permitted to expire without being sold or exercised, its premium would be lost by the Client. The risk involved in writing a put option is that there could be a decrease in the market value of the underlying security caused by rising interest rates or other factors. If this occurred, the option could be exercised and the underlying security would then be sold to the Client at a higher price than its current market value. The risk involved in writing a call option is that there could be an increase in the market value of the underlying security caused by declining interest rates or other factors. If this occurred, the option could be exercised and the underlying security would then be sold by the Client at a lower price than its current market value. Purchasing and writing put and call options and, in particular, writing "uncovered" options are highly specialized activities and entail greater than ordinary investment risks.

Short Sales

A Client may sell securities short. Short selling involves the sale of a security that the Client does not own and must borrow in order to make delivery in the hope of purchasing the same security at a later date at a lower price. In order to make delivery to its purchaser, the Client must borrow securities from a third party lender. The Client subsequently returns the borrowed securities to the lender by delivering to the lender the securities it receives in the transaction or by purchasing securities in the open market. The Client must generally pledge cash with the lender equal to the market price of the borrowed securities. This deposit may be increased or decreased in accordance with changes in the market price of the borrowed securities. During the period in which the securities are borrowed, the lender typically retains his right to receive interest and dividends accruing to the securities. In exchange, in addition to lending the securities, the lender generally pays a fee for the use of the Client's cash. This fee is based on prevailing interest rates, the availability of the particular security for borrowing and other market factors.

Valuation of Portfolio Investments

From time to time, special situations affecting the valuation of the investments (such as limited liquidity, unavailability or unreliability of third-party pricing information

and acts or omissions of service providers to the Client) could have an impact on the value of a Client's investment, particularly if prior judgments as to the appropriate valuation of an investment should later prove to be incorrect after a net asset value-related calculation or transaction is completed. Generally, Highland is not required to make retroactive adjustments to prior subscription or withdrawal transactions, management fees or performance allocations based on subsequent valuation data. In addition, Highland may, but is not required to, discount the value of its positions due to limited liquidity, concentration levels or for other reasons. Due to the nature of its investments, Highland may not be able to place a precise value on positions and therefore may need to estimate values.

ITEM 9. DISCIPLINARY INFORMATION

On September 25, 2014, Highland Capital Management, L.P. ("Highland") entered into a settlement with the Securities and Exchange Commission ("SEC") resulting in the SEC issuing an order. This order resolves the SEC's allegations that Highland violated Sections 204(a) and 206(3) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 204-2 thereunder by trading securities between its Clients' accounts and accounts in which Highland and its principals maintained an ownership interest without adhering to certain requirements set forth by the Advisers Act. The transactions occurred between 2007 and 2009, and many were executed in an effort to generate or maintain liquidity for the advised accounts during September and October 2008. Specifically, the order found that, during the relevant time period, Highland engaged in a number of transactions with its Client advisory accounts without disclosing in writing to those Clients that Highland was acting as principal, or obtaining Client consent to the transactions, before the trades were completed. Highland did ultimately receive Client consent for many of the transactions; however, this consent was received after the transactions had settled, and therefore did not comply with the requirements of Advisers Act Section 206(3). In addition, the order found that, during the relevant time period, Highland failed to keep and maintain true, accurate and current certain books and records as required by the Advisers Act.

The order requires Highland to cease and desist from committing or causing any violations and any future violations of Advisers Act Sections 204(a) and 206(3) and Rule 204-2; censures Highland; and requires Highland to pay a civil monetary penalty of $225,000. Highland was also required to comply with certain undertakings, including retaining an independent consultant to conduct a comprehensive review of Highland's compliance and control systems relating to principal trades, and the creation and retention of its books and records. As of the date hereof, all such undertakings have been successfully completed.

ITEM 10. OTHER FINANCIAL INDUSTRY ACTIVITIES AND AFFILIATIONS

Highland and its advisory affiliates manage various strategies and some strategies are managed by more than one adviser. For this reason, certain Clients of Highland (or Clients of Highland's advisory affiliates) may be referred to and enter into advisory agreements with such affiliated adviser. Neither Highland nor its advisory affiliates charge a fee for such referral.

BROKER-DEALER, BANKING, AND CONSULTING AFFILIATES

Mr. Dondero indirectly owns a majority interest in NexBank Capital, Inc., whose wholly owned subsidiaries include Nexbank Securities, Inc. (also doing business as Nexbank Capital Advisors and Nexbank Wealth Advisors)("NexBank Securities"), and NexBank SSB.. Certain employees of Highland, including James Dondero and Mark Okada, serve on the Board of Directors of Nexbank.

NexBank Securities, Inc.

NexBank Securities is a registered broker-dealer and a Member of FINRA/SIPC. It may provide distribution assistance in connection with the sale or placement of funds managed by Highland. NexBank Securities, Inc., also doing business as NexBank Advisors, which is a SEC registered investment adviser.

NexBank, SSB

NexBank, SSB, a state chartered bank, is an affiliate of Highland and may, from time to time, provide banking and agency services to portfolio companies in which Client Accounts may be invested. Client Accounts and portfolio companies may invest in assets originated by, or enter into loans, borrowings and/or financings with NexBank, including in primary or secondary transactions. These services generally may result in compensation to NexBank, SSB in various forms, including administrative agent fees, structuring fees, origination and syndication fees, and assignment fees. As a result, we have an incentive to select, or attempt to influence the selection of, NexBank for such services. Fees are charged at rates competitive with those offered by third parties. Highland may also refer Client Accounts or controlled investments to NexBank, SSB for banking services. NexBank, SSB may charge its customary fees for the provision of such banking services.

To the extent permitted by applicable law, NexBank, SSB, may sell or offer participations to Highland Accounts in a variety of commercial loans for which NexBank will receive compensation.

Highland Capital Funds Distributor, Inc.

Highland Capital Funds Distributor, Inc., a SEC-registered broker dealer and a Member of FINRA/SIPC, is under common control through James Dondero's indirect ownership of Highland Capital Funds Distributor. It may provide distribution assistance in connection with the sale or placement of funds managed by Highland.

INVESTMENT ADVISER AFFILIATES

A related person of Highland is the general partner of a number of other collective investment vehicles organized as partnerships including those managed by the following affiliated investment advisers:

Acis CLO Management, LLC

Acis CLO Management LLC is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Acis CLO Management LLC is under common control with Highland.

Falcon E&P Opportunities GP, LLC

Falcon E&P Opportunities GP, LLC, a SEC-registered investment adviser, may be deemed to be under common control with us because James Dondero controls this entity.

Highland Capital Management Fund Advisors, L.P.

Highland Capital Management Fund Advisors, L.P. a SEC-registered investment adviser, is under common control with us because James Dondero controls the Highland Capital Management Fund Advisors general partner.

Additionally, Highland Capital Management Fund Advisors serves as advisor or sub-advisor to investment companies registered under the Investment Company Act of 1940, as amended.

Highland Capital Management Latin America, L.P.

Highland Capital Management Latin America, L.P. is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Highland Capital Management Latin America is under common control with Highland.

Highland Capital Management Korea Limited

Highland Capital Management Korea Limited is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Highland Capital Management Korea Limited is under common control with Highland.

Highland HCF Advisor, Ltd.

Highland HCF Advisor, Ltd. is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Highland HCF Advisor is under common control with Highland.

NexPoint Advisors, L.P.

NexPoint Advisors, L.P., a SEC-registered investment adviser, is under common control with us because James Dondero controls the NexPoint Advisors general partner.

Thomas Surgent, our Chief Compliance Officer, is also the Chief Compliance Officer of Acis CLO Management, LLC, Highland Capital Management Latin America, L.P., Highland Capital Management Korea Limited, and Highland HCF Advisor, Ltd. Jason Post is the Chief Compliance Officer of Highland Capital Management Fund Advisors, L.P., and NexPoint Advisors, L.P. Eric Holt is the Chief Compliance Officer of NexBank Securities, Inc., also doing business as NexBank Wealth Advisors.

Highland and/or Highland personnel provide advisory services to each of these affiliated investment advisors, with the exception of Falcon E&P Opportunities GP, LLC, either through sub-advisory or "dual hatting" arrangements with respect to Highland personnel. In addition Highland is a party to Shared Services Agreement with each of these advisors, under which Highland provides certain administrative and back office services to such advisors, including finance and accounting, human resources, marketing, legal, information technology and operations.

INSURANCE COMPANY AFFILIATES

Highland Capital Management Services, Inc. is an affiliate of Highland and parent company of Governance Re Ltd., a captive insurance agency issuing directors & officers' liability insurance and employment practice liability insurance to Highland its affiliates, and their respective portfolio companies. NexVantage Title Services is a title insurance company

affiliated with NexBank and Highland, which may provide title insurance with respect to real property investments owned by Client Accounts or their portfolio companies. A conflict of interest exists due to the fact that these entities receive premiums from portfolio companies and/or Client Accounts. As a result, Highland is incentivized to choose these affiliates to provide these services over a third party even though such party's services may be better suited for the company. Other Highland affiliates may provide insurance related products or services from time to time to Clients and/or portfolio companies and receive arm's length fees for such services. See "Conflicts of Interest," in the section titled Code of Ethics, Participation of Interest in Client Transactions and Personal Trading.

INDEPENDENT BUSINESS ENTITIES

Employees, including the owners, of Highland also own personal interests in a variety of independent business entities. A conflict of interest exists due to the potential for the owners' personal relationships and financial interests to conflict with our Client's interests.

BUSINESS ACTIVITIES WITH PORTFOLIO COMPANIES

Highland or its affiliates provide on a periodic basis certain services to portfolio companies including, but not limited to, forensic accounting, interim management consulting services and merger and acquisition advisory services. Highland or our affiliates may also furnish operational consulting services to certain portfolio companies of Highland's Clients. The time spent by Highland with respect to such activities depends upon a number of factors including the size of the investment, the relationship with the portfolio company and the financial and strategic position of such company. Highland or its affiliated advisors (including employees) may be directly or indirectly compensated for such services provided such compensation is received as a result of an arm's length contract between the company and such person. Employees of Highland may be granted equity or options in the portfolio companies for which they provide certain services.

Additional information regarding potential conflicts of interest arising from Highland's relationship and activities with its affiliates is provided in the section titled Code of Ethics, Participation or Interest in Client Transactions and Personal Trading.

ITEM 11. CODE OF ETHICS, PARTICIPATION OR INTEREST IN CLIENT TRANSACTIONS AND PERSONAL TRADING

Highland maintains a policy of strict compliance with the highest standards of ethical business conduct and the provisions of applicable federal securities laws, including rules and regulations promulgated by the SEC, and has adopted policies and procedures described in its Code of Ethics. The Code of Ethics applies to each employee of Highland and any other "access person" as defined under the Advisers Act. It is designed to ensure compliance with legal requirements of Highland's standard of business conduct.

A complete copy of Highland's Code of Ethics is available to any Client or prospective Client upon request.

STANDARDS OF CONDUCT

Highland and its access persons are expected to comply with all applicable federal and state laws and regulations. Access persons are expected to adhere to the highest standards of ethical conduct and maintain confidentiality of all information obtained in the course of their employment and bring any risk issues, violations, or potential violations to the attention of the Chief Compliance Officer. Access persons are expected to deal with Clients fairly and disclose any activity that may create an actual or potential conflict of interest between them and Highland or Client.

ETHICAL BUSINESS PRACTICES

Falsification or alteration of records or reports, also known as a prohibited financial practice, or knowingly approving such conduct is prohibited. Payments to government officials or employees are prohibited except for political contributions approved by our Chief Compliance Officer. We seek to outperform our competition fairly and honestly and seek competitive advantages through superior performance not illegal or unethical dealings. Access persons are strictly prohibited from (i) participating in online blogging and communication with the media, unless approved by the Chief Compliance Officer or the Compliance Department, and (ii) spreading of false rumors pertaining to any publicly traded company.

CONFIDENTIALITY

Employees must maintain the confidentiality of Highland's proprietary and confidential information, and must not disclose that information unless the necessary approval is obtained. Highland has a particular duty and responsibility, as investment adviser, to safeguard Client information. Information concerning the identity and transactions of investors is confidential, and such information will only be disclosed to those employees and outside parties who need to know it in order to fulfill their responsibilities.

GIFT AND ENTERTAINMENT POLICY

Access persons are permitted, on occasion, to accept gifts and invitations to attend entertainment events. When doing so, however, employees should always act in our best interests and that of our Clients and should avoid any activity that might create an actual or perceived conflict of interest or impropriety in the course of our business relationship. Under no circumstances may (i) gifts of cash or cash equivalents be accepted or (ii) may any gifts be received in consideration or recognition of any services provided to or transactions entered into by, Client Accounts.

PERSONAL TRADING

Personal Trading Policy

Access persons are allowed to trade reportable securities during designated time periods, however all transactions in reportable securities other than ETFs must be pre-approved by the Chief Compliance Officer or his/her designee. Except in very limited circumstances approved by the Chief Compliance Officer, access persons are not permitted to trade any security of which we or a Client own any portion of the capital structure or that is on our restricted list without permission. Access persons who violate the personal trading policy are reprimanded in accordance with the sanctions provisions outlined in the Code of Ethics. Personal securities transactions are reviewed by the Chief Compliance Officer or his/her designee for compliance with the personal trading policy and applicable SEC rules and regulations.

Prohibition against Insider Trading

Highland forbids any access person from trading, either personally or on behalf of others, including Clients advised by Highland, on material non-public information or communicating material non-public information to others in violation of the law or duty owed to another party. This conduct is frequently referred to as "insider trading". The concepts of material non-public information, penalties for insider trading, and processes for identifying insider trading are addressed in detail in the Compliance Manual and Code of Ethics.

Reporting Requirements

In compliance with SEC rules, access persons are required to disclose all of their personal brokerage accounts and holdings within 10 days of initial employment with Highland, within 10 days of opening a new account, and annually thereafter. Additionally, the last day of the month following each quarter-end, all access persons must report all transactions in reportable securities over which the access person had any direct or indirect beneficial ownership. Access persons are also required annually to affirm all reportable transactions from the prior year.

POTENTIAL CONFLICTS

Highland, its affiliates and their respective officers, directors, trustees, stockholders, members, partners and employees and their respective funds and investment accounts (collectively, the "Related Parties") engage in a broad range of activities, including activities for their own account and for the accounts of Clients. This section describes various potential conflicts that may arise in respect of the Related Parties, as well as how we address such conflicts of interest. The discussion below does not describe all conflicts that may arise.

Any of the following potential conflicts of interest will be discussed and resolved on a case by case basis. Our determination as to which factors are relevant, and the resolution of such conflicts, will be made using our best judgment, but in our sole discretion. In resolving conflicts, we will take into consideration the interests of the relevant Clients, the circumstances giving rise to the conflict and applicable laws. Certain procedures for resolving specific conflicts of interest are set forth below.

Allocation of Investment Opportunities

Highland, together with its affiliated advisors (the "Related Advisors"), acts as investment adviser to Clients that have similar investment objectives and pursue similar strategies. Certain investments identified by the Related Advisors may be appropriate for multiple Clients. Investment decisions for such Clients are made by the applicable Related Advisors in their best judgment, but in their discretion, taking into account such factors as they believe relevant. Such factors may include investment objectives, regulatory restrictions, current holdings, availability of cash for investment, the size of investments generally, risk-return considerations, tax consequences, and limitations and restrictions on a Client's Account that are imposed by such Client. In addition, if it is fair and reasonable that certain Clients are fully filled of their appetite before others (e.g., for tax considerations, to avoid de minimis partial allocations, to cover or close out an existing position to mitigate risk or losses, etc.), then these Clients may receive full or disproportionate allocations, with the remaining amounts allocated in accordance with normal procedures among the other participating Clients. One or more of the foregoing considerations in this paragraph may (and are often expected to) result in allocations among accounts other than on a pari passu basis. Accordingly, particular investment may be bought or sold for only one Client or in different amounts and at different times for more than one but less than all Clients, even though it could have been bought or sold for other Clients at the same time. Likewise, a particular investment may be bought for one or more Clients when one or more other Clients are selling the investment. In addition, purchases or sales of the same investment may be made for two or more Clients on the same date. There can be no assurance that a Client will not receive less (or more) of a certain investment than it would otherwise receive if the applicable Related Advisors did not have a conflict of interest among Clients.

In effecting transactions, it is not always possible, or consistent with the investment objectives of the Related Advisors' various Clients, to take or liquidate the same investment positions at the same time or at the same prices. Certain investment restrictions may limit the Related Advisors' ability to act for a Client and may reduce performance. Regulatory and legal restrictions (including restrictions on aggregated positions) may also restrict the investment activities of the Related Advisors and result in reduced performance.

The Related Advisors seek to manage and/or mitigate these potential conflicts of interest described by following procedures with respect to the allocation of investment opportunities their Clients, including the allocation of limited investment opportunities. Our allocation policy is based on a fundamental desire to treat each Client Account fairly over time.

In addition to the investment strategies implemented by the portfolio managers for each of our Clients, such portfolio managers may also give trading desk personnel of the adviser general authorization to enter into a limited amount of short-term trades (purchases expected to be sold within 15 business days) in debt instruments on behalf of such Clients. Over time, it is expected that these trades will not exceed 2% of each such Client's assets. Such investments executed by authorized traders are generally allocated on a weighted rotational basis, based on the AUM of the accounts eligible to participate in such investment opportunities.

Investment Negotiation

In order to ensure compliance with Section 17(d) under the Investment Company Act whenever an investment professional proposes to negotiate a term other than price for an investment (including any amendments), he/she must check to see if the investment (or any other position in the issuer's capital structure) is held (or proposed to be invested) in any retail accounts of our advisory affiliates.

If the investment is held in any retail accounts, that person must contact the Chief Compliance Officer for guidance.

(i) The transaction is generally permitted if all accounts are in the same part of the capital structure and participate in the investment pro rata

(ii) Alternatively, impose "Chinese Wall" between retail/institutional investment decision-making

One person can negotiate, provided final investment decision still made separately.

May also consult outside counsel and/or the retail board for guidance.

Capital Structure Conflicts

Conflicts will arise in cases when Clients of the Related Advisors invest in different parts of an issuer's capital structure, including circumstances in which one or more Clients own private securities or obligations of an issuer and other Clients may own public securities of the same issuer. In addition, one or more Clients may invest in securities, or other financial instruments, of an issuer that are senior or junior to securities, or financial instruments, of the same issuer that are held by or acquired for, one or more other Clients. If such issuer encounters financial problems, decisions related to such securities (such as over the terms of any workout or proposed waivers and amendments to debt covenants) will raise conflicts of interests. For example, a Client holding debt securities of the issuer may be better served by a liquidation of the issuer in which it may be paid in full, whereas a Client holding equity securities of the issuer might prefer a reorganization that holds the potential to create value for the equity holders.

In the event of conflicting interests within an issuer's capital structure, the Related Advisors will generally pursue the strategy that reflects what would be expected to be negotiated in an arm's length transaction with due consideration being given to our fiduciary duties to each of our accounts (without regard to the nature of the fees received from such accounts):

- This strategy may be recommended by one or more investment professionals of the Related Advisors
- A single person may represent more than one part of an issuer's capital structure
- The recommended course of action will be presented to our Conflicts Committee for final determination as to how to proceed. We may elect, but are not required, to assign different teams to make recommendations for different parts of the capital structure as the Conflicts Committee determines in its discretion.
- It is acknowledged that the applicable retail portfolio manager will separately and independently make his or her decision on suitability as to the course of action for the applicable retail portfolio and will leave the Conflicts Committee meeting prior to the final determination being made by the Conflicts Committee.

The Related Advisors may elect, but are not required, to assign different teams to make recommendations for different parts of the capital structure as the Conflicts Committee determines in its discretion.

In the event any Related Parties serve on the Board of the subject company, they may recuse themselves from voting on transactions involving a capital structure conflict.

- Related Party board members may still make recommendations to the Conflicts Committee

- If any such persons are also on the Conflicts Committee, they may recuse themselves from the Committee's determination.

The Related Advisors may use external counsel for guidance and assistance.

The foregoing procedures are not applicable to the advisors to retail accounts, which advisors generally make their own independent determination as to the course of action that is most appropriate for the applicable retail accounts.

Position Conflicts

Another type of conflict may arise if we cause one Client account of a Related Advisor to buy a security and another Client account to sell or short the same security. Currently, such opposing positions are generally not permitted within the same account without prior trade approval by the Chief Compliance Officer. However, a portfolio manager may enter into opposing positions for different Clients to the extent each such Client has a different investment objective and each such position is consistent with the investment objective of the applicable Client. In addition, transactions in investments by one or more affiliated Client accounts may have the effect of diluting or otherwise disadvantaging the values, prices or investment strategies of other Client accounts.

Generally, a Related Advisor does not purchase, sell or hold securities on behalf of Clients contrary to the current recommendations made to other affiliated Client accounts. However, because certain Client accounts may have investment objectives, strategies or legal, contractual, tax or other requirements that differ (such as the need to take tax losses, realize profits, raise cash, diversification, etc.), a Related Advisor may purchase, sell or continue to hold securities for certain Client accounts contrary to other recommendations. In addition, a Related Advisor may be permitted to sell securities or instruments short for certain Client accounts and may not be permitted to do so for other affiliated Client accounts.

Principal Trading

The Related Advisors, through their ownership interest in certain Unregistered Investment Funds, may be deemed a *related person* of such entity. In situations where we determine that we are a *related person* by our ownership of greater than 25% of such entity, such fund is considered a "*Principal Account*."

To the extent a Related Advisor wishes to trade an asset from a Client account to or from a Principal Account (a "Principal Cross Trade"), the SEC has stated that the Principal Cross Trade may only occur if the Client account on the other side from the Principal Account consents to the trade after a disclosure by the Related Advisor of

all material facts. Our Compliance Manual sets forth procedures for executing both cross trades and principal cross trades.

Cross Trading

In an effort to reduce transaction costs, increase execution efficiency, and capitalize on timing opportunities, we may execute cross trades, or sell a security for one affiliated Client to another affiliated Client, without interposing a broker-dealer. All cross trades are subject to the cross trade procedures set forth in our Compliance Manual. Cross trades present an inherent conflict of interest because we and/or our affiliates represent the interest of the buyer and seller in the same transaction. As a result, Clients involved in a cross trade bear the risk that the price obtained from a cross trade may be less favorable than if the trade had been executed in the open market.

Conflicts Related to Investment Activities

The Related Advisors may buy or sell the same securities for an affiliate's account that they buy or sell for a Client or may pursue the same investment strategies for an affiliate's account as for a Client's. The Related Advisors also may receive greater management or performance-based fees or incentives in connection with managing certain Client accounts than from other Client accounts. In addition, if the Related Advisors allocate a Client's assets among pooled vehicles managed by the Related Advisors, they may have an incentive to allocate assets into vehicles that produce the greatest fees for the Related Advisors. Each of these situations give rise to a potential conflict of interest in the allocation of investment opportunities. In addition, the Related Advisors have an incentive to resolve conflicts of interest in favor of affiliated Clients over non-affiliated Clients. As previously described, the Related Advisors adopted trade allocation policies and procedures that seek to ensure fair and equitable access to investment opportunities for all accounts.

Trade Aggregation

In some circumstances, the Related Advisors may seek to buy or sell the same securities contemporaneously for multiple Client accounts. The Related Advisors may, in appropriate circumstances, aggregate securities trades for a Client with similar trades for other Clients, but are not required to do so. In particular, the Related Advisors may determine not to aggregate transactions that relate to portfolio management decisions that are made independently for different accounts or if the Related Advisors determine that aggregation is not practicable, not required or inconsistent with Client direction. When transactions are aggregated and it is not possible, due to prevailing trading activity or otherwise, to receive the same price or execution on the entire volume of securities purchased or sold, the various prices may be averaged or allocated on another basis deemed to be fair and equitable. In addition,

under certain circumstances, the Clients will not be charged the same commission or commission equivalent rates in connection with a bunched or aggregated order. The effect of the aggregation may therefore, on some occasions, either advantage or disadvantage any particular Client.

From time to time, aggregation may not be possible because a security is thinly traded or otherwise not able to be aggregated and allocated among all affiliated Client accounts seeking the investment opportunity or a Client may be limited in, or precluded from, participating in an aggregated trade as a result of that Client's specific brokerage arrangements. Also, an issuer in which Clients wish to invest may have threshold limitations or aggregate ownership interests arising from legal or regulatory requirements or company ownership restrictions, which may have the effect of limiting the potential size of the investment opportunity and thus the ability of the applicable Client to participate in the opportunity.

Company Errors

For the Company's Clients, the Company's responsibility for its trade errors is set forth in the governing documents for the relevant Client. No soft-dollars may be used to satisfy any trade errors. In addition, the Company may not use the securities in one Client's account to settle the trade error in another Client's account.

Conflicts Related to Valuation

The Related Advisors may have a role in determining asset values with respect to Client accounts and may be required to price an asset when a market price is unavailable or unreliable. This may give rise to a conflict of interest because a Related Advisor may be paid an asset-based fee on certain Client accounts. In order to mitigate these conflicts, the Related Advisors determine asset values in accordance with valuation procedures, which generally are set forth in their applicable Compliance Manual.

Conflicts Related to Investments in Affiliated Funds

The Related Advisors purchase for Client accounts interests in other pooled vehicles, including Structured Product Vehicles, Unregistered Investment Funds and Retail Funds, offered by Related Parties. Investment by a Client in such a vehicle means Related Parties receive advisory or other fees from the Client in addition to advisory fees charged for managing the Client's Account. The details of any possible fee offsets, rebates or other reduction arrangements in connection with such investments are provided in the documentation relating to the relevant Client account and/or underlying investment vehicle. In choosing between vehicles managed by Related Parties and those not affiliated with Related Parties, Related Parties may have a financial incentive to choose Related Parties-affiliated vehicles over third parties by

reason of additional investment management, advisory or other fees or compensation Related Parties may earn. The potential for fee offsets, rebates or other reduction arrangements may not necessarily eliminate this conflict and Related Parties may nevertheless have a financial incentive to favor investments in Related Parties-affiliated vehicles. If the Related Advisors invest in an affiliated vehicle, a Client should not expect the Related Advisors to have better information with respect to that vehicle than other investors may have (and if the Related Advisors do have better information they may be prohibited from acting upon it in a way that disadvantages other investors).

Additionally, Related Parties may sponsor and manage funds and accounts that compete with the Related Advisors or make investment with funds sponsored or managed by third-party advisers that would reduce capacity otherwise available to the Related Advisors' Clients.

Other Potential Conflicts

Related Parties may provide services other than advice to a Client, including administration, organizing/managing business affairs, executing and reconciling trades, preparing financials and providing audit support, preparing tax documents, sales and investor relations support, and diligence and valuation services, for additional fees. A potential conflict arises in such circumstances because Related Parties are incentivized to favor its Clients that pay such additional fees. However, the individuals who provide advice to Clients do not provide these additional services.

The Related Advisors may cause a Client to purchase, sell or hold securities of issuers in which Related Parties make a market or has an equity, debt or other financial interest or securities of issuers or other investments in which Related Parties, their officers or employees or their affiliated broker-dealers and other Related Parties and their officers or employees have positions or other financial interests. For example, the Related Advisors may purchase on behalf of a Client unregistered securities for which an affiliate acts as placement agent, which may result in additional fees to the affiliate or assist the affiliate in meeting its contractual obligations. The Related Advisors may also cause a Client to borrow money from Related Parties, and the Related Parties may earn interest or fees on such transactions. Conflicts also may arise if the Related Advisors implement a portfolio decision or strategy (including a decision to hold an investment) for one Client ahead of, or contemporaneously with, another Client. Such transactions may have the effect of diluting or otherwise disadvantaging the values, prices or investment strategies of other Client accounts and could result in one Client receiving more favorable trading results or reduced costs at the expense of the other Client.

Related Parties may invest (or recommend that a Client invest) in securities issued by a Client and may hedge derivative positions by buying or selling securities issued by a Client. A potential conflict may arise in such circumstances because a Related Advisor may be incentivized to favor its Clients that issue securities, or such Clients of its affiliates, over other Clients. In addition to Clients, some of the Related Advisors' service providers are issuers of securities. The Related Advisors may determine that it is in the best interests of a Client to purchase securities issued by one of these entities. The Related Advisors have adopted policies and procedures designed to address conflicts of interest arising from the foregoing activities. Furthermore, it is the Related Advisors' general policy not to take into account the fact that an issuer is a Client, service provider or vendor when making investment decisions.

Certain qualified employees and affiliates may invest in Clients either through general partner entities or as limited partners, shareholders or otherwise. The Related Advisors generally reduce or waive all or a portion of the management fee, performance-based fee related to the investments by such persons.

