Docket #0397 Date Filed: 10/14/2025

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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.,** **Reorganized Debtor.**	**Chapter 11** **Case No. 19-34054-sgj11**
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST, **Plaintiff,** **v.** **JAMES D. DONDERO; MARK A. OKADA; SCOTT ELLINGTON; ISAAC LEVENTON; GRANT JAMES SCOTT III; FRANK WATERHOUSE; STRAND ADVISORS, INC.; NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; DUGABOY INVESTMENT TRUST AND NANCY DONDERO, AS TRUSTEE OF DUGABOY**	**Adv. Pro. No. 21-03076-sgj**

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INVESTMENT TRUST; GET GOOD TRUST AND GRANT JAMES SCOTT III, AS TRUSTEE OF GET GOOD TRUST; HUNTER MOUNTAIN INVESTMENT TRUST; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1 AND LAWRENCE TONOMURA AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2 AND LAWRENCE TONOMURA IN HIS CAPACITY AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2; CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO, LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND DALLAS FOUNDATION; RAND PE FUND I, LP, SERIES 1; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; SAS ASSET RECOVERY, LTD.; AND CPCM, LLC,

Defendants.

DEFENDANTS' WITNESS AND EXHIBIT LIST FOR OCTOBER 17, 2025 AT 9:30 A.M. (CENTRAL TIME)

Defendants NexPoint Advisors, L.P., NexPoint Asset Management, L.P. f/k/a Highland Capital Management Fund Advisors, L.P., James Dondero, The Dugaboy Investment Trust, Get Good Trust, Strand Advisors, Inc., Scott Ellington, and Isaac Leventon (collectively, the "Defendants") submit this Witness and Exhibit List for the hearing scheduled on Friday, October 17, 2025 at 9:30 a.m. on the Motion for a Temporary Restraining Order brought by Plaintiff Hunter Mountain Investment Trust (the "TRO Hearing").

THE DEFENDANTS' WITNESS LIST

The Defendants may call the following persons to testify as witnesses at the Hearing:

1. Any witness called by any other party; and

2. Rebuttal witnesses as necessary.

The Defendants reserve the right to cross-examine any witness called by any other party.

THE DEFENDANTS' EXHIBIT LIST

No.	Exhibit	Offered	Admitted
A	Hearing Transcript from September 3, 2025 hearing on the Motion to Substitute pp.27-33		
B	*Motion to Dismiss of Defendants James D. Dondero, The Dugaboy Investment Trust, Get Good Trust, Hunter Mountain Investment Trust, Rand PE Fund I, LP, and Strand Advisors, Inc.and Memorandum in Support* filed July 12, 2022 [Dkts. 189, 190]		
C	The Grand Court Of The Cayman Islands Financial Services Division's Consent Order issued on July 31, 2025		
D	Hearing Transcript excerpts from the June 25, 2025 hearing in Bankruptcy Case No. 19-34054 pp.173-74		
E	Letter dated July 11, 2025 regarding Rule 11 Agreement		
F	Get Good Trust's Disclosures in Response to Order Requiring Disclosures in Bankruptcy Case No. 19-43054, Dkt. 2546		
G	CLO HoldCo, Ltd, Charitable DAF Fund, LP, Highland Dallas Foundation, Inc.'s Disclosures in Response to Order Requiring Disclosures in Bankruptcy Case No. 19-43054, Dkt. 2547		
H	NexPoint Real Estate Partners, et al, and Highland Capital Management Services' Disclosures in Response to Order Requiring Disclosures in Bankruptcy Case No. 19-43054, Dkt. 2544		
I	Highland Funds I, et al., Disclosures in Response to Order Requiring Disclosures in Bankruptcy Case No. 19-43054, Dkt. 2539		
J	NexPoint Advisors, L.P. and Highland Capital Fund Advisors, L.P.'s Disclosures in Response to Order Requiring Disclosures in Bankruptcy Case No. 19-43054, Dkt. 2543		
K	Dugaboy Investment Trust's Disclosures in Response to Order Requiring Disclosures in Bankruptcy Case No. 19-43054, Dkt. 2548		
L	*Exhibit 1 to Petitioners': (I) Omnibus Reply in Support of Motion of Petitioners for Entry of An Order Granting Provisional Relief Compelling Turnover Of The Debtor's Books And Records Pursuant To Bankruptcy Code Sections 105(A), 542, 1519 And 1521; And (II) Objection To The Patrick Entities' Emergency Cross Motion For Adjournment Of Motion* filed in *In re: Charitable Daf Holdco, Ltd. (In Official Liquidation)* (Del. Bankr. Case. No. 25-11376) at ¶¶ 9 and 11.3;		
M	Resignation Letter of Mark Patrick dated October 2, 2024;		
N	Appearance Detail for Index No. 650744/2023 *UBS Securities LLC v. Dondero* in the New York State Supreme Court		