Conflicts Related to Information Possessed by or Provided by the Related Advisors

Certain Related Parties may receive or create information (*e.g.*, proprietary technical models) that is not generally available to the public. The Related Advisors have no obligation to provide such information to Clients or effect transactions for Clients on the basis of such information and in many cases the Related Advisors will be prohibited from trading for the same Clients based on the information. Similarly, some Clients may have access to information regarding Related Parties' transactions or views that is not available to other Clients, and may act on that information through accounts managed by persons other than Related Parties. Such transactions may negatively impact other Clients (*e.g.*, through market movements or decreasing availability or liquidity of securities). Additionally, our personnel or those of our advisory affiliates may from time to time serve on the board of directors of portfolio companies, and in such capacity may recommend investment opportunities to such companies.

Conflicts Related to the Related Advisors' Relationships with Third Parties

The Related Advisors may advise third-parties regarding valuation, risk management, transition management and potential restructuring or disposition activities in connection with proprietary or Client investments, which may create an incentive to purchase securities or other assets from those third parties or engage in related activities to bid down the price of such assets, which may have an adverse effect on a Client.

The Related Advisors may work with pension or other institutional investment consultants and such consultants may also provide services to the Related Advisors. Consultants may provide brokerage execution services to Related Parties and Related Parties may attend conferences sponsored by consultants. The Related Advisors also may be hired to provide investment management or other services to a pension or other institutional investment consultant that works with a Client, which may create conflicts.

Related Parties may in-source or out-source to third parties certain processes or functions, which may give rise to conflicts. There may be conflict when negotiating with third-party service providers if Related Parties bear operational expenses of various Clients to the extent that a given fee structure would tend to place more expense on Clients for which Related Parties have a greater entitlement to reimbursement or less expense on Clients for which Related Parties have lesser (or no) entitlement to reimbursement. Related Parties may provide information about a Client's portfolio positions to unrelated third parties to provide additional market analysis and research to Related Parties and they may use such analysis to provide investment advice to other Clients.

Related Parties may purchase information (such as periodicals, conference participation, papers, surveys) from professional consultant firms, and such firms may have an incentive to give favorable evaluations of Related Parties to their Clients.

In selecting broker-dealers that provide research or other products or services that are paid with soft dollars, conflicts may arise between a Related Advisor and a Client because a Related Advisor may not produce or pay for these benefits but may use brokerage commissions generated by Client transactions. Soft dollar arrangements may also give a Related Advisor an incentive to select a broker-dealer based on a factor other than the Related Advisor's interest in receiving the most favorable execution. Conflicts of interest related to soft dollar relationships with brokerage firms may be particularly influential to the extent that a Related Advisor uses soft dollars to pay expenses it might otherwise be required to pay itself. Furthermore, research or brokerage services obtained using soft dollars or that are bundled with trade execution, clearing, settlement or other services provided by a broker-dealer may be used in such a way that disproportionately benefits one Client over another (*e.g.*, economics of scale or price discounts). For example, research or brokerage services paid for through one Client's commission may not be used in managing that Client's account. Additionally, where a research product or brokerage service has a mixed-use, determining the appropriate allocation of the product or service may create conflicts. Please refer to the section titled Brokerage Practices for information regarding the Related Advisors' use of soft dollars.

Conflicts may arise where a Related Advisor has the responsibility and authority to vote proxies on behalf of its Clients. Please refer to the section titled Voting Client Securities for information regarding the policies and procedures governing the Related Advisors' proxy voting activities.

Related Parties may serve on the boards of directors and/or investment committees of external organizations, including those organizations that are currently or may become Clients of Related Parties, and such service may present conflicts of interest to the extent the employee become aware of material non-public information and may be unable to initiate some transactions for other Clients while in possession of that information.

The Related Advisors may conduct business with institutions such as broker dealers or investment banks that invest, or whose Clients invest, in pooled vehicles sponsored or advised by the Related Advisors, or may provide other consideration to such institutions or recognized agents, and as a result the Related Advisors may have a conflict of interest in placing its brokerage transactions.

Related Parties may receive stock options from companies, the securities of which may be held in accounts of Related Parties' Clients, in exchange providing consulting work, including but not limited to, advisory services and financial services, for those companies.

Other Accounts and Relationships

As part of our regular business, Highland and its Related Parties hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective Clients, on a principal or agency basis, subject to applicable law including Section 206(3) of the Advisers Act, with respect to loans, securities and other investments and financial instruments of all types. The Related Parties also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets-oriented investment activities. The Related Parties will not be restricted in their performance of any such services or in the types of debt, equity, real estate or other investments which they may make. The Related Parties may have economic interests in or other relationships with respect to investments made by Clients. In particular, but subject to Highland's personal trading policy the Related Parties may make and/or hold an investment, including investments in securities, that may compete with, be pari passu, senior or junior in ranking to an, investment, including investments in securities, made and/or held by Clients or in which partners, security holders, members, officers, directors, agents or employees of such Clients serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in restrictions on transactions by Clients and otherwise create conflicts of interest for

Clients. In such instances, the Related Parties may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to Client investments, subject to the capital structure conflicts procedures discussed above. In connection with any such activities described above, but subject to Highland's personal trading policy the Related Parties may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable for Clients. Subject to Highland's personal trading policy, the Related Parties will not be required to offer such securities or investments to Clients or provide notice of such activities to Clients. In addition, in managing Client portfolios, each of the Related Advisors may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Related Advisors in accordance with their fiduciary duties to their other Clients, the Related Advisors may take, or be required to take, actions which adversely affect the interests of their Clients.

The Related Parties have invested and may continue to invest in investments that would also be appropriate for Clients. Such investments may be different from those made on behalf of Clients. No Related Advisor nor any Related Party has any duty, in making or maintaining such investments, to act in a way that is favorable to Clients or to offer any such opportunity to Clients, subject to Highland's allocation policy and personal trading policy. The investment policies, fee arrangements and other circumstances applicable to such other parties may vary from those applicable to Clients. Any Related Party may also provide advisory or other services for a customary fee with respect to investments made or held by Clients, and no stockholders nor Clients shall have any right to such fees except to the extent the governing documents of the applicable Client expressly provide otherwise. Any Related Party may also have ongoing relationships with, render services to or engage in transactions with other Clients, who make investments of a similar nature to those of Clients, and with companies whose securities or properties are acquired by Clients and may own equity or debt securities issued by Clients. In connection with the foregoing activities any Related Party may from time to time come into possession of material nonpublic information that limits the ability of the Related Advisors to effect a transaction for Clients, and Client investments may be constrained as a consequence of the Related Advisors' inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its Clients.

Although the professional staff of the Related Advisors will devote as much time to Clients as they deem appropriate to perform their duties, the staff may have conflicts in allocating its time and services among Client accounts.

The directors, officers, employees and agents of the Related Parties may, subject to applicable law, serve as directors (whether supervisory or managing), officers, employees, partners, agents, nominees or signatories, and receive arm's length fees in connection with such service, for Clients or any Related Party, or for any Client joint ventures or any affiliate thereof, and no Clients nor their stockholders shall have the right to any such fees except to the extent the governing documents of the applicable Client expressly provide otherwise.

The Related Parties serve or may serve as officers, directors or principals of entities that operate in the same or a related line of business as Clients, or of other investment funds managed by Related Advisors. In serving in these multiple capacities, they may have obligations to other Clients or investors in those entities, the fulfillment of which may not be in the best interests of Clients or their stockholders. Clients may compete with other entities managed by Related Advisors for capital and investment opportunities.

There is no limitation or restriction on Related Advisors with regard to acting as investment manager (or in a similar role) to other parties or persons. This and other future activities of Related Parties may give rise to additional conflicts of interest. Such conflicts may be related to obligations that Related Advisor or their affiliates have to other Clients.

Certain Related Parties, including NexBank SSB and Governance Re among others, may provide banking, agency, insurance and other services to Clients and their operating affiliates for customary fees, and no Client, nor its subsidiaries will have a right to any such fees except to the extent the governing documents thereof expressly provide otherwise.

Related Advisors may direct Clients to acquire or dispose of investments in cross or principal trades involving Clients of the Advisory Parties in accordance with applicable legal and regulatory requirements as described above. In addition, Clients may make and/or hold an investment, including an investment in securities, in which Related Parties have a debt, equity or participation interest, and the holding and sale of such investments by Clients may enhance the profitability of Related Parties' own investments in such companies. Moreover, Clients and their operating affiliates may invest in assets originated by, or enter into loans, borrowings and/or financings with Related Parties, including but not limited to NexBank, including in primary and secondary transactions with respect to which Related Parties may receive customary fees from the applicable issuer, and no Client nor their subsidiaries shall have the right to any such fees except to the extent the governing documents of such Client expressly provide otherwise. In each such case, Related Parties may have a potentially conflicting division of loyalties and responsibilities regarding Clients and the other parties to such investment. Under certain circumstances, the Related

Advisors may determine that it is appropriate to avoid such conflicts by selling an investment at a fair value that has been calculated pursuant to our valuation procedures to another fund managed or advised by the Related Advisors. In addition, the Related Advisors may enter into agency cross-transactions where it or any of its affiliates act as broker for Clients, to the extent permitted under applicable law.

Related Parties may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of investments purchased by Clients. Such transactions are on an arm's-length basis and may be subject to arm's-length fees. There is no expectation for preferential access to transactions involving investments that are underwritten, originated, arranged or placed by Related Parties and no Client nor their stockholders shall have the right to any such fees except to the extent the governing documents of such Client expressly provide otherwise.

Material Non-Public Information

There are generally no ethical screens or information barriers among the Related Advisors and certain of their affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If any Related Advisor, any of their personnel or affiliates were to receive material non-public information about an investment or issuer, or have an interest in causing a Client to acquire a particular investment, we may be prevented from causing the Client to purchase or sell such asset due to internal restrictions imposed on us. Notwithstanding the maintenance of certain internal controls relating to the management of material non-public information, it is possible that such controls could fail and result in the Related Advisors, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. In addition, while the Related Advisors and certain of their affiliates generally operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, our ability to operate as an integrated platform could also be impaired, which would limit our access to personnel of our affiliates and potentially impair our ability to manage Client investments.

ITEM 12. BROKERAGE PRACTICES

BROKER-DEALER SELECTION

Highland has an obligation to obtain "best execution" for Client transactions considering the execution price and overall commission costs paid and certain other factors. Our trading desk routes orders to various broker-dealers for execution at their discretion. Where possible, we deal directly with the dealers who make a market in the securities involved, except in those circumstances where we believe better prices and execution are available elsewhere.

Through periodic meetings of the Brokerage Committee, Highland reviews compensation paid to broker-dealers. The meetings include an in-depth review of "best execution reports" which are third party reports that show how Highland's execution compared to its peers. The reports also include information regarding the most used broker-dealers, lowest and highest cost broker-dealers, and other information used in reviewing broker-dealer selection and compensation.

Factors involved in selecting brokerage firms include:

Broker Specific

- Size of broker
- Reputation
- Quality of service
- Experience
- Financial stability and creditworthiness
- Financial statements
- Regulatory filings
- Standing in financial community
- Ability to handle block trades
- Acceptable record of delivery and payment on past transactions
- Quality of research and investment information provided

Transaction Specific

- Best available execution

- Market knowledge regarding specific industries and securities
- Access to sources of supply or markets
- Nature of the market for the security

THE APPROVAL PROCESS

Highland's trading desk is only allowed to trade with broker-dealers that are approved by our Brokerage Committee unless interim approval is expressly provided by the Compliance Department, in which case such approval shall be ratified by the Brokerage Committee at the next meeting of the Committee. New broker-dealers are added to Highland's approved list of broker-dealers subject to a formal review process which closely analyzes all of the above mentioned broker specific selection items. The Brokerage Committee reviews the requirements and determines what additional procedures or reporting are necessary.

Highland generally has discretion to select brokers for its Clients that are pooled investment vehicles, such as, Retail Funds and Unregistered Investment Funds. For the Retail Funds, the Board of Trustees/Directors of each Retail Fund is ultimately responsible for the oversight of the Retail Fund and has the authority to direct or limit the brokers that may be used for the particular Retail Fund.

SOFT DOLLARS

In those circumstances where more than one broker-dealer is able to satisfy our obligation to obtain best execution, Highland may place a trade order on behalf of Client Accounts with a broker-dealer that charges more than the lowest available commission cost or price. Highland may do this in exchange for certain brokerage and research services provided either directly from the broker-dealer or through a third party ("Soft Dollar Arrangements"), provided that each of the following is met:

- Highland determines:

    1. The research or brokerage product or service constitutes an eligible brokerage or research service;
    2. The product or service provides lawful and appropriate assistance in the performance of Highland's investment decision making responsibilities; and
    3. In good faith the amount of Client commissions paid is reasonable in light of the value of the products or services provided.

- The brokerage or research is "provided by" a broker-dealer who participates in effecting the trade that generates the commission. Highland may not incur a direct obligation for research with a third party vendor and then arrange to have a broker-dealer pay for that research in exchange for brokerage commissions.

- Highland may only generate soft dollars with commissions in agency transactions. Highland may not use dealer markups in principal transactions to generate soft dollars. In addition, a trade for a fixed income security or over-the-counter ("OTC") security may be done on an agency basis only if the trader determines that it would not result in a broker-dealer unnecessarily being inserted between Highland and the market for that security.

- No soft dollars are generated on accounts for which:

    1. Investment discretion resides with the Client (i.e. non-discretionary accounts);
    2. Client mandates restrict or prohibit the generation of soft dollar commissions;
    3. The Client has a directed brokerage arrangement.

- The brokerage trade placed is for "securities" transactions (and not, for example, futures transactions).

Research services furnished by brokers through whom Highland effects securities transactions may be used in servicing all of Highland's accounts, and not all such services may be used in connection with the accounts which paid commissions to the broker providing such services.

If a Client Account is under the custody of one brokerage firm and another brokerage firm is a selling group member for an underwriting syndicate, such a Client Account may not be able to participate in the purchase of securities in the underwriting because the custodial brokerage firm was not a selling group member. In addition, to the extent that a Client directs brokerage trades to be placed with a particular broker, the allocation of securities transactions may be impacted.

When Highland uses Client brokerage commissions (or markups or markdowns) to obtain research or other products or services, Highland receives a benefit because the firm does not have to produce or pay for research, products, or services. Consequently, Highland may have an incentive to select or recommend a broker-dealer based on our interest in receiving the research or other products or services, rather than Clients' interest in receiving most favorable execution.

PRODUCTS AND SERVICES ACQUIRED WITH SOFT DOLLARS

All products and services acquired with soft dollars qualify under the Safe Harbor of 28(e) of the Securities Exchange Act of 1934. Examples of eligible services and products include independent stock research, economic research, research in specific industry sectors, real time feeds, newswires, strategic analysis, and back office systems.

DIRECTED BROKERAGE

Highland does not require Clients to direct brokerage, but in those situations where a Client has directed Highland to place trades with a particular broker-dealer, Highland may not be free to seek the best price, volume discounts or best execution by placing transactions with other broker-dealers. Additionally, as a result of directing Highland to place trades with a particular broker-dealer, a disparity in commission charges may exist between the commissions charged to Clients who direct us to use a particular broker-dealer and those Clients who do not direct us to use a particular broker-dealer as well as a disparity among the brokers to which different Clients have directed trades.

TRADE AGGREGATION

Orders of Clients may be combined (or "bunched") when possible to obtain volume discounts resulting in a lower per share commission. Please see the section entitled Code of Ethics, Participation or Interest in Client Transactions, and Personal Trading for additional information regarding Highland's trade aggregation procedures.

ITEM 13. REVIEW OF ACCOUNTS

ACCOUNT REVIEW

Highland has an Investment Committee which, subject to certain size thresholds, is responsible for (i) assessing and approving new issues and new credits and (ii) determining general account suitability for those investments.

In circumstances where the decision to buy is made outside of the Investment Committee (i.e. where limited quantity purchases are allowed or with respect to follow-on investments), allocations will be made by consultation with the Portfolio Managers, typically from a "Gatekeepers" email request sent by or at the direction of the requesting Portfolio Manager. In determining the aggregate amount to be sought, the Investment Committee and/or Portfolio Managers consider, without limitation, the normal investment amount of the account, the general level of cash on hand and available to be drawn, cash generating activities, withdrawals and other factors affecting the desired purchase amount for Clients. The Investment Committee also may reconsider buy decisions relating to existing Client holdings when there are significant changes in relevant factors relating to the investment, including, but not limited to, the market value of the investment, the business of the issuer or borrower, results of operations, balance sheet and creditworthiness of the issuer or in the case of an equity security, the outlook for the issuer. An initial target allocation is determined by the committee at the time of any buy or sell decision based on appropriate factors (e.g., suitability, cash needs/availability, transaction size, etc.) which is then reconciled and adjusted, as appropriate, by the Allocation Committee prior to the commencement of trading on the next trading day. Our fiduciary duty requires that we recommend only those investments that are suitable for a Client, based on the Client's particular investment objectives, needs and circumstances. We are responsible for inquiring and documenting the criteria discussed above and shall develop suitable investment guidelines for each Client.

Traders Book

In certain circumstances, our Authorized Traders, as from time to time amended, determine that an investment is a good short-term opportunity for technical trading reasons. In these cases, an Authorized Trader propose these investment ideas to the Portfolio Managers who will consider the short-term investment based on the facts known to them and presented by the Authorized Trader. If the Portfolio Managers agree to participate in the short-term trade, the Authorized Trader executes the trade for the benefit of those accounts. The trade will then follow our Allocation Policy for immediate term investments.

Equities

Investment decisions with respect to equity investments are generally made independently by each applicable Portfolio Manager and allocated solely within the accounts managed by such Portfolio Manager, provided that in certain circumstances, such as debt to equity conversions, such determination may be presented to the Investment Committee in accordance with the process typically applicable to credit investments.

Investments in all Client Accounts are reviewed periodically and are reviewed collectively and individually by multiple reviewers in order to provide multiple perspectives on the accounts. Reviewers evaluate Client objectives along with, among other factors, applicable portfolio restrictions, available cash, particularized investment suitability, investment performance and diversification. In addition to, and not as a substitute for the foregoing, additional reviews are conducted in accordance with Client requests as set forth in the relevant investment advisory contract.

NATURE AND FREQUENCY OF REPORTING

Client reporting varies based on the type of product/vehicle. The following summarizes the reporting provided to each Client. The reports provided to a Client within a particular investment product/vehicle may differ from our description depending upon strategies and Client needs.

Structured Product Vehicles

Investors in Structured Product Vehicle Clients generally have access to a written monthly report provided by the trustee and the ability to review a marked portfolio on a monthly basis. The monthly trustee report primarily includes compliance reporting and portfolio holdings.

Unregistered Investment Funds – Hedge Funds

Investors in Hedge Fund Clients are generally provided a written monthly account statement with their respective net asset value. They also receive a written monthly reporting package, which includes a one-page summary with a fund overview, market commentary, and Highland's outlook on the market. In addition, the report includes fund specific details around the portfolio statistics, composition, and attribution.

On a quarterly basis, Highland may hold a conference call for a portfolio update with the Portfolio Manager, which will be accompanied by a written presentation to provide an update on the portfolio as well as the credit markets.

In addition to the above mentioned reporting, investors also receive audited written financial statements on an annual basis.

Unregistered Investment Funds – Private Equity Funds

Investors in Private Equity Fund Clients are provided a quarterly written capital statement with their respective investment commitments and capital balances, as well as periodic capital call written notices describing amounts being called on commitments and a detailed description of the use of proceeds.

On a quarterly basis, Highland may hold a conference call for a portfolio update with the Portfolio Manager, which will be accompanied by a written presentation to provide an update on the portfolio holdings.

In addition to the above mentioned reporting, investors also receive annual audited written financial statements.

Separate Accounts

Separate Account Clients typically have reporting that is tailored based on their expressed desired format and frequency. However, in general, the reporting Highland provides Separate Account Clients mirrors that of Hedge Fund Client written reporting. Reports to Separate Account Clients may be customized to include more detailed statistics, holdings, etc., at the request of the Client since there are generally fewer limitations on the type of information Highland can share regarding their investments. In addition to this reporting, Separate Account Clients have the ability to access the portfolio holdings as they deem necessary through the custodian of the account. An audit may or may not be required depending on the Client.

ITEM 14. CLIENT REFERRALS AND OTHER COMPENSATION

As stated in Item 12, we may allocate portfolio transactions to brokers or dealers who provide research and/or related services. For a more detailed discussion of such practices, please refer to Item 12.

Employees of Highland Capital Funds Distributor, Inc. are compensated based on their activities in soliciting investors through FINRA and/or SEC registered intermediaries for Clients advised by our advisory affiliates and may be similarly compensated in respect of our future Clients.. These employees are compensated with a base salary and discretionary bonus. Unaffiliated persons may from time to time serve as solicitors for Highland and may be compensated for referrals. Any agreement with a solicitor will be in compliance with Rule 206(4)-3 of the Advisers Act.

ITEM 15. CUSTODY

Highland does not act as custodian for Client assets. However, under Rule 206(4)-2 under the Advisers Act, Highland is deemed to have custody of certain Client assets. In the case of Retail Funds and Unregistered Investment Funds, such Clients have made arrangements with qualified custodians as disclosed in the relevant offering and other fund documents. In addition, such Clients obtain additional financial statements which statements are provided to investors no later than 120 days following the fiscal year end. With respect to Structured Product Vehicles, the trustee has custody of the Client's assets in accordance with the relevant offering and other fund documents.

In the case of Separate Accounts, Clients may give Highland the power to withdraw funds or securities maintained with a custodian upon request. Without coming to a legal conclusion as to whether Highland would have custody over these assets, Highland operates as if it does have custody in such situations. Accordingly, unless an exception is available, any Separate Account Clients would receive an annual surprise custody audit and receive account statements from their broker-dealer, bank, or qualified custodian and should carefully review those statements. Separate Accounts Clients should carefully review those statements and, to the extent Highland also delivers statements to such Clients, compare the Highland statement to the statements of the qualified custodian. For tax and other purposes, the custodial statement is the official record of a Separate Account Client's account and assets.

Loans held in Client Accounts may be agented by NexBank, SSB. As Agent Bank, NexBank, SSB will receive cash or send cash to such Clients for interest or principal payments or borrowings. Client Accounts (other than Retail Funds) may also have bank accounts or account control agreements in place at NexBank, SSB. In such instances NexBank receives an independent control examination pursuant to Rule 206(4)-2.

ITEM 16. INVESTMENT DISCRETION

Highland advises a wide variety of Client Accounts and manages assets on a discretionary basis. For a description of limitations Clients may impose on our discretionary authority to manage securities, please see the section titled Our Advisory Business.

Highland accepts discretionary authority to manage Clients' assets through an investment management agreement with its Clients.

Additionally, before an investment may be made into an Unregistered Investment Fund, or other similar structure, Highland provides all potential investors in the fund with an offering document, which sets forth in detail the investment strategy and program. By completing the subscription documents to acquire an interest or shares in an Unregistered Investment Fund, investors give us complete authority to manage the capital contributed in accordance with the offering document received.

ITEM 17. VOTING CLIENT SECURITIES

SECURITIES HELD IN CLIENT ACCOUNTS

Highland's proxy voting policy ensures proxies are voted on behalf of each Client Account's securities and in the best economic interests of such Client Account, without regard to the interests of Highland or any other Client of Highland. Portfolio Manager(s) of the applicable Client Account(s) evaluate the subject matter of each proxy and vote on behalf of the Client Account in accordance to the guidelines set forth in our proxy voting policy. In any case where a Client has instructed the Company to vote in a particular manner on the Client's behalf, those instructions will govern in lieu of parameters set forth in the proxy voting policy.

If the Portfolio Manager(s) determines that Highland may have a potential material conflict of interest, whether actual or perceived, in voting a proxy, the Portfolio Manager(s) will contact Highland's Compliance Department prior to the voting deadline. In the event of a conflict, the Company may choose to address such conflict by: (i) voting in accordance with the Proxy Advisor's recommendation; (ii) the CCO determining how to vote the proxy (if the CCO approves deviation from the proxy advisor's recommendation, then the CCO shall document the rationale for the vote); (iii) "echo voting" or "mirror voting" the proxy in the same proportion as the votes of other proxy holders that are not Clients; or (iv) with respect to Clients other than Retail Funds, notifying the affected Client of the material conflict of interest and seeking a waiver of the conflict or obtaining such Client's voting instructions.

OBTAINING A COPY OF THE POLICY

Clients and prospective Clients can obtain a copy of the proxy voting policy or information on how Highland voted proxies by contacting Highland's Chief Compliance Officer at (972) 628-4100.

ITEM 18. FINANCIAL INFORMATION

Highland does not charge or solicit pre-payment of more than $1200 in fees per Client six or more months in advance.

Highland has discretionary authority or custody of Client funds or securities. There is no financial condition that is reasonably likely to impair our ability to meet contractual commitments to Clients.

ITEM 19. REQUIREMENTS FOR STATE-REGISTERED ADVISERS

Not Applicable.

EXHIBIT Q

FORM ADV PART 2A

ACIS CAPITAL MANAGEMENT, L.P.

June 29, 2018

300 Crescent Court, Suite 700
Dallas, Texas 75201
(972) 628-4100

This brochure provides information about the qualifications and business practices of Acis Capital Management, L.P., an investment adviser registered with the Securities and Exchange Commission. If you have any questions about the contents of this brochure, please contact us at (972) 628-4100. The information in this brochure has not been approved or verified by the United States Securities and Exchange Commission or by any state securities authority. Additional information about Acis Capital Management, L.P. is also available at the Securities and Exchange Commission's website www.adviserinfo.sec.gov. Our registration as an investment adviser does not imply any level of skill or training.

ITEM 2. MATERIAL CHANGES

The sole material change to this brochure since the last annual update dated March 31, 2018, is as follows:

On April 13, 2018, the Bankruptcy Court for the Northern District of Texas (the "Court") entered an Order for Relief placing Acis Capital Management, L.P. ("Acis") and Acis Capital Management GP, LLC ("Acis GP") in involuntary Chapter 7 bankruptcy. On May 11, 2018, the bankruptcy was converted into a Chapter 11 reorganization, and Robin Phelan, an attorney based in Dallas, Texas, was appointed by the Court as the trustee to oversee the bankruptcy (the "Trustee"). Mr. Phelan, in his capacity as Trustee, exercises discretionary control over all Acis investment decisions and transactions. Accordingly, the Trustee is a control person of both Acis and Acis GP. The bankruptcy proceeding is on-going. Highland Capital Management, L.P. continues to provide non-discretionary investment advice and back office services to Acis pursuant to subadvisory and shared service agreements with Acis.

ITEM 3. TABLE OF CONTENTS

ITEM 4. ADVISORY BUSINESS

Acis Capital Management, L.P. ("we", "us", "our", "Company", or "Acis") is an investment adviser registered with the SEC as an alternative fixed income manager since 2010. Acis specializes in investments in rated and unrated debt instruments relating to collateralized loan obligations. Our Client base consists of separate accounts, structured product vehicles, and unregistered investment funds at this time and may manage others from time to time.

OWNERSHIP OF ACIS

Acis is 100% owned, directly, or indirectly, by senior management. James Dondero and Mark Okada, directly or indirectly are principal owners of Acis.

Figures are in US$ millions as of 12/31/2017.

Total Assets Under Management	$3,114.22

By Vehicle Type:

Separate Accounts	$639.65
Structured Product Vehicles	$2,474.57

The stated AUM above is managed on a discretionary basis.

OUR ADVISORY SERVICES

Acis provides investment advisory services to single Client accounts ("Separate Accounts"), and provides advisory services to, unregistered investment funds ("Unregistered Investment Funds"), structured product vehicles (including but not limited to Collateralized Loan Obligations ("CLOs") and Collateralized Debt Obligations ("CDOs")), together with Separate Accounts, "Client Accounts" or "Clients").

Acis is an affiliate of Highland Capital Management, L.P. ("Highland"), a SEC registered investment advisor. Employees of Acis may also be employees of Highland. In addition, Highland provides Acis a variety of services mentioned herein pursuant to shared services and sub-advisory agreements, which services include, without limitation: advisory services, back office support, valuation services, legal and compliance services, administration, and tax and finance services. Payments to Highland under this agreement are funded solely by the Management Fee except for permitted fund expenses.

TAILORING SERVICES

We tailor our investment advice to the needs of our Clients and subject to applicable investment restrictions set forth in the governing documents for the applicable Clients.

ITEM 5. FEES AND COMPENSATION

For providing investment advisory services, Acis typically charges Clients a management fee and/or performance fee or carried interest, and other fees as necessary and agreed to (including, but not limited to, expenses related to servicing accounts, such as administration and legal services).

Under appropriate circumstances and where permitted by applicable law, the terms of an investment advisory contract, including fees, terms of payment and performance fees and termination provisions, are negotiable. In negotiating fees, Acis considers various factors, including assets under management, investment objectives, strategies and restrictions, and the resources required to meet investment objectives.

We have entered into service agreements with Highland Capital Management, L.P., a Delaware limited partnership ("HCM" or "Highland"), pursuant to which HCM will provide administrative, managerial and/or advisory services to the General Partner on mutually agreed terms. Payments from Acis to HCM pursuant to the service agreements are funded solely by the Management Fee, except for permitted account expenses that are borne by the applicable accounts.

Clients incur brokerage and other transaction costs associated with Acis' management of Client Accounts. Please see Item 12. Brokerage Practices of this ADV Part 2 for a discussion of Acis' brokerage practices.

FEE SCHEDULE

The following summary of fees is typically updated in this brochure annually (on or about March 31) and does not reflect subsequent changes unless expressly indicated otherwise. Fees in the below Fee Schedule are annualized.

Product	Management Fee	Performance Fee or Carried Interest	Other Fees
Separate Accounts	From 0.60% to 2.00%	Up to 20% over IRR on some accounts	None
Structured Products	From 0.15% to 0.85%	From 0.00% to 20.00%	None
Unregistered Investment Funds	From 0.7% to 2.00%	From 0.00% to 20.00%	None

Certain investment vehicles managed by Acis invest in other investment vehicles managed by Acis or our affiliates. For example, an Acis managed Separate Account purchase interest in the debt or equity of a CLO of which Highland acts as collateral manager. Both investment vehicles may impose management fees, performance fees or other expenses (including administrative fees). This results in greater expense to a Client than if such Client had invested directly in the underlying investment vehicle. Certain companies in which Clients are invested also use the products or services, or invest in investment vehicles, offered by Acis or its affiliates and pay fees or other compensation accordingly.

SEPARATE ACCOUNTS

For our Separate Accounts, the agreement entered into with Acis will determine the fee structure. Typically, a Separate Account will pay Acis management fees of 0.60% to 2.0% (per annum) based upon the average daily net assets, which may or may not be net of investment leverage. Acis may also collect a performance fee after reaching an internal rate of return ("IRR") for some accounts. Fees may be deducted from the Separate Account's assets in advance at the beginning of each calendar quarter.

STRUCTURED PRODUCT VEHICLES

As compensation for our advisory services, each Structured Product Vehicle pays Acis management fees ranging from 0.15% to 0.85% annually. Management fees are based on the principal balance of the assets held in the portfolio on defined determination dates. Management fees are established during structuring and remain constant for the duration of the life of the Structured Product Vehicle. Management fees also accrue during a payment period.

In addition to management fees, performance fees, and brokerage and transaction costs, investors in Structured Product Vehicles will indirectly bear the fees and expenses paid by the Structured Product Vehicle, including administration, legal, audit and accounting fees, and certain other fees and expenses. Each Structured Product Vehicle's governing documents include more detailed information about the fees and expenses paid by such Structured Product Vehicle.

Unregistered Investment Funds

As compensation for our advisory services, each Unregistered Investment Fund typically pays Highland management fees that range from 0.7% to 2.00% annually. Management fees are based upon outstanding capital accounts or amounts of committed capital and are deducted quarterly in advance or in arrears depending on the specific fund. For accounts that also provide for incentive compensation, Highland also deducts performance fees or investment profit allocations in the form of carried interest ranging from 0% to 20% of returns, which may be after the achievement of a hurdle rate, and which is typically contingent on the manager of the applicable Unregistered Investment Fund eclipsing the

high-water mark. In some cases, certain investors in an Unregistered Investment Fund enter into side letter agreements with Highland, under which they may pay a different fee than others based on the terms of their agreement with Highland or may otherwise receive certain additional rights. Upon termination of the applicable Unregistered Investment Fund's advisory agreement, any management fees that have been prepaid are generally returned on a pro-rated basis.

In addition to management fees, performance fees, and brokerage and transaction costs, investors in the Unregistered Investment Funds will indirectly bear the fees and expenses paid by the Unregistered Investment Funds, including custody fees, administration, legal, audit and tax preparation fees, and certain other fees and expenses. Each Unregistered Investment Fund's offering documents include more detailed information about the fees and expenses paid by such Unregistered Investment Fund.

OTHER COMPENSATION

Client Accounts may hold significant positions, individually or collectively, directly or indirectly, in the securities issued by a company. Accordingly, Acis or an affiliate may have the right to appoint a board member or officer for such company. Acis or an affiliate may appoint an employee or a third party to such position as it sees fit in the best interest of the company and its Clients. Employee are permitted to retain all compensation received for such positions except to the extent contrary to the governing documents for one or more Client Accounts, in which case the proportion of such compensation related to such Client Account(s) will be paid to those Account(s) (generally in proportion to relative assets of the Client Account as of the date paid).

In addition, to the extent permitted by the offering and/or governing documents of the applicable advised accounts, Acis and/or its affiliates receive other fees for services provided to portfolio companies, provided such fees are on arms-length terms and approved by the Board of Directors or other governing body of the applicable portfolio company. See also Item 10. Other Financial Industry Activities and Affiliations.

We have established procedures designed to address possible conflicts of interest that such board or officer positions might present, including requiring authorization from the Chief Compliance Officer prior to an officer or employee serving as a board member. As a result of such activities, Acis may acquire confidential information, which may restrict Client Accounts from transacting in certain securities. As a result, we may not initiate a transaction on behalf of Clients which we otherwise might have.

Please see Item. 6 Performance-Based Fees and Side-By-Side Management of this ADV Part 2 for additional information regarding performance fees or investment profit allocations in the form of carried interest.

ITEM 6. PERFORMANCE-BASED FEES AND SIDE-BY-SIDE MANAGEMENT

As described above, certain Clients pay Acis a performance fee or investment profit allocations in the form of carried interest. To the extent that Acis charges a performance-based fee, the performance-based fee will comply with the requirements of Section 205 and Rule 205-3 under the Investment Advisers Act of 1940 (the "Advisers Act"). In situations where Acis has entered into a performance fee arrangement, it has an economic incentive to make riskier investments and/or pursue riskier strategies than it might otherwise. In addition, because Acis manages both accounts with an asset-based fee and accounts with a performance fee or a combination of an asset-based fee and performance fee, we have an incentive to favor Client accounts for which we receive a performance-based fee. In addition, Acis and its principals also make investments through a number of proprietary accounts, including Acis Capital Management, L.P. In order to mitigate any such conflicts, Acis has also developed allocation of limited offering securities (such as IPOs and registered secondary offerings) procedures intended to result in fair and equitable allocation over time. To mitigate any actual or perceived conflicts of interest, allocation to principal accounts that do not include third party investors may only be made after all other Client Account orders for the security have been filled. A more detailed summary of our allocation guidelines is available to Clients or prospective Clients upon request.

A description of performance-based fees is included in the section titled Fees and Compensation.

ITEM 7. TYPES OF CLIENTS

Our Clients include:

- Separate Accounts
- Structured Product Vehicles
- Unregistered Investment Funds

Investment advice is provided directly to Clients and not individually to investors in a particular Client.

Acis has minimum account requirements for Unregistered Investment Funds, Structured Product Vehicles and Separate Accounts and generally requires a minimum investment of $100,000 to $50 million depending on the structure. Minimum account size may be waived for certain investors at Acis' discretion.

ITEM 8. METHODS OF ANALYSIS, INVESTMENT STRATEGIES, AND RISK OF LOSS

The items below are types of investment strategies we currently utilize although we may add or subtract from this list based on various factors including macro-economic conditions.

INVESTMENT STRATEGIES

CLO Strategy

The primary focus is investing and trading in rated and unrated debt instruments relating to collateralized loan obligations ("CLO" or "CLO Securities") in the primary and secondary markets. CLO securities rates of return are determined primarily by reference to the total rate of return on one or more loans referenced in such instruments. The rate of return on the CLO securities may be determined by applying a multiplier to the rate of total return on the reference loan or loans.

Floating Rate Loan Strategy

This strategy seeks to achieve its objective by investing, under normal market conditions, approximately 80% of its net assets in a portfolio of interests in adjustable rate senior loans, the interest rates of which float or vary periodically based upon a benchmark indicator of prevailing interests rates, to domestic or foreign corporations, partnerships and other entities that operate in a variety of industries and geographic regions. The strategy may invest all or substantially all of its assets in senior loans that are rated below investment grade and unrated senior loans of comparable quality. This strategy may also include investments in (i) high quality, short-term debt securities; (ii) warrants, equity securities and junior debt securities; (iii) senior loans of foreign issuers that are foreign currency denominated; and (iv) senior loans the interest rate of which are fixed and do not float.

Structured Finance Investments

Acis invests in various structured finance instruments, including asset-backed securities; collateralized loan obligations and collateralized debt obligations; and swaps (including total rate of return swaps) whose rates of return are determined primarily by reference to the total rate of return on one or more loans referenced in such instruments. The rate of return on the structured finance instrument may be determined by applying a multiplier to the rate of total return on the reference loan or loans. Application of a multiplier is comparable to the use of financial leverage, a speculative technique. Leverage magnifies the potential for gain and the risk of loss, because of a relatively small decline in the value of a reference loan could result in a relatively large loss for the value of a structured finance instrument.

METHOD OF ANALYSIS

For all Client Accounts, we utilize both fundamental and technical analysis methods. Our investment philosophy is rooted in a value-oriented, long-term approach, which combines bottom-up research with top-down technical market analysis. Our analysts follow a rigorous and time-tested bottom-up credit analysis for each credit we manage. We have also devised and applied an institutionalized process of credit evaluation and approval, via our Investment Committee, and have built a dedicated experienced restructuring team that has been integrated into Acis' investment process.

Acis' self-discipline is largely enforced by the ongoing monitoring of individual credit names by the responsible analyst and his or her supervisor.

Other sources of information include obtaining and reviewing due diligence packages prepared by debt issuers and underwriters of institutional private placements and meetings with management of issuers.

MATERIAL RISKS OF SIGNIFICANT STRATEGIES AND METHODS OF ANALYSIS:

In this section we summarize some of the material risks of Acis' investment strategies and methods of analysis. More complete information about the specific risks associated with each strategy or Client Account is available in the applicable offering documents. All methods of investments in securities and loans involve risk of loss including risk that a Client will lose the entire value of their investment.

Allocation of Investments

There is a risk that the allocations methodology employed by Acis will not result in optimal allocation and may disadvantage one Client Account while benefiting another Client Account. Since the process involves human input, there is the risk that human error may cause harm to a Client Account. Poor or mistaken allocation decisions could result in the loss of money for investors.

Credit Risk

Clients engage in transactions in securities and financial instruments that involve counterparties. Under certain conditions, a counterparty to a transaction could default or the market for certain securities and/or financial instruments may become illiquid. There is a risk that the issuer of a fixed income security will be unable to make timely principal and interest payments on the security. Certain Clients invest in securities rated below investment grade (which are commonly referred to as "high yield" securities or "junk" securities). These investments are regarded as predominately speculative with respect to the issuer's continuing ability to meet principal and interest payments. The downgrade of a security held by a Client

Account may decrease its value. Securities are subject to varying degrees of credit risk, which are often reflected in ratings assigned by commercial rating companies such as Moody's Investor Service, Standard & Poor's Corporation, Duff & Phelps Credit Rating Co. and Fitch Investors Service.

Currency Risk

If a Client Account invests directly in non-U.S. currencies or in securities of issuers that trade in, and receive revenues in, non-U.S. currencies, or in derivatives that provide exposure to non-U.S. currencies, it will be subject to the risk that those currencies will decline in value relative to the U.S. dollar, or, in the case of hedging positions, that the U.S. dollar will decline in value relative to the currency being hedged. Currency rates in foreign countries may fluctuate significantly over short periods of time for a number of reasons, including changes in interest rates, intervention (or the failure to intervene) by U.S. or foreign governments, central banks or supranational entities such as the International Monetary Fund, or by the imposition of currency controls or other political developments in the United States or abroad. As a result, a Client's investments in foreign currency-denominated securities may reduce the returns of the Client Account.

Derivatives Risk

Derivatives, such as futures and options, are subject to the risk that changes in the value of a derivative may not correlate perfectly with the underlying asset, rate or index. Derivatives also expose the Client to the credit risk of the derivative counterparty. Derivative contracts may expire worthless and the use of derivatives may result in losses to the Client.

Frequency of Trading

Some of the strategies and techniques to be employed by Acis require frequent trades to take place and, as a consequence, portfolio turnover and brokerage commissions will be greater than for other investment vehicles of similar size that do not employ frequent trading techniques.

Hedging

Acis may (but is not required to) utilize financial instruments both for investment purposes and for risk management purposes in order to (i) protect against possible changes in the market value of a Client Account resulting from fluctuations in the markets and changes in interest rates; (ii) protect the unrealized gains in the value of a Client Account; (iii) facilitate the sale of any such investments; (iv) enhance or preserve returns, spreads or gains on any investment in a Client Account; (v) hedge against a directional trade; (vi) hedge the interest rate, credit or currency exchange

rate on any of financial instruments; (vii) protect against any increase in the price of any financial instruments Acis anticipates purchasing at a later date; or (viii) act for any other reason that Acis deems appropriate. For a variety of reasons, Acis may not seek to establish a perfect correlation between such hedging instruments and the portfolio holdings being hedged. Such imperfect correlation may prevent a Client from achieving the intended hedge or expose the Client to risk of loss. The successful utilization of hedging and risk management transactions requires skills complementary to those needed in the selection of portfolio holdings. Moreover, it should be noted that the Client Account will be exposed to certain risks that cannot be hedged.

Illiquid Securities

Acis may cause a Client to invest in a security that is illiquid. This could present a problem in realizing the prices quoted (selling a bond at or near its true value) and in effectively trading the position(s). The primary measure of liquidity is the size of the spread between the bid price and the offer price quoted by a dealer. The greater the dealer spread, the greater the liquidity risk. Liquidity risk is less relevant for investments that are intended to be held until maturity. Lack of liquidity means Acis may not be able to sell such investments at prices that reflect Acis' assessment of their value or the amount paid for such investments. Illiquidity may result from the absence of an established market for the investments as well as legal, contractual or other restrictions on their resale by Acis and other factors. Furthermore, the nature of Acis' investments, especially those in financially distressed companies, may require a long holding period prior to profitability.

Inflation Risk

Inflation risk results from the variation in the value of cash flows from a security due to inflation, as measured in terms of purchasing power. For example, if Acis purchases a 5 year bond in which it can realize a coupon rate of 5 percent, but the rate of inflation is 6 percent, then the purchasing power of the cash flow has declined. For securities other than adjustable bonds or floating rate bonds, the investment is exposed to inflation risk because the interest rate the issuer promises to make is fixed for the life of the security. To the extent that interest rates reflect the expected inflation rate, floating rate bonds have a lower level of inflation risk.

Investments in Distressed Assets

Debt obligations and other securities of distressed companies will by their nature relate to companies in unstable financial condition and entail substantial inherent risks. Consequently, many of these companies will likely have significantly leveraged capital structures, making them highly sensitive to declines in revenues and to increases in expenses and interest rates. The leveraged capital structure of such

investments will increase the exposure of the portfolio companies to adverse economic factors such as downturns in the economy or deterioration in the condition of the portfolio company or its industry. Distressed investing also involves significant expenses of legal counsel, experts, consultants and other third parties.

Investments in Equity Securities

Investments in public equities are subject to the risk that stock prices will fall over short or long periods of time. In addition, common stock represents a share of ownership in a company, and rank after bonds and preferred stock in their claim on the company's assets in the event of bankruptcy.

Investments in Foreign Securities

A Client may invest a portion of its assets in securities of companies domiciled or operating in one or more foreign countries. Investing in foreign securities involves considerations and possible risks not typically involved in investing in securities of companies domiciled and operating in the U.S., including instability of some foreign governments, the possibility of expropriation, limitations on the use or removal of funds or other assets, foreign currency risk, changes in governmental administration or economic or monetary policy (in the U.S. or abroad) or changed circumstances in dealings between nations. The application of foreign tax laws (e.g., the imposition of withholding taxes on dividend or interest payments) or confiscatory taxation may also affect investment in foreign securities. Higher expenses may result from investment in foreign securities than would from investment in domestic securities because of the costs that must be incurred in connection with conversion between various currencies and foreign brokerage commissions that may be higher than in the U.S. Foreign securities markets also may be less liquid, more volatile and subject to less governmental supervision than in the U.S., including lack of uniform accounting, auditing and financial reporting standards and potential difficulties in enforcing contractual obligations.

Investments in Structured Finance Instruments

Acis may cause Clients to invest in structured finance instruments. A portion of leveraged loans, high yield debt securities, structured finance instruments and synthetic securities (collectively the "Collateral Debt Obligations") may consist of equipment trust certificates, collateralized mortgage obligations, collateralized bond obligations, collateralized loan obligations or similar instruments. Structured finance instruments present risks similar to those of the other types of Collateral Debt Obligations in which the Client may invest and such risks may be of greater significance in the case of structured finance instruments. Moreover, investing in structured finance instruments entails a variety of unique risks, including prepayment risk. In addition, the performance of a structured finance instrument

will be affected by a variety of factors, including its priority in the capital structure of the issuer thereof, the availability of any credit enhancement, the level and timing of payments and recoveries on and the characteristics of the underlying receivables, loans or other assets that are being securitized, remoteness of those assets from the originator or transferor, the adequacy of and ability to realize upon any related collateral and the capability of the servicer of the securitized assets. Each structured finance instrument to be purchased by a Client must be rated by a rating agency.

Investments in Synthetic Securities

Acis may cause Clients to invest in synthetic securities. In addition to credit risks associated with holding non-investment grade loans and high yield debt securities, with respect to synthetic securities, Acis or its Clients will usually have a contractual relationship only with the counterparty of such synthetic securities, and not the obligor on a reference obligation (the "Reference Obligor"). Such agreement generally stipulates that Acis or its Client will have no right to directly enforce compliance by the Reference Obligor with the terms of the reference obligation (defined herein as the debt security or other obligation upon which the synthetic security is based), nor any rights of set-off against the Reference Obligor, nor have any voting rights with respect to the reference obligation. In addition, in the event of insolvency of the counterparty, the Client will be treated as a general creditor of such counterparty, and will not have any claim with respect to the reference obligation. Consequently, the Client will be subject to the credit risk of the counterparty as well as that of the Reference Obligor. As a result, concentrations of synthetic securities in any one counterparty subject the notes to an additional degree of risk with respect to defaults by such counterparty as well as by the Reference Obligor. Acis will not perform independent credit analyses of the counterparties, any such counterparty, or an entity guaranteeing such counterparty, individually or in the aggregate.

*Investments in Senior Secured Loan*s

Senior secured loans have significant credit risks and material losses may occur. As with other debt obligations, claims and collateral may be difficult to enforce in the event of a default. No assurance can be made that full or significant recovery of principal and/or interest will be received or that any collateral recovered will be marketable or sufficient.

Leverage

When deemed appropriate by Acis and subject to applicable regulations, a Client may use leverage in its investment program, including the use of borrowed funds and investments in certain types of options, such as puts, calls and warrants, which may be purchased for a fraction of the price of the underlying securities while giving the purchaser the full benefit of movement in the market of those underlying securities.

While such strategies and techniques increase the opportunity to achieve higher returns on the amounts invested, they also increase the risk of loss. To the extent a Client purchases securities with borrowed funds, its net assets will tend to increase or decrease at a greater rate than if borrowed funds are not used. The level of interest rates generally, and the rates at which such funds may be borrowed in particular, could affect the operating results of the Client. If the interest expense on borrowings were to exceed the net return on the portfolio securities purchased with borrowed funds, the Client's use of leverage would result in a lower rate of return than if the Client were not leveraged.

Maturity Risk

In certain situations, Acis may purchase a bond of a given maturity as an alternative to another bond of a different maturity. Ordinarily, under these circumstances, Acis will make an adjustment to account for the differential interest-rate risks in the two bonds. This adjustment, however, makes an assumption about how the interest rates at different maturities will move. To the extent that the yield movements deviate from this assumption, there is a yield-curve or maturity risk. Another situation where yield-curve risk should be considered is in the analysis of bond swap transactions where the potential incremental returns are dependent entirely on the parallel shift assumption for the yield curve.

Market or Interest Rate Risk

The price of most fixed income securities move in the opposite direction of the change in interest rates. For example, as interest rates rise, the prices of fixed income securities fall. If a Client holds a fixed income security to maturity, the change in its price before maturity will have little impact on the Clients performance; however, if the Client has to sell the fixed income security before the maturity date, an increase in interest rates will result in a loss. Senior secured bank loans generally pay interest at rates that are determined periodically by reference to a base lending rate plus a premium. These rates often are re-determined daily, monthly, quarterly or semi-annually. Recently, domestic and international markets have experienced a period of acute stress starting in the real estate and financial sectors and then moving to other sectors of the world economy. This stress has resulted in unusual and extreme volatility in the equity and debt markets and in the prices of individual investments. These market conditions could add to the risk of short-term volatility of investments.

Options

A Client may use a number of option strategies. Put options and call options typically have similar structural characteristics and operational mechanics regardless of the underlying instrument on which they are purchased or sold. A put option gives the purchaser of the option, upon payment of a premium, the right to sell, and the writer

the obligation to buy, the underlying security, commodity, index, currency or other instrument at the exercise price. A call option, upon payment of a premium, gives the purchaser of the option the right to buy, and the seller the obligation to sell, the underlying instrument at the exercise price.

With certain exceptions, exchange listed options generally settle by physical delivery of the underlying security or currency, although in the future cash settlement may become available. Index options are cash settled for the net amount, if any, by which the option is "in-the-money" (i.e., where the value of the underlying instrument exceeds, in the case of a call option, or is less than, in the case of a put option, the exercise price of the option) at the time the option is exercised. Frequently, rather than taking or making delivery of the underlying instrument through the process of exercising the option, listed options are closed by entering into offsetting purchase or sale transactions that do not result in ownership of the new option. The Client's ability to close out its position as a purchaser or seller of a listed put or call option is dependent, in part, upon the liquidity of the option market.

Over-the-counter ("OTC") options are purchased from or sold to securities dealers, financial institutions or other parties ("Counterparties") through direct bilateral agreement with the Counterparty. In contrast to exchange listed options, which generally have standardized terms and performance mechanics, all the terms of an OTC option, including such terms as method of settlement, term, exercise price, premium, guarantee, and security, are set by negotiation of the parties. Unless the parties provide for it, there is no central clearing or guaranty function in an OTC option. As a result, if the Counterparty fails to make or take delivery of the security, currency or other instrument underlying an OTC option it has entered into with the Client or fails to make a cash settlement payment due in accordance with the terms of that option, the Client will lose any premium it paid for the option as well as any anticipated benefit of the transaction.

If a put or call option purchased by the Client were permitted to expire without being sold or exercised, its premium would be lost by the Client. The risk involved in writing a put option is that there could be a decrease in the market value of the underlying security caused by rising interest rates or other factors. If this occurred, the option could be exercised and the underlying security would then be sold to the Client at a higher price than its current market value. The risk involved in writing a call option is that there could be an increase in the market value of the underlying security caused by declining interest rates or other factors. If this occurred, the option could be exercised and the underlying security would then be sold by the Client at a lower price than its current market value. Purchasing and writing put and call options and, in particular, writing "uncovered" options are highly specialized activities and entail greater than ordinary investment risks.

Valuation of Portfolio Investments

From time to time, special situations affecting the valuation of the investments (such as limited liquidity, unavailability or unreliability of third-party pricing information and acts or omissions of service providers to the Client) could have an impact on the value of a Client's investment, particularly if prior judgments as to the appropriate valuation of an investment should later prove to be incorrect after a net asset value-related calculation or transaction is completed. Generally, Acis is not required to make retroactive adjustments to prior subscription or withdrawal transactions, management fees or performance allocations based on subsequent valuation data. In addition, Acis may, but is not required to, discount the value of its positions due to limited liquidity, concentration levels or for other reasons. Due to the nature of its investments, Acis may not be able to place a precise value on positions and therefore may need to estimate values.

ITEM 9. DISCIPLINARY INFORMATION

Not Applicable.

ITEM 10. OTHER FINANCIAL INDUSTRY ACTIVITIES AND AFFILIATIONS

Acis and its advisory affiliates manage various strategies and some strategies are managed by more than one adviser. For this reason certain Clients of Acis (or Clients of Acis' advisory affiliates) may be referred to and enter into advisory agreements with such affiliated adviser. Neither Acis nor its advisory affiliates charge a fee for such referral or receive any portion of the advisory fees charged Clients managed by an affiliated adviser.

As shared in Item 4. Advisory Business, Acis may use the services of affiliates to service its' Clients. Acis believes using such services benefits Clients as a whole as the reserves available to them are greater.

BROKER-DEALER, BANKING, AND CONSULTING AFFILIATES

Acis is under common control with Nexbank Capital Inc., whose wholly owned subsidiaries include Nexban Securities, Inc. (also doing business as Nexbank Capital Advisors and Nexbank Wealth Advisors)("NexBank Securities"), and NexBank SSB. Certain employees of Acis, including James Dondero and Mark Okada, serve on the Board of Directors of NexBank.

NexBank Securities, Inc.

NexBank Securities is a registered broker-dealer and a Member of FINRA/SIPC. It may provide distribution assistance in connection with the sale or placement of funds managed by Acis. NexBank Securities, Inc., also doing business as NexBank Wealth Advisors, is also a SEC registered investment adviser.

NexBank, SSB

NexBank, SSB, a state chartered bank, is an affiliate of Acis and may, from time to time, provide banking and agency services to portfolio companies in which Client Accounts may be invested. Client Accounts and portfolio companies may invest in assets originated by, or enter into loans, borrowings and/or financings with NexBank, including in primary or secondary transactions. These services generally may result in compensation to NexBank, SSB in various forms, including administrative agent fees, structuring fees, origination and syndication fees, and assignment fees. As a result, we have an incentive to select, or attempt to influence the selection of, NexBank for such services. Fees are charged at rates competitive with those offered by third parties. Acis may also refer Client Accounts or controlled investments to NexBank, SSB for banking services. NexBank, SSB may charge its customary fees for the provision of such banking services.

To the extent permitted by applicable law, NexBank, SSB, may sell or offer participations to Acis Accounts in a variety of commercial loans for which NexBank will receive compensation.

Highland Capital Funds Distributor, Inc.

Highland Capital Funds Distributor, Inc., a SEC-registered broker dealer and a Member of FINRA/SIPC, is under common control through James Dondero's indirect ownership of Highland Capital Funds Distributor. It may provide distribution assistance in connection with the sale or placement of funds managed by Highland.

INVESTMENT ADVISER AFFILIATES

A related person of Acis is the general partner of a number of other collective investment vehicles organized as partnerships including those managed by the following affiliated investment advisers:

Acis CLO Management, LLC

Acis CLO Management, LLC is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Acis CLO Management, LLC is under common control with Highland.

Falcon E&P Opportunities GP, LLC

Falcon E&P Opportunities GP, LLC, a SEC-registered investment adviser, may be deemed to be under common control with us because James Dondero controls this entity.

Granite Bay Advisors, L.P.

Granite Bay Advisors, L.P., a SEC-registered investment adviser, is under common control with Acis because the owners of Acis own substantially all of Granite Bay Advisors, L.P.

Highland Capital Management, L.P.

Highland is a SEC-registered investment adviser, and under common control with Acis because the owners of Acis own substantially all of Highland. Highland also acts as sub-adviser for Acis advised funds.

Highland Capital Management Fund Advisors, L.P.

Highland Capital Management Fund Advisors, L.P., a SEC-registered investment adviser, is under common control with us because James Dondero controls the Highland Capital Management Fund Advisors general partner.

Additionally, Highland Capital Management Fund Advisors serves as advisor or sub-advisor to investment companies registered under the Investment Company Act of 1940, as amended.

Highland Capital Management Latin America, L.P.

Highland Capital Management Latin America, L.P. is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Highland Capital Management Latin America is under common control with Highland.

Highland Capital Management Korea Limited

Highland Capital Management Korea Limited is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Highland Capital Management Korea Limited is under common control with Highland.

Highland HCF Advisor, Ltd.

Highland HCF Advisor, Ltd. is a Relying Adviser and files a single Form ADV with Highland, the Filing Adviser. Therefore, Highland HCF Advisor is under common control with Highland.

NexPoint Advisors, L.P.