No.	Exhibit	Offered	Admitted
O	Cancellation Notice for September 29, 2025 Hearing for Index No. 650744/2023 *UBS Securities LLC v. Dondero* in the New York State Supreme Court		
P	Notice of Appeal of Denial of Motion to Dismiss for Index No. 650744/2023 *UBS Securities LLC v. Dondero* in the New York State Supreme Court		
Q	The JOLs Petition in the Grand Court Of The Cayman Islands Financial Services Division dated July 15, 2025		
R	Atreyu Logistics LLC Articles of Incorporation Filing		
S	Evidence of Cayman Court Approving Crossvine Funding		
T	Any exhibits designated by any other party; and		
U	Any exhibits necessary as rebuttal evidence.		

The Defendants reserve the right to amend or supplement this Witness and Exhibit List as necessary in advance of the Hearing.

Dated: October 14, 2025

Respectfully submitted,

STINSON LLP

/s/ Deborah Deitsch-Perez

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CERTIFICATE OF SERVICE

I certify that on October 14, 2025, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this case.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

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COUNSEL FOR NEXPOINT ADVISORS, L.P. AND
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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.,	§	Chapter 11
	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	

RESPONSE OF THE ADVISORS TO ORDER REQUIRING DISCLOSURES

COME NOW NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA," with NexPoint, the "Advisors"), and file this their *Response to Order Requiring Disclosures* (the "Order"), entered by the Court *sua sponte* in the above styled and numbered Chapter 11 bankruptcy case (the "Bankruptcy Case") of Highland Capital Management, L.P. (the "Debtor"), respectfully stating as follows:

I. THE ADVISORS HAVE CLEAR STANDING

1. The Court appears to question the standing of the Advisors with respect to past, present, and potentially future actions. The Court also appears to believe that the Advisors "frequently file lengthy and contentious pleadings," while the mere fact of the Order implies that the Advisors have been opaque regarding their ownership and control. Respectfully, any concerns along these lines are not warranted.

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2. First, the Advisors are expressly named as parties enjoined by the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* (the "Plan"). "Enjoined Parties" under the Plan is defined as including any "Related Entity." Plan at p. 8. "Related Entity" includes "affiliates" of the Debtor and any entity on the "Related Entity List." Plan at p. 14. This list is filed as a Plan Supplement, *see* Plan at p. 14, and it includes both Advisors. *See* Docket No. 1811-9 at pp. 9 and 12.

3. As the Advisors are both subject to the Plan's injunctions, the Advisors have unquestionable standing to seek relief from the Plan, including objecting to the Plan, appealing the Plan, and seeking to stay the Plan. *See, e.g., Samnorwood Indep. Sch. Dist. v. Tex. Educ. Agency*, 533 F.3d 258, 265 (5th Cir. 2008) ("a third party ha[s] standing to appeal an injunction which adversely affects its interest, even when it was not a party to the litigation"). Thus, even if the Advisors did not have a direct economic interest under the Plan—a point on which the Court focused—the fact that the Plan enjoined them and took from them the rights they otherwise had conferred standing. As the Advisors informed the Court, if they were not being enjoined under the Plan from advising their clients to take certain actions, or causing their clients to take certain actions, which they believed to be necessary and proper pursuant to their own fiduciary duties, and if the Plan was not exculpating various persons, including of their fiduciary duties to the Advisors and their clients, then the Advisors would not have contested the Plan. The Plan need not have enjoined the Advisors or provided broad exculpations, but it did, and the Advisors should not be faulted for contesting and continuing to contest the Plan.

4. Next, the Debtor has filed four adversary proceedings against the Advisors. It was the Debtor who filed these, and sought preliminary injunctive relief and mandatory final injunctions. The Advisors have reasonably and lawfully *defended* themselves against the Debtor's claims and causes of action. That is not vexatiousness of any kind.