NexPoint Advisors, L.P., a SEC-registered investment adviser, is under common control with us because James Dondero controls the NexPoint Advisors general partner.

NexPoint Real Estate Advisors II, L.P.

NexPoint Real Estate Advisors II, L.P., a SEC-registered investment adviser, is under common control with us because James Dondero controls the NexPoint Real Estate Advisors II general partner.

Thomas Surgent, our Chief Compliance Officer, is also the Chief Compliance Officer of Acis CLO Management, LLC, Highland Capital Management, L.P., Granite Bay Advisors, L.P., Highland Capital Management Latin America, L.P., Highland Capital Management Korea Limited, Highland HCF Advisor, Ltd., and NexPoint Real Estate Advisors II, L.P. Jason Post is the Chief Compliance Officer of Highland Capital Management Fund Advisors, L.P., and

NexPoint Advisors, L.P. Eric Holt is the Chief Compliance Officer of NexBank Securities, Inc., also doing business as NexBank Advisors.

Highland and/or Highland personnel provide advisory services to each of these affiliated investment advisors, with the exception of Falcon E&P Opportunities GP, LLC, either through sub-advisory or "dual hatting" arrangements with respect to Highland personnel. In addition, Highland is a party to Shared Services Agreement with each of these advisors, under which Highland provides certain administrative and back office services to such advisors, including finance and accounting, human resources, marketing, legal, information technology and operations.

INSURANCE COMPANY AFFILIATES

Highland Capital Management Services, Inc. is an affiliate of Acis and parent company of Governance Re Ltd., a captive insurance agency issuing directors & officers' liability insurance and employment practice liability insurance to Acis, its affiliates, and their respective portfolio companies. NexVantage Title Services is a title insurance company affiliated with NexBank and Highland, which may provide title insurance with respect to real property investments owned by Client Accounts or their portfolio companies. A conflict of interest exists due to the fact that these entities receive premiums from portfolio companies of Client Accounts. As a result, Acis is incentivized to choose these affiliates to provide these services over a third party even though such party's services may be better suited for the company.

INDEPENDENT BUSINESS ENTITIES

Employees, including the owners, of Acis also own personal interests in a variety of independent business entities. A conflict of interest exists due to the potential for the owners' personal relationships and financial interests to conflict with our Client's interests.

BUSINESS ACTIVITIES WITH PORTFOLIO COMPANIES

Acis or its affiliates provide on a periodic basis certain services to portfolio companies including, but not limited to, forensic accounting, interim management consulting services and merger and acquisition advisory services. Acis or our affiliates may also furnish operational consulting services to certain portfolio companies of Acis' Clients. The time spent with respect to such activities depends upon a number of factors including the size of the investment, the relationship with the portfolio company and the financial and strategic position of such company. Acis or its affiliated advisors (including employees) may be directly or indirectly compensated for such services provided such compensation is received as a result of an arm's length contract between the company and such person. Employees of Acis may be granted equity or options in the portfolio companies for which they provide certain services.

Additional information regarding potential conflicts of interest arising from Acis' relationship and activities with its affiliates is provided in the section titled Code of Ethics, Participation or Interest in Client Transactions and Personal Trading.

ITEM 11. CODE OF ETHICS, PARTICIPATION OR INTEREST IN CLIENT TRANSACTIONS AND PERSONAL TRADING

Acis maintains a policy of strict compliance with the highest standards of ethical business conduct and the provisions of applicable federal securities laws, including rules and regulations promulgated by the SEC, and has adopted policies and procedures described in its Code of Ethics. The Code of Ethics applies to each employee of Acis and any other "access person" as defined under the Advisers Act. It is designed to ensure compliance with legal requirements of Acis' standard of business conduct.

A complete copy of Acis' Code of Ethics is available to any Client or prospective Client upon request.

STANDARDS OF CONDUCT

Acis and its access persons are expected to comply with all applicable federal and state laws and regulations. Access persons are expected to adhere to the highest standards of ethical conduct and maintain confidentiality of all information obtained in the course of their employment and bring any risk issues, violations, or potential violations to the attention of the Chief Compliance Officer. Access persons are expected to deal with Clients fairly and disclose any activity that may create an actual or potential conflict of interest between them and Acis or Client.

ETHICAL BUSINESS PRACTICES

Falsification or alteration of records or reports, also known as a prohibited financial practice, or knowingly approving such conduct is prohibited. Payments to government officials or employees are prohibited except for political contributions approved by our Chief Compliance Officer. We seek to outperform our competition fairly and honestly and seek competitive advantages through superior performance not illegal or unethical dealings. Access persons are strictly prohibited from (i) participating in online blogging and communication with the media, unless approved by the Chief Compliance Officer or the Compliance Department, and (ii) spreading of false rumors pertaining to any publicly traded company.

CONFIDENTIALITY

Employees must maintain the confidentiality of Acis' proprietary and confidential information, and must not disclose that information unless the necessary approval is obtained. Acis has a particular duty and responsibility, as investment adviser, to safeguard Client information. Information concerning the identity and transactions of investors is

confidential, and such information will only be disclosed to those employees and outside parties who need to know it in order to fulfill their responsibilities.

GIFT AND ENTERTAINMENT POLICY

Access persons are permitted, on occasion, to accept gifts and invitations to attend entertainment events. When doing so, however, employees should always act in our best interests and that of our Clients and should avoid any activity that might create an actual or perceived conflict of interest or impropriety in the course of our business relationship. Under no circumstances may (i) gifts of cash or cash equivalents be accepted or (ii) may any gifts be received in consideration or recognition of any services provided to or transactions entered into by, Client Accounts.

PERSONAL TRADING

Personal Trading Policy

Access persons are allowed to trade reportable securities during designated time periods, however all transactions in reportable securities other than ETFs must be pre-approved by the Chief Compliance Officer or his/her designee. Except in very limited circumstances approved by the Chief Compliance Officer, access persons are not permitted to trade any security of which we or a Client own any portion of the capital structure or that is on our restricted list without permission. Access persons who violate the personal trading policy are reprimanded in accordance with the sanctions provisions outlined in the Code of Ethics. Personal securities transactions are reviewed by the Chief Compliance Officer or his/her designee for compliance with the personal trading policy and applicable SEC rules and regulations.

Prohibition against Insider Trading

Acis forbids any access person from trading, either personally or on behalf of others, including Clients advised by Acis, on material non-public information or communicating material non-public information to others in violation of the law or duty owed to another party. This conduct is frequently referred to as "insider trading". The concepts of material non-public information, penalties for insider trading, and processes for identifying insider trading are addressed in detail in the Compliance Manual and Code of Ethics.

Reporting Requirements

In compliance with SEC rules, access persons are required to disclose all of their personal brokerage accounts and holdings within 10 days of initial employment with Acis, within 10 days of opening a new account, and annually thereafter. Additionally, no later than the last day of the month after quarter-end, all access persons must

report all transactions in reportable securities over which the access person had any direct or indirect beneficial ownership. Access persons are also required annually to affirm all reportable transactions from the prior year.

POTENTIAL CONFLICTS

Acis and its affiliates engage in a broad range of activities, including activities for their own account and for the accounts of Clients. This section describes various potential conflicts that may arise in respect of its business, as well as how Acis addresses such conflicts of interest. The discussion below does not describe all conflicts that may arise.

Any of the following potential conflicts of interest will be discussed and resolved on a case by case basis. Acis' determination as to which factors are relevant, and the resolution of such conflicts, will be made using Acis' best judgment, but in its sole discretion. In resolving conflicts, Acis will take into consideration the interests of the relevant Clients, the circumstances giving rise to the conflict and applicable laws. Certain procedures for resolving specific conflicts of interest are set forth below.

Allocation of Investment Opportunities

Acis, together with its affiliates, may act as investment adviser to Clients that have similar investment objectives and pursue similar strategies. Certain investments identified by Acis may be appropriate for multiple Clients. Investment decisions for such Clients are made by Acis and the applicable affiliates in their best judgment, but in their discretion, taking into account such factors as Acis believes relevant. Such factors may include investment objectives, regulatory restrictions, current holdings, availability of cash for investment, the size of investments generally, risk-return considerations, tax consequences, and limitations and restrictions on a Client's account that are imposed by such Client. In addition, if it is fair and reasonable that certain Clients are fully filled of their appetite before others (e.g., for tax considerations, to avoid de minimis partial allocations, to cover or close out an existing position to mitigate risk or losses, etc.), then these Clients may receive full or disproportionate allocations, with the remaining amounts allocated in accordance with normal procedures among the other participating Clients. One or more of the foregoing considerations in this paragraph may (and are often expected to) result in allocations among accounts other than on a pari passu basis. Accordingly, particular investment may be bought or sold for only one Client or in different amounts and at different times for more than one but less than all Clients, even though it could have been bought or sold for other Clients at the same time. Likewise, a particular investment may be bought for one or more Clients when one or more other Clients are selling the investment. In addition, purchases or sales of the same investment may be made for two or more Clients on the same date. There can be no assurance that a Client will not receive less (or more) of a certain investment than it would otherwise

receive if Acis, together with its affiliates, did not have a conflict of interest among Clients.

In effecting transactions, it is not always possible, or consistent with the investment objectives of Acis' and its affiliates' various Clients, to take or liquidate the same investment positions at the same time or at the same prices. Certain investment restrictions may limit Acis' and its affiliates' ability to act for a Client and may reduce performance. Regulatory and legal restrictions (including restrictions on aggregation of positions) may also restrict the investment activities of Acis and result in reduced performance.

Acis seeks to manage and/or mitigate these potential conflicts of interest described by following procedures with respect to the allocation of investment opportunities among its and its affiliates' Clients, including the allocation of limited investment opportunities. Our allocation policy is based on a fundamental desire to treat each Client Account fairly over time. Please refer to the Investment Discretion – *Allocation Conflicts* section for a more detailed explanation of Acis' allocation process.

In addition to the investment strategies implemented by the portfolio managers for each of our Clients, such portfolio managers may also give trading desk personnel of the adviser general authorization to enter into a limited amount of short-term trades (purchases expected to be sold within 15 business days) in debt instruments on behalf of such Clients. Over time, it is expected that these trades will not exceed 2% of each such Client's assets. Such investments executed by authorized traders are generally allocated on a weighted rotational basis, based on the AUM of the accounts eligible to participate in such investment opportunities.

Investment Negotiation

In order to ensure compliance with Section 17(d) under the Investment Company Act whenever an investment professional proposes to negotiate a term other than price for an investment (including any amendments), he/she must check to see if the investment (or any other position in the issuer's capital structure) is held (or proposed to be invested) in any retail accounts of our advisory affiliates.

If the investment is held in any retail accounts, that person must contact the Chief Compliance Officer for guidance.

(i) The transaction is generally permitted if all accounts are in the same part of the capital structure and participate in the investment pro rata

(ii) Alternatively, impose "Chinese Wall" between retail/institutional investment decision-making

One person can negotiate, provided final investment decision still made separately.

May also consult outside counsel and/or the retail board for guidance.

Capital Structure Conflicts

Conflicts will arise in cases when Clients of Acis and its affiliates invest in different parts of an issuer's capital structure, including circumstances in which one or more Clients own private securities or obligations of an issuer and other Clients may own public securities of the same issuer. In addition, one or more Clients may invest in securities, or other financial instruments, of an issuer that are senior or junior to securities, or financial instruments, of the same issuer that are held by or acquired for, one or more other Clients. If such issuer encounters financial problems, decisions related to such securities (such as over the terms of any workout or proposed waivers and amendments to debt covenants) will raise conflicts of interests. For example, a Client holding debt securities of the issuer may be better served by a liquidation of the issuer in which it may be paid in full, whereas a Client holding equity securities of the issuer might prefer a reorganization that holds the potential to create value for the equity holders.

In the event of conflicting interests within an issuer's capital structure, Acis will generally pursue the strategy that Acis, together with its affiliated advisers, reflects what would be expected to be negotiated in an arm's length transaction with due consideration being given to our fiduciary duties to each of our accounts (without regard to the nature of the fees received from such accounts):

- This strategy may be recommended by one or more Acis or affiliated investment professionals
- A single person may represent more than one part of an issuer's capital structure
- The recommended course of action will be presented to our Conflicts Committee for final determination as to how to proceed. We may elect, but are not required, to assign different teams to make recommendations for different parts of the capital structure as the Conflicts Committee determines in its discretion.
- It is acknowledged that the applicable retail portfolio manager will separately and independently make his or her decision on suitability as to the course of action for the applicable retail portfolio and will leave the Conflicts Committee meeting prior to the final determination being made by the Conflicts Committee.

Acis and its affiliated advisers may elect, but is not required, to assign different teams to make recommendations for different parts of the capital structure as the Conflicts Committee determines in its discretion.

In the event any Acis or affiliated personnel serve on the Board of the subject company, they may recuse themselves from voting on transactions involving a capital structure conflict.

- Acis or affiliated personnel board members may still make recommendations to the Conflicts Committee
- If any such persons are also on the Conflicts Committee, they may recuse themselves from the Committee's determination

Acis may use external counsel for guidance and assistance.

Position Conflicts

Another type of conflict may arise if we cause one Client account of Acis or its affiliates to buy a security and another Client Account to sell or short the same security. Currently, such opposing positions are generally not permitted within the same account without prior trade approval by the Chief Compliance Officer. However, a portfolio manager may enter into opposing positions for different Clients to the extent each such Client has a different investment objective and each such position is consistent with the investment objective of the applicable Client. In addition, transactions in investments by one or more affiliated Client accounts may have the effect of diluting or otherwise disadvantaging the values, prices or investment strategies of other Client accounts.

Generally, Acis does not purchase, sell or hold securities on behalf of Clients contrary to the current recommendations made to other affiliated Client accounts. However, because certain Client accounts may have investment objectives, strategies or legal, contractual, tax or other requirements that differ (such as the need to take tax losses, realize profits, raise cash, diversification, etc.), Acis may purchase, sell or continue to hold securities for certain Client accounts contrary to other recommendations. In addition, Acis may be permitted to sell securities or instruments short for certain Client accounts and may not be permitted to do so for other affiliated Client accounts.

Principal Trading

In situations where we determine that we are a *related person* by our ownership of greater than 25% of the equity voting securities of such entity, such fund is considered a "*Principal Account*."

To the extent Acis wishes to trade an asset from a Client Account to or from a Principal Account (a "Principal Cross Trade"), the SEC has stated that a Principal Cross Trade may only occur if the Client Account on the other side from the Principal Account consents to the trade after a disclosure by Acis of all material facts. Acis' Compliance

Manual sets forth procedures for executing both cross trades and principal cross trades.

Cross Trading

In an effort to reduce transaction costs, increase execution efficiency, and capitalize on timing opportunities, Acis may execute cross trades, or sell a security for one affiliated Client to another affiliated Client, without interposing a broker-dealer. All cross trades are subject to the cross trade procedures set forth in Acis' compliance manual. Cross trades, however, may present an inherent conflict of interest because Acis and/or its affiliates represent the interest of the buyer and seller in the same transaction. As a result, Clients involved in a cross trade bear the risk that the price obtained from a cross trade may be less favorable than if the trade had been executed in the open market.

Conflicts Related to Investment Activities

Acis and/or its affiliates may buy or sell the same securities for an affiliate's account that it buys or sells for a Client or may pursue the same investment strategies for an affiliate's account as for a Client's. Acis and/or its affiliates also may receive greater management or performance-based fees or incentives in connection with managing certain Client Accounts than from other Client Accounts. In addition, if Acis allocates a Client's assets among pooled vehicles managed by Acis, it may have an incentive to allocate assets into vehicles that produce the greatest fees for Acis. Each of these situations give rise to a potential conflict of interest in the allocation of investment opportunities. In addition, Acis has an incentive to resolve conflicts of interest in favor of affiliated Clients over non-affiliated Clients. As previously described, Acis has adopted trade allocation policies and procedures that seek to ensure fair and equitable access to investment opportunities for all accounts.

Trade Aggregation

In some circumstances, Acis and/or its affiliates may seek to buy or sell the same securities contemporaneously for multiple Client Accounts. Acis and/or its affiliates may, in appropriate circumstances aggregate securities trades for a Client with similar trades for other Clients, but is not required to do so. In particular, Acis and/or its affiliates may determine not to aggregate transactions that relate to portfolio management decisions that are made independently for different accounts or if Acis and/or its affiliates determine that aggregation is not practicable, not required or inconsistent with Client direction. When transactions are aggregated and it is not possible, due to prevailing trading activity or otherwise, to receive the same price or execution on the entire volume of securities purchased or sold, the various prices may be averaged or allocated on another basis deemed to be fair and equitable. In addition, under certain circumstances, the Clients will not be charged the same commission or

commission equivalent rates in connection with a bunched or aggregated order. The effect of the aggregation may therefore, on some occasions, either advantage or disadvantage any particular Client.

From time to time, aggregation may not be possible because a security is thinly traded or otherwise not able to be aggregated and allocated among all affiliated Client account seeking the investment opportunity or a Client may be limited in, or precluded from, participating in an aggregated trade as a result of that Client's specific brokerage arrangements. Also, an issuer in which Clients wish to invest may have threshold limitations or aggregate ownership interests arising from legal or regulatory requirements or company ownership restrictions, which may have the effect of limiting the potential size of the investment opportunity and thus the ability of the applicable Client to participate in the opportunity.

Company Errors

For the Company's Clients, the Company's responsibility for its trade errors is set forth in the governing documents for the relevant Client. No soft-dollars may be used to satisfy any trade errors. In addition, the Company may not use the securities in one Client's account to settle the trade error in another Client's account.

Conflicts Related to Valuation

Acis or an affiliate may have a role in determining asset values with respect to Client Accounts and may be required to price an asset when a market price is unavailable or unreliable. This may give rise to a conflict of interest because Acis may be paid an asset-based fee on certain Client Accounts. In order to mitigate these conflicts, Acis and its affiliates determine asset values in accordance with valuation procedures, which generally are set forth in Acis' Compliance Manual.

Conflicts Related to Investments in Affiliated Funds

Acis and/or its affiliates purchase for Client Accounts interests in other pooled vehicles, including structured product vehicles, unregistered investment funds and retail funds, offered by Acis or its affiliates, unless prohibited under applicable law or the relevant account investment guidelines. Investment by a Client in such a vehicle means Acis or its affiliates receive advisory or other fees from the Client in addition to advisory fees charged for managing the Client's Account. The details of any possible fee offsets, rebates or other reduction arrangements in connection with such investments are provided in the documentation relating to the relevant Client Account and/or underlying investment vehicle. In choosing between vehicles managed by Acis and those not affiliated with Acis, Acis may have a financial incentive to choose Acis-affiliated vehicles over third parties by reason of additional investment management, advisory or other fees or compensation Acis or its affiliates may earn.

The potential for fee offsets, rebates or other reduction arrangements may not necessarily eliminate this conflict and Acis may nevertheless have a financial incentive to favor investments in Acis-affiliated vehicles. If Acis invests in an affiliated vehicle, a Client should not expect Acis to have better information with respect to that vehicle than other investors may have (and if Acis does have better information it may be prohibited from acting upon it in a way that disadvantages other investors).

Additionally, Acis' affiliates may sponsor and manage funds and accounts that compete with Acis or make investments with funds sponsored or managed by third-party advisers that would reduce capacity otherwise available to Acis' Clients.

Other Potential Conflicts

Acis and its affiliates may provide services other than advice to a Client, including administration, organizing/managing business affairs, executing and reconciling trades, preparing financials and providing audit support, preparing tax documents, sales and investor relations support, and diligence and valuation services, for additional fees. A potential conflict arises in such circumstances because Acis and its affiliates are incentivized to favor its Clients that pay such additional fees. However, the individuals who provide advice to Clients do not provide these additional services.

Acis and its affiliates may cause a Client to purchase, sell or hold securities of issuers in which Acis or its affiliate makes a market or has an equity, debt or other financial interest or securities of issuers or other investments in which Acis or its affiliates, its officers or employees or its affiliated broker-dealers and other related persons and their officers or employees have positions or other financial interests. For example, Acis may purchase on behalf of a Client unregistered securities for which an affiliate acts as placement agent, which may result in additional fees to the affiliate or assist the affiliate in meeting its contractual obligations. Acis may also cause a Client to borrow money from Acis' affiliates, and the affiliates may earn interest or fees on such transactions. Conflicts also may arise if Acis implements a portfolio decision or strategy (including a decision to hold an investment) for one Client ahead of, or contemporaneously with, another Client. Such transactions may have the effect of diluting or otherwise disadvantaging the values, prices or investment strategies of other Client Accounts and could result in one Client receiving more favorable trading results or reduced costs at the expense of the other Client.

Acis or its affiliates may invest (or recommend that a Client invest) in securities issued by a Client and may hedge derivative positions by buying or selling securities issued by a Client. A potential conflict may arise in such circumstances because Acis may be incentivized to favor its Clients that issue securities, or such Clients of its affiliates, over the Client on whose behalf Acis is making the investment. In addition to Clients,

some of Acis' service providers are issuers of securities. Acis may determine that it is in the best interests of a Client to purchase securities issued by one of these entities. Acis has adopted policies and procedures designed to address conflicts of interest arising from the foregoing activities. Furthermore, it is Acis' general policy not to take into account the fact that an issuer is a Client, service provider or vendor when making investment decisions.

Certain qualified employees and affiliates invest in Clients either through general partner entities or as limited partners, shareholders or otherwise. Acis generally reduces or waives all or a portion of the management fee, performance-based fee, or other costs and expenses related to the investments by such persons.

Conflicts Related to Information Possessed by or Provided by Acis

Certain persons within Acis or its affiliates may receive or create information (*e.g.*, proprietary technical models) that is not generally available to the public. Acis or its affiliates has no obligation to provide such information to Clients or effect transactions for Clients on the basis of such information and in many cases Acis or its affiliates will be prohibited from trading for the same Clients based on the information. Similarly, some Clients may have access to information regarding Acis' or its affiliates' transactions or views that is not available to other Clients, and may act on that information through accounts managed by persons other than Acis or its affiliates. Such transactions may negatively impact other Clients (*e.g.*, through market movements or decreasing availability or liquidity of securities). Additionally, our personnel or those of our advisory affiliates may from time to time serve on the board of directors of portfolio companies, and in such capacity may recommend investment opportunities to such companies.

Conflicts Related to Acis' Relationships with Third Parties

Acis or its affiliates may advise third-parties regarding valuation, risk management, transition management and potential restructuring or disposition activities in connection with proprietary or Client investments, which may create an incentive to purchase securities or other assets from those third parties or engage in related activities to bid down the price of such assets, which may have an adverse effect on a Client.

Acis' or its affiliates' Client may work with pension or other institutional investment consultants and such consultants may also provide services to Acis or its affiliates. Consultants may provide brokerage execution services to employees of Acis and its affiliates and such employees may attend conferences sponsored by consultants. Acis or its affiliates also may be hired to provide investment management or other services to a pension or other institutional investment consultant that works with a Client, which may create conflicts.

Acis or its affiliates may in-source or out-source to third parties certain processes or functions, which may give rise to conflicts. There may be conflict when negotiating with third-party service providers if Acis or its affiliates bears operational expenses of various Clients to the extent that a given fee structure would tend to place more expense on Clients for which Acis or its affiliates has a greater entitlement to reimbursement or less expense on Clients for which Acis has lesser (or no) entitlement to reimbursement. Acis or its affiliates may provide information about a Client's portfolio positions to unrelated third parties to provide additional market analysis and research to Acis or its affiliates and they may use such analysis to provide investment advice to other Clients.

Acis or its affiliates may purchase information (such as periodicals, conference participation, papers, surveys) from professional consultant firms, and such firms may believe they have an incentive to give favorable evaluations of Acis to their Clients.

In selecting broker-dealers that provide research or other products or services that are paid with soft dollars, conflicts may arise between Acis and a Client because Acis may not produce or pay for these benefits but may use brokerage commissions generated by Client transactions. Soft dollar arrangements may also give Acis an incentive to select a broker-dealer based on a factor other than Acis' interest in receiving the most favorable execution. Conflicts of interest related to soft dollar relationships with brokerage firms may be particularly influential to the extent that Acis uses soft dollars to pay expenses it might otherwise be required to pay itself. Furthermore, research or brokerage services obtained using soft dollars or that are bundled with trade execution, clearing, settlement or other services provided by a broker-dealer may be used in such a way that disproportionately benefits one Client over another (*e.g.*, economics of scale or price discounts). For example, research or brokerage services paid for through one Client's commission may not be used in managing that Client's account. Additionally, where a research product or brokerage service has a mixed-use, determining the appropriate allocation of the product or service may create conflicts. Please refer to the section titled Brokerage Practices for information regarding Acis' use of soft dollars.

Conflicts may arise where Acis has the responsibility and authority to vote proxies on behalf of its Clients. Please refer to the section titled Voting Client Securities for information regarding the policies and procedures governing Acis' proxy voting activities.

Employees of Acis and its affiliates may serve on the boards of directors and/or investment committees of external organizations, including those organizations that are currently or may become Clients of Acis, and such service may present conflicts of interest to the extent the employee becomes aware of material non-public information

and may be unable to initiate some transactions for other Clients while in possession of that information.

Acis and its affiliates may conduct business with institutions such as broker dealers or investment banks that invest, or whose Clients invest, in pooled vehicles sponsored or advised by Acis or its affiliates, or may provide other consideration to such institutions or recognized agents, and as a result Acis may have a conflict of interest in placing its brokerage transactions.

Employees or affiliates of Acis or a related person may receive stock options from companies, the securities of which may be held in accounts of Acis' Clients, in exchange for providing consulting services, including but not limited to, Advisory services and financial services, for the company.

Other Accounts and Relationships

As part of our regular business, Acis and its affiliates holds purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective Clients, on a principal or agency basis, subject to applicable law including Section 206(3) of the Advisers Act, with respect to loans, securities and other investments and financial instruments of all types. Acis also provides investment advisory services, among other services, and engages in private equity, real estate and capital markets-oriented investment activities. Acis will not be restricted in its performance of any such services or in the types of debt, equity, real estate or other investments which it may make. Acis may have economic interests in or other relationships with respect to investments made by Clients. In particular, but subject to Acis' personal trading policy, Acis may make and/or hold an investment, including investments in securities, that may compete with, be pari passu, senior or junior in ranking to an, investment, including investments in securities, made and/or held by Clients or in which partners, security holders, members, officers, directors, agents or employees of such Clients serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in restrictions on transactions by Clients and otherwise create conflicts of interest for Clients. In such instances, Acis may in its discretion make investment recommendations and decisions that may be the same as or different from those made with respect to Client investments, subject to the capital structure conflicts procedures discussed above. In connection with any such activities described above, but subject to Acis' personal trading policy, Acis and its affiliates may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable for Clients. Subject to Acis' personal trading policy, Acis will not be required to offer such securities or investments to Clients or provide notice of such activities to Clients. In addition, in managing Client portfolios, Acis may take into account its relationship or the relationships of its affiliates with obligors and their

respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of Acis in accordance with its fiduciary duties to its other Clients, Acis may take, or be required to take, actions which adversely affect the interests of their Clients.

Acis has invested and may continue to invest in investments that would also be appropriate for Clients. Such investments may be different from those made on behalf of Clients. Acis does not have any duty, in making or maintaining such investments, to act in a way that is favorable to Clients or to offer any such opportunity to Clients, subject to Acis' allocation policy and personal trading policy. The investment policies, fee arrangements and other circumstances applicable to such other parties may vary from those applicable to Clients. Acis may also provide advisory or other services for a customary fee with respect to investments made or held by Clients, and no stockholders nor Clients shall have any right to such fees except to the extent the governing documents of the applicable Client expressly provide otherwise. Acis may also have ongoing relationships with, render services to or engage in transactions with other Clients, who make investments of a similar nature to those of Clients, and with companies whose securities or properties are acquired by Clients and may own equity or debt securities issued by Clients. In connection with the foregoing activities Acis may from time to time come into possession of material nonpublic information that limits the ability of Acis to effect a transaction for Clients, and Client investments may be constrained as a consequence of Acis' inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its Clients.

Although the professional staff of Acis will devote as much time to Clients as they deem appropriate to perform its duties, the staff may have conflicts in allocating its time and services among Client accounts.

The directors, officers, employees and agents of Acis and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, employees, partners, agents, nominees or signatories, and receive arm's length fees in connection with such service, for Clients or Acis, or for any Client joint ventures or any affiliate thereof, and no Clients nor their stockholders shall have the right to any such fees except to the extent the governing documents of the applicable Client expressly provide otherwise.

Acis and its affiliates serve or may serve as officers, directors or principals of entities that operate in the same or a related line of business as Clients, or of other investment funds managed by Acis. In serving in these multiple capacities, they may have obligations to other Clients or investors in those entities, the fulfillment of which may not be in the best interests of Clients or their stockholders. Clients may compete with other entities managed by Acis for capital and investment opportunities.

There is no limitation or restriction on Acis with regard to acting as investment manager (or in a similar role) to other parties or persons. This and other future activities of Acis may give rise to additional conflicts of interest. Such conflicts may be related to obligations that Acis or its affiliates have to other Clients.

Certain Acis affiliates, including NexBank SSB and Governance Re among others, may provide banking, agency, insurance and other services to Clients and their operating affiliates for customary fees, and no Client, nor its subsidiaries will have a right to any such fees except to the extent the governing documents thereof expressly provide otherwise.

Acis may direct Clients to acquire or dispose of investments in cross or principal trades involving Clients of Acis in accordance with applicable legal and regulatory requirements as described above. In addition, Clients may make and/or hold an investment, including an investment in securities, in which Acis and its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by Clients may enhance the profitability of Acis' own investments in such companies. Moreover, Clients and their operating affiliates may invest in assets originated by, or enter into loans, borrowings and/or financings with Acis, including but not limited to NexBank, including in primary and secondary transactions with respect to which Acis may receive customary fees from the applicable issuer, and no Client nor their subsidiaries shall have the right to any such fees except to the extent the governing documents of such Client expressly provide otherwise. In each such case, Acis may have a potentially conflicting division of loyalties and responsibilities regarding Clients and the other parties to such investment. Under certain circumstances, Acis may determine that it is appropriate to avoid such conflicts by selling an investment at a fair value that has been calculated pursuant to our valuation procedures to another fund managed or advised by Acis. In addition, Acis may enter into agency cross-transactions where it or any of its affiliates act as broker for Clients, to the extent permitted under applicable law.

Acis may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of investments purchased by Clients. Such transactions are on an arm's-length basis and may be subject to arm's-length fees. There is no expectation for preferential access to transactions involving investments that are underwritten, originated, arranged or placed by Acis and no Client nor their stockholders shall have the right to any such fees except to the extent the governing documents of such Client expressly provide otherwise.

Material Non-Public Information

There are generally no ethical screens or information barriers among Acis and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If Acis, any of its personnel or affiliates were to receive material non-public information about an investment or issuer, or have an interest in causing a Client to acquire a particular investment, we may be prevented from causing the Client to purchase or sell such asset due to internal restrictions imposed on us. Notwithstanding the maintenance of certain internal controls relating to the management of material non-public information, it is possible that such controls could fail and result in Acis, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. In addition, while the Acis and certain of its affiliates generally operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, our ability to operate as an integrated platform could also be impaired, which would limit our access to personnel of our affiliates and potentially impair our ability to manage Client investments.

ITEM 12. BROKERAGE PRACTICES

BROKER-DEALER SELECTION

Acis has an obligation to obtain "best execution" for Client transactions considering the execution price and overall commission costs paid and certain other factors. Our trading desk routes orders to various broker-dealers for execution at their discretion. Where possible, we deal directly with the dealers who make a market in the securities involved, except in those circumstances where we believe better prices and execution are available elsewhere.

Through periodic meetings of the Brokerage Committee, Acis reviews compensation paid to broker-dealers. The meetings include an in-depth review of "best execution reports" which are third party reports that show how Acis' execution compared to its peers. The reports also include information regarding the most used broker-dealers, lowest and highest cost broker-dealers, and other information broker-dealer selection and compensation.

Factors involved in selecting brokerage firms include:

Broker Specific

- Size of broker
- Reputation
- Quality of service
- Experience
- Financial stability and creditworthiness
- Financial statements
- Regulatory filings
- Standing in financial community
- Ability to handle block trades
- Acceptable record of delivery and payment on past transactions
- Quality of research and investment information provided

Transaction Specific

- Best available execution
- Market knowledge regarding specific industries and securities
- Access to sources of supply or markets
- Nature of the market for the security

THE APPROVAL PROCESS

Acis' trading desk is only allowed to trade with broker-dealers that are approved by our Brokerage Committee unless interim approval is expressly provided by the Compliance Department, in which case such approval shall be ratified by the Brokerage Committee at the next meeting of the Committee. New broker-dealers are added to Acis' approved list of

broker-dealers subject to a formal review process which closely analyses all of the above mentioned broker specific selection items. The Brokerage Committee will review the requirements and determine what additional procedures or reporting are necessary.

SOFT DOLLARS

In those circumstances where more than one broker-dealer is able to satisfy our obligation to obtain best execution, Acis may place a trade order on behalf of Client Accounts with a broker-dealer that charges more than the lowest available commission cost or price. Acis may do this in exchange for certain brokerage and research services provided either directly from the broker-dealer or through a third party ("Soft Dollar Arrangements"), provided that each of the following is met:

- Acis determines:

    1. The research or brokerage product or service constitutes an eligible brokerage or research service;
    2. The product or service provides lawful and appropriate assistance in the performance of Acis' investment decision making responsibilities; and
    3. In good faith the amount of Client commissions paid is reasonable in light of the value of the products or services provided.

- The brokerage or research is "provided by" a broker-dealer who participates in effecting the trade that generates the commission. Acis may not incur a direct obligation for research with a third party vendor and then arrange to have a broker-dealer pay for that research in exchange for brokerage commissions.

- Acis may only generate soft dollars with commissions in agency transactions. Acis may not use dealer markups in principal transactions to generate soft dollars. In addition, a trade for a fixed income security or over-the-counter ("OTC") security may be done on an agency basis only if the trader determines that it would not result in a broker-dealer unnecessarily being inserted between Acis and the market for that security.

- No soft dollars are generated on accounts for which:

    1. Investment discretion resides with the Client (i.e. non-discretionary accounts);
    2. Client mandates restrict or prohibit the generation of soft dollar commissions;
    3. The Client has a directed brokerage arrangement.

- The brokerage trade placed is for "securities" transactions (and not, for example, futures transactions).

Research services furnished by brokers through whom Acis effects securities transactions may be used in servicing all of Acis' accounts, and not all such services may be used in connection with the accounts which paid commissions to the broker providing such services.

If a Client Account is under the custody of one brokerage firm and another brokerage firm is a selling group member for an underwriting syndicate, such a Client Account may not be able to participate in the purchase of securities in the underwriting because the custodial brokerage firm was not a selling group member. In addition, to the extent that a Client directs brokerage trades to be placed with a particular broker, the allocation of securities transactions may be impacted.

When Acis uses Client brokerage commissions (or markups or markdowns) to obtain research or other products or services, Acis receives a benefit because the firm does not have to produce or pay for research, products, or services. Consequently, Acis may have an incentive to select or recommend a broker-dealer based on our interest in receiving the research or other products or services, rather than Clients' interest in receiving most favorable execution.

PRODUCTS AND SERVICES ACQUIRED WITH SOFT DOLLARS

All products and services acquired with soft dollars qualify under the Safe Harbor of 28(e) of the Securities Exchange Act of 1934. Examples of eligible services and products include independent stock research, economic research, research in specific industry sectors, real time feeds, newswires, strategic analysis, and back office systems.

DIRECTED BROKERAGE

Acis does not require Clients to direct brokerage, but in those situations where a Client has directed Acis to place trades with a particular broker-dealer, Acis may not be free to seek the best price, volume discounts or best execution by placing transactions with other broker-dealers. Additionally, as a result of directing Acis to place trades with a particular broker-dealer, a disparity in commission charges may exist between the commissions charged to Clients who direct us to use a particular broker-dealer and those Clients who do not direct us to use a particular broker-dealer as well as a disparity among the brokers to which different Clients have directed trades.

TRADE AGGREGATION

Orders of Clients may be combined (or "bunched") when possible to obtain volume discounts resulting in a lower per share commission. Please see the sections entitled Code of Ethics, Participation or Interest in Client Transactions, and Personal Trading for additional information regarding Acis' trade aggregation procedures.

ITEM 13. REVIEW OF ACCOUNTS

ACCOUNT REVIEW

Acis has an Investment Committee which, subject to certain size thresholds, is responsible for (i) assessing and approving new issues and new credits and (ii) determining general account suitability for those investments.

In circumstances where the decision to buy is made outside of the Investment Committee (i.e. where limited quantity purchases are allowed or with respect to follow-on investments), allocations will be made by consultation with the Portfolio Managers, typically from a "Gatekeepers" email request sent by or at the direction of the requesting Portfolio Manager. In determining the aggregate amount to be sought, the Investment Committee and or Portfolio Managers consider, without limitation, the normal investment amount of the account, the general level of cash on hand and available to be drawn, cash generating activities, withdrawals and other factors affecting the desired purchase amount for Clients. The Investment Committee also may reconsider buy decisions relating to existing Client holdings when there are significant changes in relevant factors relating to the investment, including, but not limited to, the market value of the investment, the business of the issuer or borrower, results of operations, balance sheet and creditworthiness of the issuer or in the case of an equity security, the outlook for the issuer. An initial target allocation is determined by the committee at the time of any buy or sell decision based on appropriate factors (e.g., suitability, cash needs/availability, transaction size, etc.) which is then reconciled and adjusted, as appropriate, by the Allocation Committee prior to the commencement of trading on the next trading day. Our fiduciary duty requires that we recommend only those investments that are suitable for a Client, based on the Client's particular investment objectives, needs and circumstances. We are responsible for inquiring and documenting the criteria discussed above and shall develop suitable investment guidelines for each Client.

Traders Book

In certain circumstances our Authorized Traders, as from time to time amended, determine that an investment is a good short-term opportunity for technical trading reasons. In these cases, an Authorized Trader proposes these investment ideas to the Portfolio Managers who will consider the short-term investment based on the facts known to them and presented by the Authorized Trader. If the Portfolio Managers agree to participate in the short-term trade, the Authorized Trader executes the trade for the benefit of those accounts. The trade will then follow our Allocation Policy for immediate term investments.

Equities

Investment decisions with respect to equity investments are generally made independently by each applicable Portfolio Manager and allocated solely within the accounts managed by such Portfolio Manager, provided that in certain circumstances, such as debt to equity conversions, such determination may be presented to the Investment Committee in accordance with the process typically applicable to credit investments.

Investments in all Client Accounts are reviewed periodically and are reviewed collectively and individually by multiple reviewers in order to provide multiple perspectives on the accounts. Reviewers evaluate Client objectives along with, among other factors, applicable portfolio restrictions, available cash, particularized investment suitability, investment performance and diversification. In addition to, and not as a substitute for the foregoing, additional reviews are conducted in accordance with Client requests as set forth in the relevant investment advisory contract.

NATURE AND FREQUENCY OF REPORTING

Client reporting varies based on the type of product/vehicle. The following summarizes the reporting provided to each Client. The reports provided to a Client within a particular investment product/vehicle may differ from our description depending upon strategies and Client needs.

Separate Accounts

Separate Account Clients typically have reporting that is tailored based on their expressed desired format and frequency. However, in general, the reporting Acis provides Separate Account Clients mirrors that of Hedge Fund Client written reporting. Reports to Separate Account Clients may be customized to include more detailed statistics, holdings, etc., at the request of the Client since there are generally fewer limitations on the type of information Acis can share regarding their investment. In addition to this reporting, Separate Account Clients have the ability to access the portfolio holdings as they deem necessary through the custodian of the account. An audit may or may not be required depending on the Client.

Structured Product Vehicles

Investors in Structured Product Vehicle Clients would generally have access to a written monthly report provided by the trustee and the ability to review a marked portfolio on a monthly basis. The monthly trustee report typically includes compliance reporting and portfolio holdings.

Unregistered Investment Funds – Hedge Funds

Investors in Hedge Fund Clients are generally provided a written monthly account statement with their respective net asset value. They also receive a written monthly reporting package, which includes a one-page summary with a fund overview, market commentary, and Acis' outlook on the market. In addition, the report includes fund specific details around the portfolio statistics, composition, and attribution.

ITEM 14. CLIENT REFERRALS AND OTHER COMPENSATION

As stated in Item 12, we may allocate portfolio transactions to brokers or dealers who provide research and/or related services. For a more detailed discussion of such practices, please refer to Item 12.

Employees of Highland Capital Funds Distributor, Inc. are compensated based on their activities in soliciting investors through FINRA and/or SEC registered intermediaries for Clients advised by our advisory affiliates and may be similarly compensated in respect of our future Clients. These employees are compensated with a base salary and discretionary bonus. Unaffiliated persons may from time to time serve as solicitors for Acis and may be compensated for referrals. Any agreement with a solicitor will be in compliance with Rule 206(4)-3 of the Advisers Act.

ITEM 15. CUSTODY

Acis does not act as custodian for Client assets. However, under Rule 206(4)-2 under the Advisers Act, Acis is deemed to have custody of certain Client assets. In the case of Unregistered Investment Funds, such Clients have made arrangements with qualified custodians as disclosed in the relevant offering and other fund documents. With respect to Structured Product Vehicles, the Trustee has custody of the Client's assets in accordance with the relevant offering and other fund documents. In addition, such Clients obtain additional financial statements which statements are provided to investors no later than 120 days following the fiscal year end.

In the case of Separate Accounts, Clients may give Acis the power to withdraw funds or securities maintained with a custodian upon request. Without coming to a legal conclusion as to whether Acis would have custody over these assets, Acis operates as if it does have custody in such situations. Accordingly, unless an exception is available, any such Separate Account Clients would receive an annual surprise custody audit and receive account statements from their broker-dealer, bank, or qualified custodian and should carefully review those statements. Separate Accounts Clients should carefully review those statements and, to the extent Acis also delivers statements to such Clients, compare the Acis statement to the statements of the qualified custodian. For tax and other purposes, the custodial statement is the official record of a Separate Account Client's account and assets.

Loans held in Client Accounts may be agented by NexBank, SSB. As Agent Bank, NexBank, SSB will receive cash or send cash to such Clients for interest or principal payments or borrowings. Client Accounts may also have bank accounts or account control agreements in place at NexBank, SSB. In such instances NexBank receives an independent control examination pursuant to Rule 206(4)-2.

ITEM 16. INVESTMENT DISCRETION

Acis advises a wide variety of Client Accounts and manages assets on a discretionary basis. For a description of limitations Clients may impose on our discretionary authority to manage securities, please see Item 4. Advisory Business.

Acis accepts discretionary authority to manage Clients' assets through an investment management agreement with its Clients.

Additionally, before an investment may be made into an Unregistered Investment Fund, a Separate Account or other similar structure, Acis provides all potential investors in the fund with an offering document, which sets forth in detail the investment strategy and program. By completing the subscription documents to acquire an interest or shares in an Unregistered Investment Fund, investors give us complete authority to manage the capital contributed in accordance with the offering document received.

ITEM 17. VOTING CLIENT SECURITIES

SECURITIES HELD IN CLIENT ACCOUNTS

Acis' proxy voting policy ensures proxies are voted on behalf of each Client Account's securities and in the best economic interests of such Client Account, without regard to the interests of Acis or any other Client of Acis. Portfolio manager(s) of the applicable Client Account(s) evaluate the subject matter of each proxy and vote on behalf of the Client Account in accordance to the guidelines set forth in our proxy voting policy. In any case where a Client has instructed the Company to vote in a particular manner on the Client's behalf, those instructions will govern in lieu of parameters set forth in the proxy voting policy.

If the portfolio manager(s) determines that Acis may have a potential material conflict of interest, whether actual or perceived, in voting a proxy, the portfolio manager(s) will contact Acis' Compliance Department prior to the voting deadline. In the event of a conflict, the Company may choose to address such conflict by: (i) voting in accordance with the Proxy Advisor's recommendation; (ii) the CCO determining how to vote the proxy (if the CCO approves deviation from the proxy advisor's recommendation, then the CCO shall document the rationale for the vote); (iii) "echo voting" or "mirror voting" the proxy in the same proportion as the votes of other proxy holders that are not Clients; or (iv) with respect to Clients other than Retail Funds, notifying the affected Client of the material conflict of interest and seeking a waiver of the conflict or obtaining such Client's voting instructions

OBTAINING A COPY OF THE POLICY

Clients and prospective Clients can obtain a copy of the proxy voting policy or information on how Acis voted proxies by contacting Acis' Chief Compliance Officer at (972) 628-4100.

ITEM 18. FINANCIAL INFORMATION

Acis does not charge or solicit pre-payment of more than $1,200 in fees per Client six or more months in advance.

Acis has non-discretionary authority or custody of Client funds or securities.

On April 13, 2018, the Bankruptcy Court for the Northern District of Texas (the "Court") entered an Order for Relief placing Acis Capital Management, L.P. ("Acis") and Acis Capital Management GP, LLC ("Acis GP") in involuntary Chapter 7 bankruptcy. On May 11, 2018, the bankruptcy was converted into a Chapter 11 reorganization, and Robin Phelan, an attorney based in Dallas, Texas, was appointed by the Court as the trustee to oversee the bankruptcy (the "Trustee"). Mr. Phelan, in his capacity as Trustee, exercises discretionary control over all Acis investment decisions and transactions. Accordingly, the Trustee is a control person of both Acis and Acis GP. The bankruptcy proceeding is on-going. Highland Capital Management, L.P. continues to provide non-discretionary investment advice and back office services to Acis pursuant to subadvisory and shared service agreements with Acis.

ITEM 19. REQUIREMENTS FOR STATE-REGISTERED ADVISERS

Not Applicable.

EXHIBIT R

Fill in this information to identify the case:

Debtor 1: Acis Capital Management, L.P.

Debtor 2 (Spouse, if filing):

United States Bankruptcy Court for the: Northern District of Texas

Case number: 18-30264-sgj11

Official Form 410

Proof of Claim

04/16

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

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

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

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

Part 1: Identify the Claim

1. **Who is the current creditor?**
   Highland Capital Management, L.P.
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

   Where should notices to the creditor be sent?
   Holland O'Neil, Foley Gardere, Foley & Lardner
   Name
   2021 McKinney Ave, Suite 1600
   Number Street
   Dallas TX 75201
   City State ZIP Code
   Contact phone 214-999-3000
   Contact email honeil@foley.com

   Where should payments to the creditor be sent? (if different)
   Scott Ellington, Highland Capital Management
   Name
   300 Crescent Court, Suite 700
   Number Street
   Dallas TX 75201
   City State ZIP Code
   Contact phone
   Contact email

   Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) _____ Filed on ____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☑ No
   ☐ Yes. Who made the earlier filing?

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

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

7. **How much is the claim?** $ 4,672,140.38 . **Does this amount include interest or other charges?**
☑ No
☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as health care information.
Sub-Advisory Services and Shared Services

9. **Is all or part of the claim secured?**
☑ No
☐ Yes. The claim is secured by a lien on property.
Nature of property:
☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
☐ Motor vehicle
☐ Other. Describe: _____
Basis for perfection: _____
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)
Value of property: $_____
Amount of the claim that is secured: $_____
Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)
Amount necessary to cure any default as of the date of the petition: $_____
Annual Interest Rate (when case was filed)_____%
☐ Fixed
☐ Variable

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

11. **Is this claim subject to a right of setoff?**
☑ No
☐ Yes. Identify the property: _____

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

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

☐ No

☑ Yes. *Check one:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☑ Other. Specify subsection of 11 U.S.C. § 507(a)(3) that applies.	$ 2,049,564.35

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

Part 3: Sign Below

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

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

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

Check the appropriate box:

☑ I am the creditor.
☐ I am the creditor's attorney or authorized agent.
☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 08/01/2018
MM / DD / YYYY

Signature

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

Name: Scott Ellington
First name Middle name Last name

Title: General Counsel

Company: Highland Capital Management, L.P.
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address: 300 Crescent Court, Suite 700
Number Street

Dallas TX 75201
City State ZIP Code

Contact phone _____ Email _____

***In re Acis Capital Management, L.P.*- Case No. 18-30264**
***In re Acis Capital Management, G.P.*- Case No. 18-30265**
United States Bankruptcy Court for the Northern District of Texas

EXHIBIT A TO PROOF OF CLAIM

1. Claimant: Highland Capital Management, L.P. ("**Highland**") maintains its business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. Highland files its proof of claim (the "**Claim**") pursuant to 11 U.S.C. §§ 105(a), 501, and 502(f) and the Federal Rules of Bankruptcy Procedure 3002 and 3003. Prior to the Involuntary Petition Date (defined below), Highland provided sub-advisory and shared services to the Debtors (defined below). Highland has provided portfolio management and advisory services to the Debtors pursuant to that certain Third Amended and Restated Sub-Advisory Agreement by and between the Debtors and Highland dated March 17, 2017 ("**Sub-Advisory Agreement**") (**Exhibit 1**). Specifically, Highland has acted as an investment manager and has identified, evaluated, and recommended investments to investment vehicles advised or sub-advised by the Debtors. Highland has also provided the Debtors with back and middle office services pursuant to that certain Fourth Amended and Restated Shared Services Agreement by and between the Debtors and Highland dated March 17, 2017 ("**Shared Services Agreement**") (**Exhibit 2**). Highland has provided the Debtors with all of the employees and staff necessary to manage the portfolios. Highland continued to provide the same sub-advisory and shared services to the Debtors throughout the Gap Period (defined below). To date, Highland continues to provide such services.

2. Debtors: Acis Capital Management, L.P. and Acis Capital Management, G.P. (the "**Debtors**"). The Debtors' cases have been consolidated under case number 18-30264 in the United States Bankruptcy Court for the Northern District of Texas. Highland provides the service at the following address: 300 Crescent Court, Suite 700, Dallas, Texas 75201.

3. Indebtedness: Because the Debtors were put into bankruptcy involuntarily, the amount included in the proof of claim accounts for pre-petition claims as well as Gap Claims (defined below).

a. Pre-Petition: Joshua Terry, the petitioning creditor, filed the involuntary petition on January 30, 2018 (the "**Petition Date**"). As of the Petition Date, the outstanding indebtedness owing from the Debtors to Highland was as set forth below by account number:

Invoice	Type	Balance
A1-A7; BVK[1]	Sub-Advisory	$1,605,362.41
A1-A7; BVK	Shared Services	$1,017,213.62
	Totals	**$2,622,576.03**

b. Gap Period: When a debtor files bankruptcy, the order for relief is typically entered on the date the petition is filed. However, an involuntary bankruptcy case diverges from the simultaneous entry of an order for relief in that an order for relief is entered at a later date than when a petition is filed. This creates a period of time, referred to as the "gap period", where the debtor may accrue post-petition but pre-order for relief debt. Pursuant to Section 502(f) of the Bankruptcy Code:

> In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section…the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. 502(f).

[1] A1-A7 and BVK account for the following vehicles: Acis CLO 2013-1, Ltd.; Acis CLO 2013-2, Ltd.; Acis CLO 2014-3, Ltd.; Acis CLO 2014-4, Ltd.; Acis CLO 2014-5, Ltd.; Acis CLO 2015-6, Ltd.; Acis CLO 2017-7, Ltd.; BayVK R2 Lux S.A., SICAV-FIS.

Claims arising during the gap period are entitled to priority treatment under section 507(a)(3). The Court entered the Order for Relief on April 13, 2018 ("**Order for Relief Date**"). Highland continued to provide services to the Debtors from January 30, 2018 to April 13, 2018 ("**Gap Period**"). The outstanding balance owed from the Debtors to Highland for the sub-advisory and shared services during the Gap Period is set forth below (and shall be referred to as the "**Gap Claim**"):

Account No.	Type	Balance
A1-A7; BVK	Sub-Advisory	$1,170,147.06
A1-A7; BVK	Shared Services	$879,417.29
	Totals	**$2,049,564.35**

c. Reservation of Rights as to Administrative Claim: Highland has provided uninterrupted sub-advisory and shared services since the Order for Relief Date. Highland reserves its rights to seek allowance of its administrative claims.

d. Indemnity Claims: Highland has contingent claims for indemnification pursuant to Section 6.03 of the Shared Services Agreement and Section 4(c) of the Sub-Advisory Agreement. According to Section 6.03 of the Shared Services Agreement and Section 4(c) of the Sub-Advisory Agreement, "the Management Company [Debtors] hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless Covered Person [Highland and its representatives] from…any and all claims, demands, liabilities, costs…suits, proceedings, judgments, assessments, actions…of whatever nature, known or unknown, liquidated, or unliquidated...arising out of the investment or other activities of the Management Company." Highland reserves such contractual indemnification right.

4. Reservation of Rights; Other Rights: The Claims described in this Attachment are legal, binding, enforceable, allowed, and not subject to any offset, defense, claim, counterclaim or any other diminution of any type, kind or nature, whatsoever; provided, however, the Chapter 11 Trustee alleges that he may offset Highland's Claims and recover from Highland through his current adversary proceeding against Highland (Adversary Proceeding 18-03212). Highland disputes such contention, and believes all Claims sought herein are recoverable despite the Chapter 11 Trustee's allegations. No portion of the Claims or any funds previously paid to Highland are subject to impairment, avoidance, subordination, or disallowance pursuant to the Bankruptcy Code (including, without limitation, Bankruptcy Code § 502) or applicable non-bankruptcy law. Highland expressly reserves the right in the future to assert any and all claims that it may have, including, without limitation, imposition of a constructive trust, equitable lien, security interest, subrogation, marshaling, or other legal or equitable remedies to which it may be entitled. The filing of this proof of claim is not to be construed as an election of remedies. Highland further reserves the rights (a) to amend, modify or supplement this proof of claim, including any exhibit, schedule or annex, or to file an amended proof of claim for the purpose of modifying or liquidating the amount of any interest, fees, costs and expenses accrued or incurred subsequent to the Petition Date or any contingent or unliquidated claims or rights of Highland set forth herein; (b) file additional proofs of claim; and (c) against third parties.

5. Notices: All notices to Highland are to be sent to:

Highland Capital Management, L.P.
Attn: David Klos
300 Crescent Court
Suite 700
Dallas, Texas 75201

with copies to:

Foley Gardere
Foley & Lardner, LLP
c/o Holland O'Neil
2021 McKinney Avenue, Suite 1600
Dallas, TX 75201

6. Payments: All payments and distributions to Highland with respect to this proof of claim are to be made as follows:

Highland Capital Management, L.P.
Attn: David Klos
300 Crescent Court
Suite 700
Dallas, Texas 75201
Re: *In re Acis Capital Management, L.P.*

7. Miscellaneous: This proof of claim is filed under compulsion of the bar date established in this bankruptcy case solely out of an abundance of caution to protect Highland from forfeiture of its claim within this bankruptcy proceeding. The amounts set forth in this proof of claim shall not be construed as an admission by Highland as to the amounts due and owing outside of this bankruptcy proceeding. The filing of this proof of claim is **not:** (a) a waiver or release of and/or Highland's rights or remedies against any person, entity or property; (b) a consent by Highland to entry of final judgment by this Court in any core proceeding commenced in this bankruptcy case, consistent with the United States Supreme Court's holding in *Stern v. Marshall*, 131 S. Ct. 2594 (2011); (c) a waiver of the right to move to withdraw the reference or otherwise challenge the jurisdiction of this Court; (d) a waiver of the right to a jury trial; (e) an election of a remedy which waives or otherwise affects any other remedy; or (f) a waiver of the right to assert a different or enhanced classification of priority for its Claim in respect of the other claims asserted in this bankruptcy case.

EXECUTION VERSION

THIRD AMENDED AND RESTATED SUB-ADVISORY AGREEMENT

by and between

ACIS CAPITAL MANAGEMENT, L.P.

and

HIGHLAND CAPITAL MANAGEMENT, L.P.

Dated March 17, 2017

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THIRD AMENDED AND RESTATED
SUB-ADVISORY AGREEMENT

This Third Amended and Restated Sub-Advisory Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated as of March 17, 2017, is entered into by and between Acis Capital Management, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the sub-advisor hereunder (in such capacity, the "Sub-Advisor" and together with the Management Company, the "Parties").

R E C I T A L S

WHEREAS, the Parties entered into that certain Second Amended and Restated Sub-Advisory Agreement dated July 29, 2016 to be effective January 1, 2016 (the "Existing Agreement");

WHEREAS, the Management Company from time to time has entered and will enter into portfolio management agreements, investment management agreements and/or similar agreements (each such agreement as amended, modified, waived, supplemented or restated, subject in each case to the requirements of Section 8, a "Management Agreement") and related indentures, credit agreements, collateral administration agreements, service agreements or other agreements (each such agreement as amended, modified, waived, supplemented or restated, subject in each case to the requirements of Section 8, a "Related Agreement"), in each case as set forth on Appendix A hereto, as amended from time to time, pursuant to which the Management Company has agreed to provide portfolio and/or investment management services to certain funds and accounts and to certain collateralized loan obligation issuers and to borrowers in certain short-term or long-term warehouse or repurchase facilities in connection therewith (any such transaction, a "Transaction", any fund, account, issuer, warehouse borrower or repurchase agreement seller in respect of any such Transaction, an "Account", and the assets collateralizing each such Transaction and/or comprising the portfolio of such Account, a "Portfolio");

WHEREAS, the Management Company and the Sub-Advisor desire to enter into this Agreement in order to permit the Sub-Advisor to provide certain limited services to assist the Management Company in performing certain obligations under the Management Agreements and Related Agreements;

WHEREAS, the Parties now desire to amend and restate the Existing Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals, and the receipt of good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, intending to be legally bound, hereby agree that the Existing Agreement is hereby amended, restated and replaced in its entirety as follows.

1. Appointment; Limited Scope of Services.

(a) Highland is hereby appointed as Sub-Advisor to the Management Company for the purpose of assisting the Management Company in managing the Portfolios of each Account

pursuant to the related Management Agreement and Related Agreements, in each case that have been included in the scope of this Agreement pursuant to the provisions of Section 8, subject to the terms set forth herein and subject to the supervision of the Management Company, and Highland hereby accepts such appointment.

(b) Without limiting the generality of the foregoing, the Sub-Advisor shall, during the term and subject to the provisions of this Agreement:

(i) make recommendations to the Management Company in its capacity as portfolio manager, investment manager or any similar capacity for any applicable Account as to the general composition and allocation of the Portfolio with respect to such Account among various types of securities, the nature and timing of the changes therein and the manner of implementing such changes, including recommendations as to the specific loans and other assets to be purchased, retained or sold by any such Account;

(ii) place orders with respect to, and arrange for, any investment by or on behalf of such Account (including executing and delivering all documents relating to such Account's investments on behalf of such Account or the Management Company, as applicable), upon receiving a proper instruction from the Management Company;

(iii) identify, evaluate, recommend to the Management Company, in its capacity as portfolio manager for such Account, and, if applicable, negotiate the structure and/or terms of investment opportunities within the specific investment strategy of the Management Company for such Account;

(iv) assist the Management Company in its capacity as portfolio manager for such Account in performing due diligence on prospective Portfolio investments by such Account;

(v) provide information to the Management Company in its capacity as portfolio manager for such Account regarding any investments to facilitate the monitoring and servicing of such investments and, if requested by the Management Company, provide information to assist in monitoring and servicing other investments by such Account

(vi) assist and advise the Management Company in its capacity as portfolio manager for such Account with respect to credit functions including, but not limited to, credit analysis and market research and analysis; and

(vii) assist the Management Company in performing any of its other obligations or duties as portfolio manager for such Account.

The foregoing responsibilities and obligations are collectively referred to herein as the "Services."

Notwithstanding the foregoing, all investment decisions will ultimately be the responsibility of, and will be made by and at the sole discretion of, the Management Company. Furthermore, the

parties acknowledge and agree that the Sub-Advisor shall be required to provide only the services expressly described in this Section 1(b), and shall have no responsibility hereunder to provide any other services to the Management Company or any Transaction, including, but not limited to, administrative, management or similar services.

(c) The Sub-Advisor agrees during the term hereof to furnish the Services on the terms and conditions set forth herein and subject to the limitations contained herein. The Sub-Advisor agrees that, in performing the Services, it will comply with all applicable obligations of the Management Company set forth in the Management Agreements and the Related Agreements. In addition, with respect to any obligation that would be part of the Services but for the fact that the relevant Management Agreement or Related Agreement does not permit such obligation to be delegated by the Management Company to the Sub-Advisor, the Sub-Advisor, upon request in writing by the Management Company, shall work in good faith with the Management Company and shall use commercially reasonable efforts to assist the Management Company in satisfying all such obligations.

2. Compensation.

(a) As compensation for its performance of its obligations as Sub-Advisor under this Agreement in respect of any Transaction, the Sub-Advisor will be entitled to receive the Sub-Advisory Fee payable thereto. The "Sub-Advisory Fee" shall be payable in accordance with Appendix A attached hereto, as such appendix may be amended by the Parties from time to time.

(b) Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Sub-Advisor for any and all costs and expenses that are properly Company Expenses or that may be borne by the Management Company under the Management Company LLC Agreement.

(c) Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any and all amounts payable to the Sub-Advisor pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

(d) From time to time, the Management Company may enter into sub-advisory agreements with certain management companies on similar terms to this Agreement. Promptly following the receipt of any fees pursuant to such sub-advisory agreements, the Management Company shall pay 100% of such fees to the Sub-Advisor.

3. Representations and Warranties.

(a) Each of the Management Company and the Sub-Advisor represents and warrants, as to itself only, that:

(i) it has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(ii) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(iii) no consent, approval, authorization or order of or declaration or filing with any government, governmental instrumentality or court or other person or entity is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(iv) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (A) its constituting and organizational documents; (B) the terms of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound; (C) any statute applicable to it; or (D) any law, decree, order, rule or regulation applicable to it of any court or regulatory, administrative or governmental agency, body of authority or arbitration having or asserting jurisdiction over it or its properties, which, in the case of clauses (B) through (D) above, would have a material adverse effect upon the performance of its duties hereunder.

(b) The Sub-Advisor represents and warrants to the Management Company that it is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act").

(c) The Management Company acknowledges that it has received Part 2 of Highland Capital Management, L.P.'s Form ADV filed with the Securities and Exchange Commission. The Sub-Advisor will provide to the Management Company an updated copy of Part 2 of its Form ADV promptly upon any amendment to such Form ADV being filed with the Securities and Exchange Commission.

4. Standard of Care; Liability; Indemnification.

(a) Sub-Advisor Standard of Care. Subject to the terms and provisions of this Agreement, the Management Agreements and/or the Related Agreements, as applicable, the Sub-Advisor will perform its obligations hereunder and under the Management Agreements and/or the Related Agreements in good faith with reasonable care using a degree of skill and attention no less than that which the Sub-Advisor uses with respect to comparable assets that it manages for others and, without limiting the foregoing, in a manner which the Sub-Advisor reasonably believes to be consistent with the practices and procedures followed by institutional managers of national standing relating to assets of the nature and character of the Portfolios, in each case except as expressly provided otherwise under this Agreement, the Management Agreements and/or the

Related Agreements. To the extent not inconsistent with the foregoing, the Sub-Advisor will follow its customary standards, policies and procedures in performing its duties hereunder, under the Management Agreements and/or under the Related Agreements.

(b) Exculpation. To the fullest extent permitted by law, none of the Sub-Advisor, any of its affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)) (each a "Covered Person") will be liable to the Management Company, any Member, any shareholder, partner or member thereof, any Account (or any other adviser, agent or representative thereof), or to any holder of notes, securities or other indebtedness issued by any Account (collectively, the "Management Company Related Parties"), for (i) any acts or omissions by such Covered Person arising out of or in connection with the provision of the Services hereunder, for any losses that may be sustained in the purchase, holding or sale of any security or debt obligation by any Account, or as a result of any activities of the Sub-Advisor, the Management Company or any other adviser to or agent of the Account or any other sub-advisor appointed by the Management Company to provide portfolio management services to any other delegatee of the Management Company or any other person or entity, unless such act or omission was made in bad faith or is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a "Disabling Conduct") on the part of such Covered Person, (ii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of the Sub-Advisor, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of the Sub-Advisor with reasonable care, or (iii) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to any Management Company Related Party, no Covered Person acting under this Agreement shall be liable to such Management Company Related Party for its good-faith reliance on the provisions of this Agreement.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to any Management Company Related Party solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to any such Management Company Related Party, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to any Management Company Related Party in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care

(c) Indemnification. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated ("Claims"), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the Services, the activities of the Management Company Related Parties, or activities undertaken in connection with the Management Company Related Parties, or otherwise relating to or arising out of this Agreement, any Management Agreement and/or the Related Documents, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of *nolo contendere* or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder may be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 4(c) shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 4(c) to the fullest extent permitted by law

(d) Other Sources of Recovery etc. The indemnification rights set forth in Section 4(c) are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or

indemnification from any Person in which any of the Transactions has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained

(e) Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 4(c) shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person

(f) Reliance. A Covered Person shall incur no liability to any Management Company Related Party in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

(g) Rights Under Management Agreements and Related Agreements. The Management Company will ensure that the Sub-Advisor is provided substantially similar indemnification and exculpation rights as are afforded to the Management Company in its role as portfolio manager under any future Management Agreement or Related Agreement encompassed within the Services hereunder, and it is expressly acknowledged by the Parties that the Sub-Advisor may not consent to including a Management Agreement and the related Transaction and Related Agreements within the scope of this Agreement pursuant to Section 8 if such indemnification and exculpation rights are not reasonably acceptable to it.

5. Limitations on Employment of the Sub-Advisor; Conflicts of Interest.

(a) The services of the Sub-Advisor to the Management Company are not exclusive, and the Sub-Advisor may engage in any other business or render similar or different services to others including, without limitation, the direct or indirect sponsorship or management of other Transactions, investment-based accounts or commingled pools of capital, however structured, having investment objectives similar to those of the Management Company or the Accounts. Moreover, nothing in this Agreement shall limit or restrict the right of any manager, partner, officer or employee of the Sub-Advisor to engage in any other business or to devote his or her time and attention in part to any other business, whether of a similar or dissimilar nature to the Management Company or any Account, or to receive any fees or compensation in connection therewith.

(b) So long as this Agreement or any extension, renewal or amendment of this Agreement remains in effect, the Sub-Advisor shall be the only portfolio management sub-advisor for the Management Company. The Sub-Advisor assumes no responsibility under this Agreement other than to render the services called for hereunder. It is understood that directors, officers, employees, members and managers of the Management Company are or may become interested in the Sub-Advisor and its Affiliates as directors, officers, employees, partners, stockholders, members, managers or otherwise, and that the Sub-Advisor and directors, officers, employees,

partners, stockholders, members and managers of the Sub-Advisor and its Affiliates are or may become similarly interested in the Management Company as members or otherwise.

(c) The Management Company acknowledges that various potential and actual conflicts of interest may exist with respect to the Sub-Advisor as described in the Sub-Advisor's Form ADV Part 2A and as described in Appendix B hereto, and the Management Company expressly acknowledges and agrees to the provisions contained in such Appendix B, as amended from time to time with mutual consent of the Parties.

6. Termination; Survival.

(a) This Agreement may be terminated, in its entirety or with respect to any Management Agreement, at any time without payment of penalty, by the Management Company upon 30 days' prior written notice to the Sub-Advisor.

(b) This Agreement shall terminate automatically with respect to any Management Agreement on the date on which (i) such Management Agreement has been terminated (and, if required thereunder, a successor portfolio manager has been appointed and accepted) or discharged; or (ii) the Management Company is no longer acting as portfolio manager, investment manager or in a similar capacity (whether due to removal, resignation or assignment) under such Management Agreement and the Related Agreements. Upon the termination of this Agreement with respect to any Management Agreement the Management Company shall provide prompt notice thereof to the Sub-Advisor, and Appendix A hereto shall be deemed to be amended by deleting such Management Agreement and the Related Agreements related thereto.

(c) All accrued and unpaid financial and indemnification obligations with respect to any conduct or events occurring prior to the effective date of the termination of this Agreement shall survive the termination of this Agreement.

7. Cooperation with Management Company. The Sub-Advisor shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Sub-Advisor. Specifically, the Sub-Advisor agrees that it will provide the Management Company with reasonable access to information relating to the performance of Sub-Advisor's obligations under this Agreement.

8. Management Agreements and Related Agreements. The Sub-Advisor's duty to provide Services in connection with any Management Agreement shall not commence until (a) Appendix A to this Agreement has been amended by mutual agreement of the Parties to include such Management Agreement and the related Account, fund and/or account and Related Agreements and (b) the Sub-Advisor acknowledges receipt of such Management Agreement and each Related Agreement. The Sub-Advisor shall not be bound to comply with any amendment, modification, supplement or waiver to any Management Agreement or any Related Agreement until it has received a copy thereof from the Management Company. No amendment, modification, supplement or waiver to any Management Agreement or Related Agreement that, when applied to the obligations and rights of the Management Company under such Management Agreement or Related Agreement, affects (i) the obligations or rights of the Sub-Advisor hereunder; (ii) the amount of priority of any fees or other amounts payable to the Sub-Advisor hereunder; or (iii) any

definitions relating to the matters covered in clause (i) or (ii) above, will apply to the Sub-Advisor under this Agreement unless in each such case the Sub-Advisor has consented thereto in writing (such consent not to be unreasonably withheld or delayed unless the Sub-Advisor determines in its reasonable judgment that such amendment, modification, supplement or waiver could have a material adverse effect on the Sub-Advisor).

9. Amendments; Assignments.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 9, without the prior written consent of the other Party and (ii) in accordance with the Advisers Act and other applicable law.

(b) Except as otherwise provided in this Section 9, the Sub-Advisor may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with the Advisers Act and other applicable law.

(c) The Sub-Advisor may, without satisfying any of the conditions of Section 9(a) other than clause (ii) thereof (so long as such assignment does not constitute an assignment within the meaning of Section 202(a)(1) of the Advisers Act), (1) assign any of its rights or obligations under this Agreement to an affiliate; *provided* that such affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Sub-Advisor pursuant to this Agreement and (ii) has the legal right and capacity to act as Sub-Advisor under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Sub-Advisor under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Sub-Advisor in another corporate or similar form and has substantially the same staff; provided, further, that the Sub-Advisor shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Sub-Advisor will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

10. Advisory Restrictions. This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any Management Agreement or any part thereof. It is the express intention of the parties hereto that (i) the Services are limited in scope; and (ii) this Agreement complies in all respects with all applicable (A) contractual provisions and restrictions contained in each Management Agreement and each Related Agreement and (B) laws, rules and regulations (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the Services to be provided under this Agreement shall automatically without action by any person or entity be limited, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

11. Records; Confidentiality.

(a) The Sub-Advisor shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; provided, that the Sub-Advisor shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

(b) The Sub-Advisor shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Sub-Advisor hereunder and shall not disclose any such information to non-affiliated third parties except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its rating of notes issued in connection with a Transaction or supplying credit estimates on any obligation included in the Portfolios, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Account for which the Management Company serves as portfolio manager, (iv) as required by (A) applicable law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Sub-Advisor or any of its affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Sub-Advisor on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Sub-Advisor may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Transaction, or (ix) information relating to performance of the Portfolios as may be used by the Sub-Advisor in the ordinary course of its business. Notwithstanding the foregoing, it is agreed that the Sub-Advisor may disclose without the consent of any Person (1) that it is serving as Sub-Advisor to the Management Company and each Account, (2) the nature, aggregate principal amount and overall performance of the Portfolios, (3) the amount of earnings on the Portfolios, (4) such other information about the Management Company, the Portfolios and the Transactions as is customarily disclosed by Sub-Advisors to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Sub-Advisor, the Management Company, the Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

12. Notice. Any notice or demand to any party to this Agreement to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail, facsimile or email transmission or by delivering it by hand as follows (or to such other address, email address or facsimile number as shall have been notified to the other parties hereto):

(a) If to the Management Company:

Acis Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Sub-Advisor:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

13. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

14. WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

15. Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties.

16. No Waiver. The performance of any condition or obligation imposed upon any party hereunder may be waived only upon the written consent of the parties hereto. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other party under this Agreement. Any failure by any party to this Agreement to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

17. Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written form of communication, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

18. Third Party Beneficiaries. Nothing in this Agreement will be construed to give any person or entity other than the parties to this Agreement, the Accounts and any person or entity with indemnification rights hereunder any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. Except as provided in the foregoing sentence, this Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the parties to this Agreement and their successors and assigns.

19. No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the parties. Except as expressly provided herein or in any other written agreement between the parties, no party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other party.

20. Entire Agreement. This Agreement, together with each Management Agreement and Related Agreement, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the parties with respect to such subject matter.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as the Sub-Advisor

By: Strand Advisors, Inc., its General Partner

By:_____
Name: James Dondero
Title: President

ACIS CAPITAL MANAGEMENT, L.P.,
as the Management Company

By: Acis Capital Management GP, LLC, its General Partner

By:_____
Name: James Dondero
Title: President

Appendix A

The Management Company shall pay to the Sub-Advisor a Sub-Advisory Fee for the Services for the Accounts in an amount equal to the aggregate management fees that would be received by the Management Company for such Accounts if such management fees were calculated in exact conformity with the calculation of management fees for such Accounts, except that the management fee rates applied in such calculation were replaced by the fee rate set forth in the following table. Such fees shall be payable promptly (or at such time as is otherwise agreed by the parties) following the Management Company's receipt of management fees for such Accounts, it being understood that none of the foregoing shall prohibit the Management Company from waiving or entering into side letters with respect to management fees for such Accounts; provided that any such waived or reduced amounts shall not be recognized for purposes of calculating the fees payable by the Management Company hereunder. Notwithstanding the foregoing, the parties may agree to a different allocation from that set forth during any period in order to reflect the then current fair market value of the Services rendered.

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Issuer / Borrower / Fund / Account	Management Agreement	Related Agreements	Date of Management Agreement	Annualized Sub-Advisory Fee Rate (bps)
Hewett's Island CLO I-R, Ltd.	**Management Agreement**	**Indenture**	**November 20, 2007**	20
Acis CLO 2013-1 Ltd.	**Portfolio Management Agreement**	**Indenture**	**March 18, 2013**	20
Acis CLO 2013-2 Ltd.	**Portfolio Management Agreement**	**Indenture**	**October 3, 2013**	20
Acis CLO 2014-3 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**February 25, 2014**	20
Acis CLO 2014-4 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**June 5, 2014**	20
Acis CLO 2014-5 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**November 18, 2014**	20
Acis CLO 2015-6 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**April 16, 2015**	20
BayVK R2 Lux S.A., SICAV-FIS	**Agreement for the Outsourcing of the Asset Management**	**Service Level Agreement**	**February 27, 2015**	20
Acis Loan Funding, Ltd.	**Portfolio Management Agreement**		**August 10, 2015**	0

APPENDIX B

Purchase and Sale Transactions; Brokerage

The Management Company acknowledges and agrees that the Sub-Advisor or any of its affiliates may acquire or sell obligations or securities, for its own account or for the accounts of its customers, without either requiring or precluding the acquisition or sale of such obligations or securities for the account of any Account. Such investments may be the same or different from those made by or on behalf of the Management Company or the Accounts.

Additional Activities of the Sub-Advisor

Nothing herein shall prevent the Sub-Advisor or any of its clients, its partners, its members, funds or other investment accounts managed by it or any of its affiliates, or their employees and their affiliates (collectively, the "Related Entities"), from engaging in other businesses, or from rendering services of any kind to the Management Company, its affiliates, any Account or any other Person or entity regardless of whether such business is in competition with the Management Company, its affiliates, such Account or otherwise. Without limiting the generality of the Sub-Advisor and its Related Entities may:

(a) serve as managers or directors (whether supervisory or managing), officers, employees, partners, agents, nominees or signatories for the Management Company or any affiliate thereof, or for any obligor or issuer in respect of any of the Portfolio Assets or any affiliate thereof, to the extent permitted by their respective organizational documents and underlying instruments, as from time to time amended, or by any resolutions duly adopted by the Management Company, any Account, their respective affiliates or any obligor or issuer in respect of any of the Portfolio Assets (or any affiliate thereof) pursuant to their respective organizational documents;

(b) receive fees for services of whatever nature rendered to the obligor or issuer in respect of any of the Portfolio Assets or any affiliate thereof;

(c) be retained to provide services unrelated to this Agreement to the Management Company, any Account or their respective affiliates and be paid therefor, on an arm's-length basis;

(d) be a secured or unsecured creditor of, or hold a debt obligation of or equity interest in, the Management Company, any Account or any affiliate thereof or any obligor or issuer of any Portfolio Asset or any affiliate thereof;

(e) sell any Portfolio Asset to, or purchase or acquire any Portfolio Asset from, any Account while acting in the capacity of principal or agent; *provided, however*, that any such sale or purchase effected by the Sub-Advisor shall be subject to applicable law and any applicable provisions of this Agreement, the related Management Agreement and Related Agreements, as applicable;

(f) underwrite, arrange, structure, originate, syndicate, act as a distributor of or make a market in any Portfolio Asset;

(g) serve as a member of any "creditors' board", "creditors' committee" or similar creditor group with respect to any Portfolio Asset; or

(h) act as portfolio manager, portfolio manager, investment manager and/or investment adviser or sub-advisor in collateralized bond obligation vehicles, collateralized loan obligation vehicles and other similar warehousing, financing or other investment vehicles.

As a result, such individuals may possess information relating to obligors and issuers of Portfolio Assets that is (a) not known to or (b) known but restricted as to its use by the individuals at the Sub-Advisor responsible for monitoring the Portfolio Assets and performing the Services under this Agreement. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Management Company and/or any Account and otherwise create conflicts of interest for the Management Company and/or any Account. The Management Company acknowledges and agrees that, in all such instances, the Sub-Advisor and its affiliates may in their discretion make investment recommendations and decisions that may be the same as or different from those made by the Management Company with respect to the investments of any Account and they have no duty, in making or managing such investments, to act in a way that is favorable to any Account.

The Management Company acknowledges that there are generally no ethical screens or information barriers between the Sub-Advisor and certain of its affiliates of the type that many firms implement to separate Persons who make investment decisions from others who might possess applicable material, non-public information that could influence such decisions. The officers or affiliates of the Sub-Advisor may possess information relating to obligors or issuers of Portfolio Assets that is not known to the individuals at the Sub-Advisor responsible for providing the Services under this Agreement. As a result, the Sub-Advisor may from time to time come into possession of material nonpublic information that limits the ability of the Sub-Advisor to effect a transaction for the Management Company and/or any Account, and the Management Company and/or such Account's investments may be constrained as a consequence of the Sub-Advisor's inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Management Company and/or such Account.

Unless the Sub-Advisor determines in its sole discretion that such Transaction complies with the conflicts of interest provisions set forth in the applicable Management Agreement and Related Agreements, he Sub-Advisor will not direct any Account to acquire or sell loans or securities entered into or issued by (i) Persons of which the Sub-Advisor, any of its affiliates or any of its officers, directors or employees are directors or officers, (ii) Persons of which the Sub-Advisor or any of its respective affiliates act as principal or (iii) Persons about which the Sub-Advisor or any of its affiliates have material non-public information which the Sub-Advisor deems would prohibit it from advising as to the trading of such securities in accordance with applicable law.

It is understood that the Sub-Advisor and any of its affiliates may engage in any other business and furnish investment management and advisory services to others, including Persons which may have investment policies similar to those followed by the Management Company with respect to the Portfolio Assets and which may own securities or obligations of the same class, or which are of the same type, as the Portfolio Assets or other securities or obligations of the obligors or issuers of the Portfolio Assets. The Sub-Advisor and its affiliates will be free, in their sole discretion, to

make recommendations to others, or effect transactions on behalf of themselves or for others, which may be the same as or different from those effected with respect to the Collateral. Nothing in this Agreement, in the Management Agreements or in the Related Agreements shall prevent the Sub-Advisor or any of its affiliates, acting either as principal or agent on behalf of others, from buying or selling, or from recommending to or directing any other account to buy or sell, at any time, securities or obligations of the same kind or class, or securities or obligations of a different kind or class of the same obligor or issuer, as those directed by the Sub-Advisor to be purchased or sold on behalf of an Account. It is understood that, to the extent permitted by applicable law, the Sub-Advisor, its Related Entities, or any of their owners, directors, managers, officers, stockholders, members, partners, partnership committee members, employees, agents or affiliates or the other Covered Persons or any member of their families or a Person or entity advised by the Sub-Advisor may have an interest in a particular transaction or in securities or obligations of the same kind or class, or securities or obligations of a different kind or class of the same issuer, as those that may be owned or acquired by an Account. The Management Company agrees that, in the course of providing the Services, the Sub-Advisor may consider its relationships with other clients (including obligors and issuers) and its affiliates.

The Management Company agrees that neither the Sub-Advisor nor any of its affiliates is under any obligation to offer any investment opportunity of which they become aware to the Management Company or any Account or to account to the Management Company or any Account for (or share with the Management Company or any Account or inform the Management Company or any Account of) any such transaction or any benefit received by them from any such transaction. The Management Company understands that the Sub-Advisor and/or its affiliates may have, for their own accounts or for the accounts of others, portfolios with substantially the same portfolio criteria as are applicable to the Accounts. Furthermore, the Sub-Advisor and/or its affiliates may make an investment on behalf of any client or on their own behalf without offering the investment opportunity or making any investment on behalf of the Management Company or any Account and, accordingly, investment opportunities may not be allocated among all such clients. The Management Company acknowledges that affirmative obligations may arise in the future, whereby the Sub-Advisor and/or its affiliates are obligated to offer certain investments to clients before or without the Sub-Advisor offering those investments to the Management Company or any Account.

The Management Company acknowledges that the Sub-Advisor and its affiliates may make and/or hold investments in an obligor's or issuer's obligations or securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's obligations or securities made and/or held by the Management Company or any Account, or in which partners, security holders, members, officers, directors, agents or employees of the Sub-Advisor and its affiliates serve on boards of directors, or otherwise have ongoing relationships or otherwise have interests different from or adverse to those of the Management Company and the Accounts.

Defined Terms

For purposes of this Appendix B, the following defined terms shall have the meanings set forth below:

"Portfolio" shall mean, with respect to any Account and/or Transaction, the assets held by or in the name of the Account or any subsidiary of the Account in respect of such Transaction,

whether or not for the benefit of the related secured parties, securing the obligations of such Account.

"Portfolio Asset" shall mean any loan, eligible investment or other asset contained in the Portfolio.

"Transaction" shall mean any action taken by the Sub-Advisor on behalf of any Account with respect to the Portfolio, including, without limitation, (i) selecting the Portfolio Assets to be acquired by the Account, (ii) investing and reinvesting the Portfolio, (iii) amending, waiving and/or taking any other action commensurate with managing the Portfolio and (iv) instructing the Account with respect to any acquisition, disposition or tender of a Portfolio Asset or other assets received in respect thereof in the open market or otherwise by the Account.

EXECUTION VERSION

FOURTH AMENDED AND RESTATED SHARED SERVICES AGREEMENT

by and between

ACIS CAPITAL MANAGEMENT, L.P.

and

HIGHLAND CAPITAL MANAGEMENT, L.P.

Dated March 17, 2017

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FOURTH AMENDED AND RESTATED
SHARED SERVICES AGREEMENT

This Fourth Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated as of March 17, 2017, is entered into by and between Acis Capital Management, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the staff and services provider hereunder (in such capacity, the "Staff and Services Provider" and together with the Management Company, the "Parties").

R E C I T A L S

WHEREAS, the Parties entered into that certain Third Amended and Restated Shared Services Agreement dated effective January 1, 2016 (the "Existing Agreement");

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act");

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company;

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a "Shared Employee") is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time); and

WHEREAS, the Parties now desire to amend and restate the Existing Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree that the Existing Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"Advisers Act" shall have the meaning set forth in the Recitals to this Agreement.

"Advisory Restriction" shall have the meaning set forth in Section 5.01(b).

"Affiliate" shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term "control" means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

"Agreement" shall have the meaning set forth in the Preamble to this Agreement.

"Applicable Asset Criteria and Concentrations" means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more CLOs or Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

"Applicable Law" shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof, including the Risk Retention Rules, of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

"CLO or Account" shall mean a collateralized loan obligation transaction, including any type of short-term or long-term warehouse or repurchase facility in connection therewith, or a fund or account advised by the Management Company, as applicable.

"Covered Person" shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

"Governmental Authority" shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission,

corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

"Highland" shall have the meaning set forth in the preamble to this Agreement.

"Indebtedness" shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers' acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) with respect to the Management Company, all indebtedness relating to the acquisition by the EU Originator Series of a collateral obligation that failed to settle (including any ineligible or defaulted collateral obligation) into a CLO; (e) all capital lease obligations; (f) all indebtedness guaranteed by such Person or any of its subsidiaries; (g) all capital lease obligations; (h) all indebtedness guaranteed by such Person or any of its subsidiaries.

"Management Company" shall have the meaning set forth in the preamble to this Agreement.

"Operating Guidelines" means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a CLO or Account.

"Parties" shall have the meaning set forth in the preamble to this Agreement.

"Portfolio" means the Management Company's portfolio of collateral loan obligations, debt securities (including equity investments or subordinated securities in a CLO such as a Retention Interest), other similar obligations, preferred return notes, financial instruments, securities or other assets held directly or indirectly by, or on behalf of, the Management Company from time to time;

"Securities Act" shall mean the Securities Act of 1933, as amended.

"Staff and Services Fee" shall have the meaning set forth in Section 3.01 of this Agreement.

"Staff and Services Provider" shall have the meaning set forth in the preamble to this Agreement.

"Shared Employee" shall have the meaning set forth in the Recitals to this Agreement.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) "or" is not exclusive (unless preceded by "either") and "include" and "including" are

not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) "writing", "written" and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) "hereof", "herein", "hereunder" and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. Highland is hereby appointed as Staff and Services Provider for the purpose of providing such services and assistance as the Management Company may request from time to time to, and to make available the Shared Employees to, the Management Company in accordance with and subject to the provisions of this Agreement and the Staff and Services Provider hereby accepts such appointment. The Staff and Services Provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.1 and subject to Section 2.4 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, accounting, payments, operations, technology and finance;

(b) *Legal/Compliance/Risk Analysis*. Assistance and advice with respect to legal issues, compliance support and implementation and general risk analysis;

(c) *Management of Collateral Obligations and CLOs and Accounts*. Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any CLO or Account from time to time.

(d) *Valuation*. Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such

valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a CLO or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(e) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a CLO or Account managed by the Management Company, CLO transactions involving the Management Company, and any other rights and obligations of the Management Company;

(f) *Marketing*. Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified CLOs or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(g) *Reporting*. Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any CLO or Account, including reports relating to (i) purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(h) *Administrative Services*. The provision of office space, information technology services and equipment, infrastructure and other related services requested or utilized by the Management Company from time to time;

(i) *Shared Employees*. The provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(j) *Ancillary Services*. Assistance and advice on all things ancillary or incidental to the foregoing; and

(k) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any CLO or Account or similar securitization, (c) the substantive investment management decisions with respect to any CLO or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. The name, location and such other matters as the Parties desire to reflect with respect to each Shared Employee shall be identified on the books and records of each of the Management Company and the Staff and Services Provider, which may be amended in writing from time to time by the Parties to add or remove any Shared Employee to reflect the employment (or lack thereof) of such employee. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. If at any time any Shared Employee (or any other person employed by the Staff and Services provider who also provides services to the Management Company) shall be terminated from employment with the Staff and Services Provider or otherwise resigns or is removed from employment with the Staff and Services Provider, then such person may only serve as a separate direct employee of the Management Company upon the approval of the Management Company. The Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate

with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any CLO or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

(i) The Staff and Services Provider shall make reasonably available for use by the Management Company, including through Shared Employees providing services pursuant to this Agreement, any relevant intellectual property and systems necessary for the provision of the services hereunder.

(j) The Staff and Services Provider shall require that each Shared Employee:

(i) certify that he or she is subject to, and has been provided with, a copy of each Party's Code of Ethics and will make such reports, and seek prior clearance for such actions and activities, as may be required under the Codes of Ethics;

(ii) be subject to the supervision and oversight of each Party's officers and directors, including without limitation its Chief Compliance Officer ("CCO"), which CCO may be the same Person, with respect to the services provided to that Party or its clients;

(iii) provide services hereunder and take actions hereunder only as approved by the Management Company;

(iv) provide any information requested by a Party, as necessary to comply with applicable disclosure or regulatory obligations;

(v) to the extent authorized to transact on behalf of the Management Company or a CLO or Account, take reasonable steps to ensure that any such transaction is consistent with any policies and procedures that may be established by the Parties and all Applicable Asset Criteria and Concentrations; and

(vi) act, at all times, in a manner consistent with the fiduciary duties and standard of care owed by the Management Company to its members and direct or indirect investors or to a CLO or Account as well as clients of Staff and Services Provider by seeking to ensure that, among other things, information about any investment advisory or trading activity applicable to a particular client or group of clients is not used to benefit the Shared Employee, any Party or any other client or group of clients in contravention of such fiduciary duties or standard of care.

(k) Unless specifically authorized to do so, or appointed as an officer or authorized person of the Management Company with such authority, no Shared Employee may contract on behalf or in the name of the Management Company, acting as principal.

Section 2.04 Applicable Asset Criteria and Concentrations. The Management Company will promptly inform the Staff and Services Provider in writing of any Applicable Asset Criteria and Concentrations to which it agrees from time to time and the Staff and Services Provider shall take such Applicable Asset Criteria and Concentrations into account when providing assistance and advice in accordance with Section 2.2 above and any other assistance or advice provided in accordance with this Agreement.

Section 2.05 Compliance with Management Company Policies and Procedures. The Management Company will from time to time provide the Staff and Services Provider and the Shared Employees with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a CLO or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company and the Staff and Services Provider's powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive the Staff and Services Fee payable thereto. The "Staff and Services Fee" shall be payable in accordance with Appendix A attached hereto, as such appendix may be amended by the Parties from time to time.

From time to time, the Management Company may enter into shared services agreements with certain management companies on similar terms to this Agreement. Promptly following the receipt of any fees pursuant to such shared services agreements, the Management Company shall pay 100% of such fees to the Staff and Services Provider.

Section 3.03 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.04 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance; Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable

access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records; Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any CLO or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any CLO or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such

information as is routinely disclosed to the trustee, custodian or collateral administrator of any CLO or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such CLO or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the CLOs or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Management Vehicles, the CLOs or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01 Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless such act or omission was made in bad faith or is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a "Disabling Conduct") on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To

the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated ("Claims"), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder may be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be

determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the CLOs or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations

and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum

and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, CLO or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as

expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any CLO or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any CLO or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

(a) If to the Management Company:

Acis Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as the Sub-Advisor

By: Strand Advisors, Inc., its General Partner

By:_____
Name: James Dondero
Title: President

ACIS CAPITAL MANAGEMENT, L.P.,
as the Management Company

By: Acis Capital Management GP, LLC, its General Partner

By:_____
Name: James Dondero
Title: President

Appendix A

The Management Company shall pay to the Staff and Services Provider a Staff and Services Fee for the services for the CLOs or Accounts in an amount equal to the aggregate management fees that would be received by the Management Company for such CLOs or Accounts if such management fees were calculated in exact conformity with the calculation of management fees for such CLOs or Accounts, except that the management fee rates applied in such calculation were replaced by the fee rate set forth in the following table. Such fees shall be payable promptly (or at such time as is otherwise agreed by the parties) following the Management Company's receipt of management fees for such CLOs or Accounts, it being understood that none of the foregoing shall prohibit the Management Company from waiving or entering into side letters with respect to management fees for such CLOs or Accounts; provided that any such waived or reduced amounts shall not be recognized for purposes of calculating the fees payable by the Management Company hereunder. Notwithstanding the foregoing, the parties may agree to a different allocation from that set forth during any period in order to reflect the then current fair market value of the Services rendered.

[*Remainder of Page Intentionally Left Blank*.]

Issuer / Borrower / Fund / Account	Management Agreement	Related Agreements	Date of Management Agreement	Annualized Staff and Services Fee Rate (bps)
Hewett's Island CLO I-R, Ltd.	Management Agreement	Indenture	November 20, 2007	15
Acis CLO 2013-1 Ltd.	Portfolio Management Agreement	Indenture	March 18, 2013	15
Acis CLO 2013-2 Ltd.	Portfolio Management Agreement	Indenture	October 3, 2013	15
Acis CLO 2014-3 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	February 25, 2014	15
Acis CLO 2014-4 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	June 5, 2014	15
Acis CLO 2014-5 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	November 18, 2014	15
Acis CLO 2015-6 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	April 16, 2015	15
BayVK R2 Lux S.A., SICAV-FIS	Agreement for the Outsourcing of the Asset Management	Service Level Agreement	February 27, 2015	15
Acis Loan Funding, Ltd.	Portfolio Management Agreement		August 10, 2015	0

EXHIBIT S

Fill in this information to identify the case:

Debtor 1: Acis Capital Management, G.P.

Debtor 2 (Spouse, if filing):

United States Bankruptcy Court for the: Northern District of Texas

Case number: 18-30265-sgj11

Official Form 410

Proof of Claim

04/16

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

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

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

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

Part 1: Identify the Claim

1. **Who is the current creditor?**

Highland Capital Management, L.P.
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**

☑ No
☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?

Holland O'Neil, Foley Gardere, Foley & Lardner
Name

2021 McKinney Ave, Suite 1600
Number Street

Dallas TX 75201
City State ZIP Code

Contact phone 214-999-3000

Contact email honeil@foley.com

Where should payments to the creditor be sent? (if different)

Scott Ellington, Highland Capital Management
Name

300 Crescent Court, Suite 700
Number Street

Dallas TX 75201
City State ZIP Code

Contact phone

Contact email

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**

☑ No
☐ Yes. Claim number on court claims registry (if known) _____ Filed on ___/___/___ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

☑ No
☐ Yes. Who made the earlier filing?

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

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

7. **How much is the claim?** $ 4,672,140.38 . **Does this amount include interest or other charges?**
☑ No
☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as health care information.
Sub-Advisory Services and Shared Services

9. **Is all or part of the claim secured?**
☑ No
☐ Yes. The claim is secured by a lien on property.
Nature of property:
☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
☐ Motor vehicle
☐ Other. Describe: _____
Basis for perfection: _____
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)
Value of property: $_____
Amount of the claim that is secured: $_____
Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)
Amount necessary to cure any default as of the date of the petition: $_____
Annual Interest Rate (when case was filed)_____%
☐ Fixed
☐ Variable

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

11. **Is this claim subject to a right of setoff?**
☑ No
☐ Yes. Identify the property: _____

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

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

☐ No

☑ Yes. *Check one:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☑ Other. Specify subsection of 11 U.S.C. § 507(a)(3) that applies.	$ 2,049,564.35

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

Part 3: Sign Below

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

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

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

Check the appropriate box:

☑ I am the creditor.
☐ I am the creditor's attorney or authorized agent.
☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 08/01/2018
MM / DD / YYYY

Signature

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

Name: Scott Ellington
First name Middle name Last name

Title: General Counsel

Company: Highland Capital Management, L.P.
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address: 300 Crescent Court, Suite 700
Number Street

Dallas TX 75201
City State ZIP Code

Contact phone _____ Email _____

***In re Acis Capital Management, L.P.*- Case No. 18-30264**
***In re Acis Capital Management, G.P.*- Case No. 18-30265**
United States Bankruptcy Court for the Northern District of Texas

EXHIBIT A TO PROOF OF CLAIM

1. Claimant: Highland Capital Management, L.P. ("**Highland**") maintains its business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. Highland files its proof of claim (the "**Claim**") pursuant to 11 U.S.C. §§ 105(a), 501, and 502(f) and the Federal Rules of Bankruptcy Procedure 3002 and 3003. Prior to the Involuntary Petition Date (defined below), Highland provided sub-advisory and shared services to the Debtors (defined below). Highland has provided portfolio management and advisory services to the Debtors pursuant to that certain Third Amended and Restated Sub-Advisory Agreement by and between the Debtors and Highland dated March 17, 2017 ("**Sub-Advisory Agreement**") (**Exhibit 1**). Specifically, Highland has acted as an investment manager and has identified, evaluated, and recommended investments to investment vehicles advised or sub-advised by the Debtors. Highland has also provided the Debtors with back and middle office services pursuant to that certain Fourth Amended and Restated Shared Services Agreement by and between the Debtors and Highland dated March 17, 2017 ("**Shared Services Agreement**") (**Exhibit 2**). Highland has provided the Debtors with all of the employees and staff necessary to manage the portfolios. Highland continued to provide the same sub-advisory and shared services to the Debtors throughout the Gap Period (defined below). To date, Highland continues to provide such services.

2. Debtors: Acis Capital Management, L.P. and Acis Capital Management, G.P. (the "**Debtors**"). The Debtors' cases have been consolidated under case number 18-30264 in the United States Bankruptcy Court for the Northern District of Texas. Highland provides the service at the following address: 300 Crescent Court, Suite 700, Dallas, Texas 75201.

3. Indebtedness: Because the Debtors were put into bankruptcy involuntarily, the amount included in the proof of claim accounts for pre-petition claims as well as Gap Claims (defined below).

a. Pre-Petition: Joshua Terry, the petitioning creditor, filed the involuntary petition on January 30, 2018 (the "**Petition Date**"). As of the Petition Date, the outstanding indebtedness owing from the Debtors to Highland was as set forth below by account number:

Invoice	Type	Balance
A1-A7; BVK[1]	Sub-Advisory	$1,605,362.41
A1-A7; BVK	Shared Services	$1,017,213.62
	Totals	**$2,622,576.03**

b. Gap Period: When a debtor files bankruptcy, the order for relief is typically entered on the date the petition is filed. However, an involuntary bankruptcy case diverges from the simultaneous entry of an order for relief in that an order for relief is entered at a later date than when a petition is filed. This creates a period of time, referred to as the "gap period", where the debtor may accrue post-petition but pre-order for relief debt. Pursuant to Section 502(f) of the Bankruptcy Code:

> In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section…the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. 502(f).

[1] A1-A7 and BVK account for the following vehicles: Acis CLO 2013-1, Ltd.; Acis CLO 2013-2, Ltd.; Acis CLO 2014-3, Ltd.; Acis CLO 2014-4, Ltd.; Acis CLO 2014-5, Ltd.; Acis CLO 2015-6, Ltd.; Acis CLO 2017-7, Ltd.; BayVK R2 Lux S.A., SICAV-FIS.

Claims arising during the gap period are entitled to priority treatment under section 507(a)(3). The Court entered the Order for Relief on April 13, 2018 ("**Order for Relief Date**"). Highland continued to provide services to the Debtors from January 30, 2018 to April 13, 2018 ("**Gap Period**"). The outstanding balance owed from the Debtors to Highland for the sub-advisory and shared services during the Gap Period is set forth below (and shall be referred to as the "**Gap Claim**"):

Account No.	Type	Balance
A1-A7; BVK	Sub-Advisory	$1,170,147.06
A1-A7; BVK	Shared Services	$879,417.29
	Totals	**$2,049,564.35**

c. Reservation of Rights as to Administrative Claim: Highland has provided uninterrupted sub-advisory and shared services since the Order for Relief Date. Highland reserves its rights to seek allowance of its administrative claims.

d. Indemnity Claims: Highland has contingent claims for indemnification pursuant to Section 6.03 of the Shared Services Agreement and Section 4(c) of the Sub-Advisory Agreement. According to Section 6.03 of the Shared Services Agreement and Section 4(c) of the Sub-Advisory Agreement, "the Management Company [Debtors] hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless Covered Person [Highland and its representatives] from…any and all claims, demands, liabilities, costs…suits, proceedings, judgments, assessments, actions…of whatever nature, known or unknown, liquidated, or unliquidated...arising out of the investment or other activities of the Management Company." Highland reserves such contractual indemnification right.

4. Reservation of Rights; Other Rights: The Claims described in this Attachment are legal, binding, enforceable, allowed, and not subject to any offset, defense, claim, counterclaim or any other diminution of any type, kind or nature, whatsoever; provided, however, the Chapter 11 Trustee alleges that he may offset Highland's Claims and recover from Highland through his current adversary proceeding against Highland (Adversary Proceeding 18-03212). Highland disputes such contention, and believes all Claims sought herein are recoverable despite the Chapter 11 Trustee's allegations. No portion of the Claims or any funds previously paid to Highland are subject to impairment, avoidance, subordination, or disallowance pursuant to the Bankruptcy Code (including, without limitation, Bankruptcy Code § 502) or applicable non-bankruptcy law. Highland expressly reserves the right in the future to assert any and all claims that it may have, including, without limitation, imposition of a constructive trust, equitable lien, security interest, subrogation, marshaling, or other legal or equitable remedies to which it may be entitled. The filing of this proof of claim is not to be construed as an election of remedies. Highland further reserves the rights (a) to amend, modify or supplement this proof of claim, including any exhibit, schedule or annex, or to file an amended proof of claim for the purpose of modifying or liquidating the amount of any interest, fees, costs and expenses accrued or incurred subsequent to the Petition Date or any contingent or unliquidated claims or rights of Highland set forth herein; (b) file additional proofs of claim; and (c) against third parties.

5. Notices: All notices to Highland are to be sent to:

Highland Capital Management, L.P.
Attn: David Klos
300 Crescent Court
Suite 700
Dallas, Texas 75201

with copies to:

Foley Gardere
Foley & Lardner, LLP
c/o Holland O'Neil
2021 McKinney Avenue, Suite 1600
Dallas, TX 75201

6. Payments: All payments and distributions to Highland with respect to this proof of claim are to be made as follows:

Highland Capital Management, L.P.
Attn: David Klos
300 Crescent Court
Suite 700
Dallas, Texas 75201
Re: *In re Acis Capital Management, L.P.*

7. Miscellaneous: This proof of claim is filed under compulsion of the bar date established in this bankruptcy case solely out of an abundance of caution to protect Highland from forfeiture of its claim within this bankruptcy proceeding. The amounts set forth in this proof of claim shall not be construed as an admission by Highland as to the amounts due and owing outside of this bankruptcy proceeding. The filing of this proof of claim is **not:** (a) a waiver or release of and/or Highland's rights or remedies against any person, entity or property; (b) a consent by Highland to entry of final judgment by this Court in any core proceeding commenced in this bankruptcy case, consistent with the United States Supreme Court's holding in *Stern v. Marshall*, 131 S. Ct. 2594 (2011); (c) a waiver of the right to move to withdraw the reference or otherwise challenge the jurisdiction of this Court; (d) a waiver of the right to a jury trial; (e) an election of a remedy which waives or otherwise affects any other remedy; or (f) a waiver of the right to assert a different or enhanced classification of priority for its Claim in respect of the other claims asserted in this bankruptcy case.

EXECUTION VERSION

THIRD AMENDED AND RESTATED SUB-ADVISORY AGREEMENT

by and between

ACIS CAPITAL MANAGEMENT, L.P.

and

HIGHLAND CAPITAL MANAGEMENT, L.P.

Dated March 17, 2017

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THIRD AMENDED AND RESTATED
SUB-ADVISORY AGREEMENT

This Third Amended and Restated Sub-Advisory Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated as of March 17, 2017, is entered into by and between Acis Capital Management, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the sub-advisor hereunder (in such capacity, the "Sub-Advisor" and together with the Management Company, the "Parties").

R E C I T A L S

WHEREAS, the Parties entered into that certain Second Amended and Restated Sub-Advisory Agreement dated July 29, 2016 to be effective January 1, 2016 (the "Existing Agreement");

WHEREAS, the Management Company from time to time has entered and will enter into portfolio management agreements, investment management agreements and/or similar agreements (each such agreement as amended, modified, waived, supplemented or restated, subject in each case to the requirements of Section 8, a "Management Agreement") and related indentures, credit agreements, collateral administration agreements, service agreements or other agreements (each such agreement as amended, modified, waived, supplemented or restated, subject in each case to the requirements of Section 8, a "Related Agreement"), in each case as set forth on Appendix A hereto, as amended from time to time, pursuant to which the Management Company has agreed to provide portfolio and/or investment management services to certain funds and accounts and to certain collateralized loan obligation issuers and to borrowers in certain short-term or long-term warehouse or repurchase facilities in connection therewith (any such transaction, a "Transaction", any fund, account, issuer, warehouse borrower or repurchase agreement seller in respect of any such Transaction, an "Account", and the assets collateralizing each such Transaction and/or comprising the portfolio of such Account, a "Portfolio");

WHEREAS, the Management Company and the Sub-Advisor desire to enter into this Agreement in order to permit the Sub-Advisor to provide certain limited services to assist the Management Company in performing certain obligations under the Management Agreements and Related Agreements;

WHEREAS, the Parties now desire to amend and restate the Existing Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals, and the receipt of good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, intending to be legally bound, hereby agree that the Existing Agreement is hereby amended, restated and replaced in its entirety as follows.

1. Appointment; Limited Scope of Services.

(a) Highland is hereby appointed as Sub-Advisor to the Management Company for the purpose of assisting the Management Company in managing the Portfolios of each Account

pursuant to the related Management Agreement and Related Agreements, in each case that have been included in the scope of this Agreement pursuant to the provisions of Section 8, subject to the terms set forth herein and subject to the supervision of the Management Company, and Highland hereby accepts such appointment.

(b) Without limiting the generality of the foregoing, the Sub-Advisor shall, during the term and subject to the provisions of this Agreement:

(i) make recommendations to the Management Company in its capacity as portfolio manager, investment manager or any similar capacity for any applicable Account as to the general composition and allocation of the Portfolio with respect to such Account among various types of securities, the nature and timing of the changes therein and the manner of implementing such changes, including recommendations as to the specific loans and other assets to be purchased, retained or sold by any such Account;

(ii) place orders with respect to, and arrange for, any investment by or on behalf of such Account (including executing and delivering all documents relating to such Account's investments on behalf of such Account or the Management Company, as applicable), upon receiving a proper instruction from the Management Company;

(iii) identify, evaluate, recommend to the Management Company, in its capacity as portfolio manager for such Account, and, if applicable, negotiate the structure and/or terms of investment opportunities within the specific investment strategy of the Management Company for such Account;

(iv) assist the Management Company in its capacity as portfolio manager for such Account in performing due diligence on prospective Portfolio investments by such Account;

(v) provide information to the Management Company in its capacity as portfolio manager for such Account regarding any investments to facilitate the monitoring and servicing of such investments and, if requested by the Management Company, provide information to assist in monitoring and servicing other investments by such Account

(vi) assist and advise the Management Company in its capacity as portfolio manager for such Account with respect to credit functions including, but not limited to, credit analysis and market research and analysis; and

(vii) assist the Management Company in performing any of its other obligations or duties as portfolio manager for such Account.

The foregoing responsibilities and obligations are collectively referred to herein as the "Services."

Notwithstanding the foregoing, all investment decisions will ultimately be the responsibility of, and will be made by and at the sole discretion of, the Management Company. Furthermore, the

parties acknowledge and agree that the Sub-Advisor shall be required to provide only the services expressly described in this Section 1(b), and shall have no responsibility hereunder to provide any other services to the Management Company or any Transaction, including, but not limited to, administrative, management or similar services.

(c) The Sub-Advisor agrees during the term hereof to furnish the Services on the terms and conditions set forth herein and subject to the limitations contained herein. The Sub-Advisor agrees that, in performing the Services, it will comply with all applicable obligations of the Management Company set forth in the Management Agreements and the Related Agreements. In addition, with respect to any obligation that would be part of the Services but for the fact that the relevant Management Agreement or Related Agreement does not permit such obligation to be delegated by the Management Company to the Sub-Advisor, the Sub-Advisor, upon request in writing by the Management Company, shall work in good faith with the Management Company and shall use commercially reasonable efforts to assist the Management Company in satisfying all such obligations.

2. Compensation.

(a) As compensation for its performance of its obligations as Sub-Advisor under this Agreement in respect of any Transaction, the Sub-Advisor will be entitled to receive the Sub-Advisory Fee payable thereto. The "Sub-Advisory Fee" shall be payable in accordance with Appendix A attached hereto, as such appendix may be amended by the Parties from time to time.

(b) Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Sub-Advisor for any and all costs and expenses that are properly Company Expenses or that may be borne by the Management Company under the Management Company LLC Agreement.

(c) Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any and all amounts payable to the Sub-Advisor pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

(d) From time to time, the Management Company may enter into sub-advisory agreements with certain management companies on similar terms to this Agreement. Promptly following the receipt of any fees pursuant to such sub-advisory agreements, the Management Company shall pay 100% of such fees to the Sub-Advisor.

3. Representations and Warranties.

(a) Each of the Management Company and the Sub-Advisor represents and warrants, as to itself only, that:

(i) it has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(ii) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(iii) no consent, approval, authorization or order of or declaration or filing with any government, governmental instrumentality or court or other person or entity is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(iv) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (A) its constituting and organizational documents; (B) the terms of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound; (C) any statute applicable to it; or (D) any law, decree, order, rule or regulation applicable to it of any court or regulatory, administrative or governmental agency, body of authority or arbitration having or asserting jurisdiction over it or its properties, which, in the case of clauses (B) through (D) above, would have a material adverse effect upon the performance of its duties hereunder.

(b) The Sub-Advisor represents and warrants to the Management Company that it is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act").

(c) The Management Company acknowledges that it has received Part 2 of Highland Capital Management, L.P.'s Form ADV filed with the Securities and Exchange Commission. The Sub-Advisor will provide to the Management Company an updated copy of Part 2 of its Form ADV promptly upon any amendment to such Form ADV being filed with the Securities and Exchange Commission.

4. Standard of Care; Liability; Indemnification.

(a) Sub-Advisor Standard of Care. Subject to the terms and provisions of this Agreement, the Management Agreements and/or the Related Agreements, as applicable, the Sub-Advisor will perform its obligations hereunder and under the Management Agreements and/or the Related Agreements in good faith with reasonable care using a degree of skill and attention no less than that which the Sub-Advisor uses with respect to comparable assets that it manages for others and, without limiting the foregoing, in a manner which the Sub-Advisor reasonably believes to be consistent with the practices and procedures followed by institutional managers of national standing relating to assets of the nature and character of the Portfolios, in each case except as expressly provided otherwise under this Agreement, the Management Agreements and/or the

Related Agreements. To the extent not inconsistent with the foregoing, the Sub-Advisor will follow its customary standards, policies and procedures in performing its duties hereunder, under the Management Agreements and/or under the Related Agreements.

(b) Exculpation. To the fullest extent permitted by law, none of the Sub-Advisor, any of its affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)) (each a "Covered Person") will be liable to the Management Company, any Member, any shareholder, partner or member thereof, any Account (or any other adviser, agent or representative thereof), or to any holder of notes, securities or other indebtedness issued by any Account (collectively, the "Management Company Related Parties"), for (i) any acts or omissions by such Covered Person arising out of or in connection with the provision of the Services hereunder, for any losses that may be sustained in the purchase, holding or sale of any security or debt obligation by any Account, or as a result of any activities of the Sub-Advisor, the Management Company or any other adviser to or agent of the Account or any other sub-advisor appointed by the Management Company to provide portfolio management services to any other delegatee of the Management Company or any other person or entity, unless such act or omission was made in bad faith or is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a "Disabling Conduct") on the part of such Covered Person, (ii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of the Sub-Advisor, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of the Sub-Advisor with reasonable care, or (iii) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to any Management Company Related Party, no Covered Person acting under this Agreement shall be liable to such Management Company Related Party for its good-faith reliance on the provisions of this Agreement.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to any Management Company Related Party solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to any such Management Company Related Party, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to any Management Company Related Party in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care

(c) Indemnification. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated ("Claims"), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the Services, the activities of the Management Company Related Parties, or activities undertaken in connection with the Management Company Related Parties, or otherwise relating to or arising out of this Agreement, any Management Agreement and/or the Related Documents, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of *nolo contendere* or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder may be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 4(c) shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 4(c) to the fullest extent permitted by law

(d) Other Sources of Recovery etc. The indemnification rights set forth in Section 4(c) are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or

indemnification from any Person in which any of the Transactions has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained

(e) Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 4(c) shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person

(f) Reliance. A Covered Person shall incur no liability to any Management Company Related Party in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

(g) Rights Under Management Agreements and Related Agreements. The Management Company will ensure that the Sub-Advisor is provided substantially similar indemnification and exculpation rights as are afforded to the Management Company in its role as portfolio manager under any future Management Agreement or Related Agreement encompassed within the Services hereunder, and it is expressly acknowledged by the Parties that the Sub-Advisor may not consent to including a Management Agreement and the related Transaction and Related Agreements within the scope of this Agreement pursuant to Section 8 if such indemnification and exculpation rights are not reasonably acceptable to it.

5. Limitations on Employment of the Sub-Advisor; Conflicts of Interest.

(a) The services of the Sub-Advisor to the Management Company are not exclusive, and the Sub-Advisor may engage in any other business or render similar or different services to others including, without limitation, the direct or indirect sponsorship or management of other Transactions, investment-based accounts or commingled pools of capital, however structured, having investment objectives similar to those of the Management Company or the Accounts. Moreover, nothing in this Agreement shall limit or restrict the right of any manager, partner, officer or employee of the Sub-Advisor to engage in any other business or to devote his or her time and attention in part to any other business, whether of a similar or dissimilar nature to the Management Company or any Account, or to receive any fees or compensation in connection therewith.

(b) So long as this Agreement or any extension, renewal or amendment of this Agreement remains in effect, the Sub-Advisor shall be the only portfolio management sub-advisor for the Management Company. The Sub-Advisor assumes no responsibility under this Agreement other than to render the services called for hereunder. It is understood that directors, officers, employees, members and managers of the Management Company are or may become interested in the Sub-Advisor and its Affiliates as directors, officers, employees, partners, stockholders, members, managers or otherwise, and that the Sub-Advisor and directors, officers, employees,

partners, stockholders, members and managers of the Sub-Advisor and its Affiliates are or may become similarly interested in the Management Company as members or otherwise.

(c) The Management Company acknowledges that various potential and actual conflicts of interest may exist with respect to the Sub-Advisor as described in the Sub-Advisor's Form ADV Part 2A and as described in Appendix B hereto, and the Management Company expressly acknowledges and agrees to the provisions contained in such Appendix B, as amended from time to time with mutual consent of the Parties.

6. Termination; Survival.

(a) This Agreement may be terminated, in its entirety or with respect to any Management Agreement, at any time without payment of penalty, by the Management Company upon 30 days' prior written notice to the Sub-Advisor.

(b) This Agreement shall terminate automatically with respect to any Management Agreement on the date on which (i) such Management Agreement has been terminated (and, if required thereunder, a successor portfolio manager has been appointed and accepted) or discharged; or (ii) the Management Company is no longer acting as portfolio manager, investment manager or in a similar capacity (whether due to removal, resignation or assignment) under such Management Agreement and the Related Agreements. Upon the termination of this Agreement with respect to any Management Agreement the Management Company shall provide prompt notice thereof to the Sub-Advisor, and Appendix A hereto shall be deemed to be amended by deleting such Management Agreement and the Related Agreements related thereto.

(c) All accrued and unpaid financial and indemnification obligations with respect to any conduct or events occurring prior to the effective date of the termination of this Agreement shall survive the termination of this Agreement.

7. Cooperation with Management Company. The Sub-Advisor shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Sub-Advisor. Specifically, the Sub-Advisor agrees that it will provide the Management Company with reasonable access to information relating to the performance of Sub-Advisor's obligations under this Agreement.

8. Management Agreements and Related Agreements. The Sub-Advisor's duty to provide Services in connection with any Management Agreement shall not commence until (a) Appendix A to this Agreement has been amended by mutual agreement of the Parties to include such Management Agreement and the related Account, fund and/or account and Related Agreements and (b) the Sub-Advisor acknowledges receipt of such Management Agreement and each Related Agreement. The Sub-Advisor shall not be bound to comply with any amendment, modification, supplement or waiver to any Management Agreement or any Related Agreement until it has received a copy thereof from the Management Company. No amendment, modification, supplement or waiver to any Management Agreement or Related Agreement that, when applied to the obligations and rights of the Management Company under such Management Agreement or Related Agreement, affects (i) the obligations or rights of the Sub-Advisor hereunder; (ii) the amount of priority of any fees or other amounts payable to the Sub-Advisor hereunder; or (iii) any

definitions relating to the matters covered in clause (i) or (ii) above, will apply to the Sub-Advisor under this Agreement unless in each such case the Sub-Advisor has consented thereto in writing (such consent not to be unreasonably withheld or delayed unless the Sub-Advisor determines in its reasonable judgment that such amendment, modification, supplement or waiver could have a material adverse effect on the Sub-Advisor).

9. Amendments; Assignments.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 9, without the prior written consent of the other Party and (ii) in accordance with the Advisers Act and other applicable law.

(b) Except as otherwise provided in this Section 9, the Sub-Advisor may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with the Advisers Act and other applicable law.

(c) The Sub-Advisor may, without satisfying any of the conditions of Section 9(a) other than clause (ii) thereof (so long as such assignment does not constitute an assignment within the meaning of Section 202(a)(1) of the Advisers Act), (1) assign any of its rights or obligations under this Agreement to an affiliate; *provided* that such affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Sub-Advisor pursuant to this Agreement and (ii) has the legal right and capacity to act as Sub-Advisor under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Sub-Advisor under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Sub-Advisor in another corporate or similar form and has substantially the same staff; provided, further, that the Sub-Advisor shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Sub-Advisor will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

10. Advisory Restrictions. This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any Management Agreement or any part thereof. It is the express intention of the parties hereto that (i) the Services are limited in scope; and (ii) this Agreement complies in all respects with all applicable (A) contractual provisions and restrictions contained in each Management Agreement and each Related Agreement and (B) laws, rules and regulations (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the Services to be provided under this Agreement shall automatically without action by any person or entity be limited, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

11. Records; Confidentiality.

(a) The Sub-Advisor shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; provided, that the Sub-Advisor shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

(b) The Sub-Advisor shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Sub-Advisor hereunder and shall not disclose any such information to non-affiliated third parties except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its rating of notes issued in connection with a Transaction or supplying credit estimates on any obligation included in the Portfolios, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Account for which the Management Company serves as portfolio manager, (iv) as required by (A) applicable law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Sub-Advisor or any of its affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Sub-Advisor on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Sub-Advisor may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Transaction, or (ix) information relating to performance of the Portfolios as may be used by the Sub-Advisor in the ordinary course of its business. Notwithstanding the foregoing, it is agreed that the Sub-Advisor may disclose without the consent of any Person (1) that it is serving as Sub-Advisor to the Management Company and each Account, (2) the nature, aggregate principal amount and overall performance of the Portfolios, (3) the amount of earnings on the Portfolios, (4) such other information about the Management Company, the Portfolios and the Transactions as is customarily disclosed by Sub-Advisors to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Sub-Advisor, the Management Company, the Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

12. Notice. Any notice or demand to any party to this Agreement to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail, facsimile or email transmission or by delivering it by hand as follows (or to such other address, email address or facsimile number as shall have been notified to the other parties hereto):

(a) If to the Management Company:

Acis Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Sub-Advisor:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

13. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

14. WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

15. Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties.

16. No Waiver. The performance of any condition or obligation imposed upon any party hereunder may be waived only upon the written consent of the parties hereto. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other party under this Agreement. Any failure by any party to this Agreement to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

17. Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written form of communication, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

18. Third Party Beneficiaries. Nothing in this Agreement will be construed to give any person or entity other than the parties to this Agreement, the Accounts and any person or entity with indemnification rights hereunder any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. Except as provided in the foregoing sentence, this Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the parties to this Agreement and their successors and assigns.

19. No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the parties. Except as expressly provided herein or in any other written agreement between the parties, no party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other party.

20. Entire Agreement. This Agreement, together with each Management Agreement and Related Agreement, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the parties with respect to such subject matter.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as the Sub-Advisor

By: Strand Advisors, Inc., its General Partner

By:_____
Name: James Dondero
Title: President

ACIS CAPITAL MANAGEMENT, L.P.,
as the Management Company

By: Acis Capital Management GP, LLC, its General Partner

By:_____
Name: James Dondero
Title: President

Appendix A

The Management Company shall pay to the Sub-Advisor a Sub-Advisory Fee for the Services for the Accounts in an amount equal to the aggregate management fees that would be received by the Management Company for such Accounts if such management fees were calculated in exact conformity with the calculation of management fees for such Accounts, except that the management fee rates applied in such calculation were replaced by the fee rate set forth in the following table. Such fees shall be payable promptly (or at such time as is otherwise agreed by the parties) following the Management Company's receipt of management fees for such Accounts, it being understood that none of the foregoing shall prohibit the Management Company from waiving or entering into side letters with respect to management fees for such Accounts; provided that any such waived or reduced amounts shall not be recognized for purposes of calculating the fees payable by the Management Company hereunder. Notwithstanding the foregoing, the parties may agree to a different allocation from that set forth during any period in order to reflect the then current fair market value of the Services rendered.

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Issuer / Borrower / Fund / Account	Management Agreement	Related Agreements	Date of Management Agreement	Annualized Sub-Advisory Fee Rate (bps)
Hewett's Island CLO I-R, Ltd.	**Management Agreement**	**Indenture**	**November 20, 2007**	20
Acis CLO 2013-1 Ltd.	**Portfolio Management Agreement**	**Indenture**	**March 18, 2013**	20
Acis CLO 2013-2 Ltd.	**Portfolio Management Agreement**	**Indenture**	**October 3, 2013**	20
Acis CLO 2014-3 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**February 25, 2014**	20
Acis CLO 2014-4 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**June 5, 2014**	20
Acis CLO 2014-5 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**November 18, 2014**	20
Acis CLO 2015-6 Ltd.	**Portfolio Management Agreement**	**Indenture** **Collateral Administration Agreement**	**April 16, 2015**	20
BayVK R2 Lux S.A., SICAV-FIS	**Agreement for the Outsourcing of the Asset Management**	**Service Level Agreement**	**February 27, 2015**	20
Acis Loan Funding, Ltd.	**Portfolio Management Agreement**		**August 10, 2015**	0

APPENDIX B

Purchase and Sale Transactions; Brokerage

The Management Company acknowledges and agrees that the Sub-Advisor or any of its affiliates may acquire or sell obligations or securities, for its own account or for the accounts of its customers, without either requiring or precluding the acquisition or sale of such obligations or securities for the account of any Account. Such investments may be the same or different from those made by or on behalf of the Management Company or the Accounts.

Additional Activities of the Sub-Advisor

Nothing herein shall prevent the Sub-Advisor or any of its clients, its partners, its members, funds or other investment accounts managed by it or any of its affiliates, or their employees and their affiliates (collectively, the "Related Entities"), from engaging in other businesses, or from rendering services of any kind to the Management Company, its affiliates, any Account or any other Person or entity regardless of whether such business is in competition with the Management Company, its affiliates, such Account or otherwise. Without limiting the generality of the Sub-Advisor and its Related Entities may:

(a) serve as managers or directors (whether supervisory or managing), officers, employees, partners, agents, nominees or signatories for the Management Company or any affiliate thereof, or for any obligor or issuer in respect of any of the Portfolio Assets or any affiliate thereof, to the extent permitted by their respective organizational documents and underlying instruments, as from time to time amended, or by any resolutions duly adopted by the Management Company, any Account, their respective affiliates or any obligor or issuer in respect of any of the Portfolio Assets (or any affiliate thereof) pursuant to their respective organizational documents;

(b) receive fees for services of whatever nature rendered to the obligor or issuer in respect of any of the Portfolio Assets or any affiliate thereof;

(c) be retained to provide services unrelated to this Agreement to the Management Company, any Account or their respective affiliates and be paid therefor, on an arm's-length basis;

(d) be a secured or unsecured creditor of, or hold a debt obligation of or equity interest in, the Management Company, any Account or any affiliate thereof or any obligor or issuer of any Portfolio Asset or any affiliate thereof;

(e) sell any Portfolio Asset to, or purchase or acquire any Portfolio Asset from, any Account while acting in the capacity of principal or agent; *provided, however*, that any such sale or purchase effected by the Sub-Advisor shall be subject to applicable law and any applicable provisions of this Agreement, the related Management Agreement and Related Agreements, as applicable;

(f) underwrite, arrange, structure, originate, syndicate, act as a distributor of or make a market in any Portfolio Asset;

(g) serve as a member of any "creditors' board", "creditors' committee" or similar creditor group with respect to any Portfolio Asset; or

(h) act as portfolio manager, portfolio manager, investment manager and/or investment adviser or sub-advisor in collateralized bond obligation vehicles, collateralized loan obligation vehicles and other similar warehousing, financing or other investment vehicles.

As a result, such individuals may possess information relating to obligors and issuers of Portfolio Assets that is (a) not known to or (b) known but restricted as to its use by the individuals at the Sub-Advisor responsible for monitoring the Portfolio Assets and performing the Services under this Agreement. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Management Company and/or any Account and otherwise create conflicts of interest for the Management Company and/or any Account. The Management Company acknowledges and agrees that, in all such instances, the Sub-Advisor and its affiliates may in their discretion make investment recommendations and decisions that may be the same as or different from those made by the Management Company with respect to the investments of any Account and they have no duty, in making or managing such investments, to act in a way that is favorable to any Account.

The Management Company acknowledges that there are generally no ethical screens or information barriers between the Sub-Advisor and certain of its affiliates of the type that many firms implement to separate Persons who make investment decisions from others who might possess applicable material, non-public information that could influence such decisions. The officers or affiliates of the Sub-Advisor may possess information relating to obligors or issuers of Portfolio Assets that is not known to the individuals at the Sub-Advisor responsible for providing the Services under this Agreement. As a result, the Sub-Advisor may from time to time come into possession of material nonpublic information that limits the ability of the Sub-Advisor to effect a transaction for the Management Company and/or any Account, and the Management Company and/or such Account's investments may be constrained as a consequence of the Sub-Advisor's inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Management Company and/or such Account.

Unless the Sub-Advisor determines in its sole discretion that such Transaction complies with the conflicts of interest provisions set forth in the applicable Management Agreement and Related Agreements, he Sub-Advisor will not direct any Account to acquire or sell loans or securities entered into or issued by (i) Persons of which the Sub-Advisor, any of its affiliates or any of its officers, directors or employees are directors or officers, (ii) Persons of which the Sub-Advisor or any of its respective affiliates act as principal or (iii) Persons about which the Sub-Advisor or any of its affiliates have material non-public information which the Sub-Advisor deems would prohibit it from advising as to the trading of such securities in accordance with applicable law.

It is understood that the Sub-Advisor and any of its affiliates may engage in any other business and furnish investment management and advisory services to others, including Persons which may have investment policies similar to those followed by the Management Company with respect to the Portfolio Assets and which may own securities or obligations of the same class, or which are of the same type, as the Portfolio Assets or other securities or obligations of the obligors or issuers of the Portfolio Assets. The Sub-Advisor and its affiliates will be free, in their sole discretion, to

make recommendations to others, or effect transactions on behalf of themselves or for others, which may be the same as or different from those effected with respect to the Collateral. Nothing in this Agreement, in the Management Agreements or in the Related Agreements shall prevent the Sub-Advisor or any of its affiliates, acting either as principal or agent on behalf of others, from buying or selling, or from recommending to or directing any other account to buy or sell, at any time, securities or obligations of the same kind or class, or securities or obligations of a different kind or class of the same obligor or issuer, as those directed by the Sub-Advisor to be purchased or sold on behalf of an Account. It is understood that, to the extent permitted by applicable law, the Sub-Advisor, its Related Entities, or any of their owners, directors, managers, officers, stockholders, members, partners, partnership committee members, employees, agents or affiliates or the other Covered Persons or any member of their families or a Person or entity advised by the Sub-Advisor may have an interest in a particular transaction or in securities or obligations of the same kind or class, or securities or obligations of a different kind or class of the same issuer, as those that may be owned or acquired by an Account. The Management Company agrees that, in the course of providing the Services, the Sub-Advisor may consider its relationships with other clients (including obligors and issuers) and its affiliates.

The Management Company agrees that neither the Sub-Advisor nor any of its affiliates is under any obligation to offer any investment opportunity of which they become aware to the Management Company or any Account or to account to the Management Company or any Account for (or share with the Management Company or any Account or inform the Management Company or any Account of) any such transaction or any benefit received by them from any such transaction. The Management Company understands that the Sub-Advisor and/or its affiliates may have, for their own accounts or for the accounts of others, portfolios with substantially the same portfolio criteria as are applicable to the Accounts. Furthermore, the Sub-Advisor and/or its affiliates may make an investment on behalf of any client or on their own behalf without offering the investment opportunity or making any investment on behalf of the Management Company or any Account and, accordingly, investment opportunities may not be allocated among all such clients. The Management Company acknowledges that affirmative obligations may arise in the future, whereby the Sub-Advisor and/or its affiliates are obligated to offer certain investments to clients before or without the Sub-Advisor offering those investments to the Management Company or any Account.

The Management Company acknowledges that the Sub-Advisor and its affiliates may make and/or hold investments in an obligor's or issuer's obligations or securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's obligations or securities made and/or held by the Management Company or any Account, or in which partners, security holders, members, officers, directors, agents or employees of the Sub-Advisor and its affiliates serve on boards of directors, or otherwise have ongoing relationships or otherwise have interests different from or adverse to those of the Management Company and the Accounts.

Defined Terms

For purposes of this Appendix B, the following defined terms shall have the meanings set forth below:

"Portfolio" shall mean, with respect to any Account and/or Transaction, the assets held by or in the name of the Account or any subsidiary of the Account in respect of such Transaction,

whether or not for the benefit of the related secured parties, securing the obligations of such Account.

"Portfolio Asset" shall mean any loan, eligible investment or other asset contained in the Portfolio.

"Transaction" shall mean any action taken by the Sub-Advisor on behalf of any Account with respect to the Portfolio, including, without limitation, (i) selecting the Portfolio Assets to be acquired by the Account, (ii) investing and reinvesting the Portfolio, (iii) amending, waiving and/or taking any other action commensurate with managing the Portfolio and (iv) instructing the Account with respect to any acquisition, disposition or tender of a Portfolio Asset or other assets received in respect thereof in the open market or otherwise by the Account.

EXECUTION VERSION

FOURTH AMENDED AND RESTATED SHARED SERVICES AGREEMENT

by and between

ACIS CAPITAL MANAGEMENT, L.P.

and

HIGHLAND CAPITAL MANAGEMENT, L.P.

Dated March 17, 2017

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FOURTH AMENDED AND RESTATED
SHARED SERVICES AGREEMENT

This Fourth Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated as of March 17, 2017, is entered into by and between Acis Capital Management, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the staff and services provider hereunder (in such capacity, the "Staff and Services Provider" and together with the Management Company, the "Parties").

R E C I T A L S

WHEREAS, the Parties entered into that certain Third Amended and Restated Shared Services Agreement dated effective January 1, 2016 (the "Existing Agreement");

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act");

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company;

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a "Shared Employee") is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time); and

WHEREAS, the Parties now desire to amend and restate the Existing Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree that the Existing Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"Advisers Act" shall have the meaning set forth in the Recitals to this Agreement.

"Advisory Restriction" shall have the meaning set forth in Section 5.01(b).

"Affiliate" shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term "control" means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

"Agreement" shall have the meaning set forth in the Preamble to this Agreement.

"Applicable Asset Criteria and Concentrations" means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more CLOs or Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

"Applicable Law" shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof, including the Risk Retention Rules, of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

"CLO or Account" shall mean a collateralized loan obligation transaction, including any type of short-term or long-term warehouse or repurchase facility in connection therewith, or a fund or account advised by the Management Company, as applicable.

"Covered Person" shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

"Governmental Authority" shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission,

corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

"Highland" shall have the meaning set forth in the preamble to this Agreement.

"Indebtedness" shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers' acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) with respect to the Management Company, all indebtedness relating to the acquisition by the EU Originator Series of a collateral obligation that failed to settle (including any ineligible or defaulted collateral obligation) into a CLO; (e) all capital lease obligations; (f) all indebtedness guaranteed by such Person or any of its subsidiaries; (g) all capital lease obligations; (h) all indebtedness guaranteed by such Person or any of its subsidiaries.

"Management Company" shall have the meaning set forth in the preamble to this Agreement.

"Operating Guidelines" means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a CLO or Account.

"Parties" shall have the meaning set forth in the preamble to this Agreement.

"Portfolio" means the Management Company's portfolio of collateral loan obligations, debt securities (including equity investments or subordinated securities in a CLO such as a Retention Interest), other similar obligations, preferred return notes, financial instruments, securities or other assets held directly or indirectly by, or on behalf of, the Management Company from time to time;

"Securities Act" shall mean the Securities Act of 1933, as amended.

"Staff and Services Fee" shall have the meaning set forth in Section 3.01 of this Agreement.

"Staff and Services Provider" shall have the meaning set forth in the preamble to this Agreement.

"Shared Employee" shall have the meaning set forth in the Recitals to this Agreement.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) "or" is not exclusive (unless preceded by "either") and "include" and "including" are

not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) "writing", "written" and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) "hereof", "herein", "hereunder" and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. Highland is hereby appointed as Staff and Services Provider for the purpose of providing such services and assistance as the Management Company may request from time to time to, and to make available the Shared Employees to, the Management Company in accordance with and subject to the provisions of this Agreement and the Staff and Services Provider hereby accepts such appointment. The Staff and Services Provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.1 and subject to Section 2.4 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, accounting, payments, operations, technology and finance;

(b) *Legal/Compliance/Risk Analysis*. Assistance and advice with respect to legal issues, compliance support and implementation and general risk analysis;

(c) *Management of Collateral Obligations and CLOs and Accounts*. Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any CLO or Account from time to time.

(d) *Valuation*. Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such

valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a CLO or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(e) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a CLO or Account managed by the Management Company, CLO transactions involving the Management Company, and any other rights and obligations of the Management Company;

(f) *Marketing*. Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified CLOs or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(g) *Reporting*. Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any CLO or Account, including reports relating to (i) purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(h) *Administrative Services*. The provision of office space, information technology services and equipment, infrastructure and other related services requested or utilized by the Management Company from time to time;

(i) *Shared Employees*. The provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(j) *Ancillary Services*. Assistance and advice on all things ancillary or incidental to the foregoing; and

(k) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any CLO or Account or similar securitization, (c) the substantive investment management decisions with respect to any CLO or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. The name, location and such other matters as the Parties desire to reflect with respect to each Shared Employee shall be identified on the books and records of each of the Management Company and the Staff and Services Provider, which may be amended in writing from time to time by the Parties to add or remove any Shared Employee to reflect the employment (or lack thereof) of such employee. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. If at any time any Shared Employee (or any other person employed by the Staff and Services provider who also provides services to the Management Company) shall be terminated from employment with the Staff and Services Provider or otherwise resigns or is removed from employment with the Staff and Services Provider, then such person may only serve as a separate direct employee of the Management Company upon the approval of the Management Company. The Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate

with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any CLO or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

(i) The Staff and Services Provider shall make reasonably available for use by the Management Company, including through Shared Employees providing services pursuant to this Agreement, any relevant intellectual property and systems necessary for the provision of the services hereunder.

(j) The Staff and Services Provider shall require that each Shared Employee:

(i) certify that he or she is subject to, and has been provided with, a copy of each Party's Code of Ethics and will make such reports, and seek prior clearance for such actions and activities, as may be required under the Codes of Ethics;

(ii) be subject to the supervision and oversight of each Party's officers and directors, including without limitation its Chief Compliance Officer ("CCO"), which CCO may be the same Person, with respect to the services provided to that Party or its clients;

(iii) provide services hereunder and take actions hereunder only as approved by the Management Company;

(iv) provide any information requested by a Party, as necessary to comply with applicable disclosure or regulatory obligations;

(v) to the extent authorized to transact on behalf of the Management Company or a CLO or Account, take reasonable steps to ensure that any such transaction is consistent with any policies and procedures that may be established by the Parties and all Applicable Asset Criteria and Concentrations; and

(vi) act, at all times, in a manner consistent with the fiduciary duties and standard of care owed by the Management Company to its members and direct or indirect investors or to a CLO or Account as well as clients of Staff and Services Provider by seeking to ensure that, among other things, information about any investment advisory or trading activity applicable to a particular client or group of clients is not used to benefit the Shared Employee, any Party or any other client or group of clients in contravention of such fiduciary duties or standard of care.

(k) Unless specifically authorized to do so, or appointed as an officer or authorized person of the Management Company with such authority, no Shared Employee may contract on behalf or in the name of the Management Company, acting as principal.

Section 2.04 Applicable Asset Criteria and Concentrations. The Management Company will promptly inform the Staff and Services Provider in writing of any Applicable Asset Criteria and Concentrations to which it agrees from time to time and the Staff and Services Provider shall take such Applicable Asset Criteria and Concentrations into account when providing assistance and advice in accordance with Section 2.2 above and any other assistance or advice provided in accordance with this Agreement.

Section 2.05 Compliance with Management Company Policies and Procedures. The Management Company will from time to time provide the Staff and Services Provider and the Shared Employees with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a CLO or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company and the Staff and Services Provider's powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive the Staff and Services Fee payable thereto. The "Staff and Services Fee" shall be payable in accordance with Appendix A attached hereto, as such appendix may be amended by the Parties from time to time.

From time to time, the Management Company may enter into shared services agreements with certain management companies on similar terms to this Agreement. Promptly following the receipt of any fees pursuant to such shared services agreements, the Management Company shall pay 100% of such fees to the Staff and Services Provider.

Section 3.03 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.04 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance; Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable

access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records; Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any CLO or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any CLO or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such

information as is routinely disclosed to the trustee, custodian or collateral administrator of any CLO or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such CLO or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the CLOs or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Management Vehicles, the CLOs or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01 Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless such act or omission was made in bad faith or is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a "Disabling Conduct") on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To

the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated ("Claims"), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder may be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be

determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the CLOs or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations

and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum

and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, CLO or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as

expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any CLO or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any CLO or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

(a) If to the Management Company:

Acis Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
as the Sub-Advisor

By: Strand Advisors, Inc., its General Partner

By:_____
Name: James Dondero
Title: President

ACIS CAPITAL MANAGEMENT, L.P.,
as the Management Company

By: Acis Capital Management GP, LLC, its General Partner

By:_____
Name: James Dondero
Title: President

Appendix A

The Management Company shall pay to the Staff and Services Provider a Staff and Services Fee for the services for the CLOs or Accounts in an amount equal to the aggregate management fees that would be received by the Management Company for such CLOs or Accounts if such management fees were calculated in exact conformity with the calculation of management fees for such CLOs or Accounts, except that the management fee rates applied in such calculation were replaced by the fee rate set forth in the following table. Such fees shall be payable promptly (or at such time as is otherwise agreed by the parties) following the Management Company's receipt of management fees for such CLOs or Accounts, it being understood that none of the foregoing shall prohibit the Management Company from waiving or entering into side letters with respect to management fees for such CLOs or Accounts; provided that any such waived or reduced amounts shall not be recognized for purposes of calculating the fees payable by the Management Company hereunder. Notwithstanding the foregoing, the parties may agree to a different allocation from that set forth during any period in order to reflect the then current fair market value of the Services rendered.

[*Remainder of Page Intentionally Left Blank*.]

Issuer / Borrower / Fund / Account	Management Agreement	Related Agreements	Date of Management Agreement	Annualized Staff and Services Fee Rate (bps)
Hewett's Island CLO I-R, Ltd.	Management Agreement	Indenture	November 20, 2007	15
Acis CLO 2013-1 Ltd.	Portfolio Management Agreement	Indenture	March 18, 2013	15
Acis CLO 2013-2 Ltd.	Portfolio Management Agreement	Indenture	October 3, 2013	15
Acis CLO 2014-3 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	February 25, 2014	15
Acis CLO 2014-4 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	June 5, 2014	15
Acis CLO 2014-5 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	November 18, 2014	15
Acis CLO 2015-6 Ltd.	Portfolio Management Agreement	Indenture Collateral Administration Agreement	April 16, 2015	15
BayVK R2 Lux S.A., SICAV-FIS	Agreement for the Outsourcing of the Asset Management	Service Level Agreement	February 27, 2015	15
Acis Loan Funding, Ltd.	Portfolio Management Agreement		August 10, 2015	0

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas Thursday, June 10, 2021 9:30 a.m. Docket MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3 FILED BY GET GOOD TRUST AND THE DUGABOY INVESTMENT TRUST (2256)
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., Defendant.	**Adversary Proceeding 21-3006-sgj** DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND BRIEF IN SUPPORT [15]
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HCRE PARTNERS, LLC N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC, Defendant.	**Adversary Proceeding 21-3007-sgj** DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER TO PLAINTIFF'S COMPLAINT [16]

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

WEBEX APPEARANCES:

For the Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300
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For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
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Transcribed by:

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

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

Thank you, Your Honor.

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

MR. MORRIS: Here's the --

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

MR. MORRIS: Yeah, I --

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

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

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

these defenses metastasize. But it's something that we're considering, and we reserve the right to do exactly that, as these defenses continue to get -- and it would be fraudulent transfer, it would be breach of fiduciary duty against Nancy Dondero, it would be breach of fiduciary duty against Jim Dondero. I'm sure that there are other claims, Your Honor. But if they want to -- if I'm forced to go down that path, I'm certainly going to use every tool that I have available to recover these amounts from the -- for the Debtor and their creditors. This is just an abuse of process.

How do you -- how does one enter into agreements of this type without telling your CFO, without telling your auditors, without putting it in writing? And I asked Mr. Dondero, what benefit did the Debtor get from all of this? And you know what his answer was, Your Honor? Because it's really -- it's appalling. It was going to give him heightened focus on getting the job done because of this agreement that he entered into with his sister, Nancy, acting on behalf of the Debtor, with no information, with no documents, with no notes, with no advice, with no corporate resolutions. The Debtor was going to get Mr. Dondero's heightened focus to sell MGM, Trussway, or Cornerstone for one dollar above cost.

I think the fraudulent transfer claim is probably a pretty solid one. But why do we have to do this? Why do we have to do this?

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

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

MS. DRAWHORN: Yes.

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

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

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

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

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

MR. MORRIS: Yes, Your Honor.

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

THE CLERK: All rise.

(Proceedings concluded at 11:58 a.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 **06/12/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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