5. On January 6, 2021, the Debtor filed a complaint against the Advisors and others, thereby initiating Adversary Proceeding No. 21-03000. The Debtor alleged that the Advisors and others tortiously interfered with contracts and violated the automatic stay, and the Debtor sought a preliminary injunction preventing the Advisors and others from seeking to remove the Debtor as the manager of various third-party CLOs. The Advisors agreed to a continuing temporary restraining order and the matter has been settled, subject to an imminent 9019, with the Debtor dismissing with prejudice all of its claims against the Advisors and the Advisors agreeing that they are controlled by Mr. Dondero—something they have always admitted. That the Debtor is dismissing these claims without any settlement payment demonstrates that these claims were always baseless. The Advisors had the right and standing to defend themselves and the interests of their clients, and they acted reasonably throughout.

6. Next, the Debtor filed separate adversary proceedings against each of the Advisors, seeking monetary damages for amounts allegedly owing under promissory notes. On January 22, 2021, the Debtor filed its complaint against HCMFA, thereby initiating Adversary Proceeding No. 21-03004, seeking damages of at least $7,687,653.07 under alleged promissory notes. Also on January 22, 2021, the Debtor filed its complaint against NexPoint, thereby initiating Adversary Proceeding No. 21-03005, seeking damages of at least $23,071,195.03. The Advisors deny any liability and have asserted various affirmative defenses. The Advisors have the right and standing to defend themselves, and have been so doing. The Court recently agreed that the reference for these adversary proceedings will have to be withdrawn, over the Debtor's objection. The Advisors will note that the Debtor argued that this Court could try these promissory note suits under section 542 of the Bankruptcy Code, a proposition rejected by this Court on multiple occasions before and by most of the case law. It was the Debtor that forced a contested hearing on what should have been, respectfully, an obvious issue and an obvious conclusion.

7. Next, the Debtor filed a fourth adversary proceeding against the Advisors, seeking unspecified contract damages but, more importantly, seeking an exotic, if not unprecedented, mandatory injunction. The Debtor filed this Complaint on February 17, 2021, thereby initiating Adversary Proceeding No. 21-03010. The Debtor convinced the Court of an emergency, and an emergency, all-day trial was held on the mandatory injunction action on six days' notice. Even though it was reasonably clear to the Debtor that there was no issue and any issue was moot, the Debtor proceeded with its case, at the conclusion of which the Court denied the injunction as moot. The Advisors had every right and standing to contest this action, and they were proven right. It was the Debtor that chose to force an all-day hearing on an issue that never existed, never was an emergency, and was moot even under the Debtor's allegations.

8. Separately, as the Court noted in the Order, the Advisors have filed an application for allowance of administrative claims of approximately $14 million, resulting from postpetition overpayments under shared service agreements between the Advisors and the Debtor. *See* Docket No. 1826. The Advisors' points and arguments are simple: the Debtor billed the Advisors for many employees under shared services agreements, who were actually no longer employed by the Debtor and could not have been providing the Advisors with any services, while the Advisors paid for these services without return value and in violation of the contracts. The Debtor contests the allowance of these claims and the Court will decide the claims in due course. The Advisors have the right and standing to prosecute these administrative claims, which claims are neither absurd, baseless, nor without *prima facie* evidence.

9. Finally, NexPoint has acquired the prepetition (and potentially postpetition) claims of various former employees of the Debtor, who are now employed by NexPoint or by a staffing company engaged by NexPoint. These employees are: Bhawika Jain, Michael Beispiel, Sang Kook (Michael) Jeong, Phoebe Stewart, and Sahan Abayaratha. *See* Docket Nos. 2044, 2045,

2046, 2047, and 2266. The amount of these employees' claims is not yet known, and remains subject to ongoing discovery. While the Debtor has objected to these employee claims, *see* Docket No. 2059, that objection has yet to be sustained. And, while the details are not clear to NexPoint, at least for Plan voting purposes the Court estimated the claims of these employees at $1 each. In any event, as the holder of prepetition claims, which have yet to be disallowed, NexPoint has full standing in the Bankruptcy Case the same as any creditor. And, since even the Court estimated these claims at *some* amount, the claims are neither absurd, baseless, nor without *prima facie* evidence.

10. As defendants in four lawsuits, it cannot be suggested that the Advisors lacked standing to defend themselves. As parties subject to this Court's permanent injunctions, they have the standing to contest those injunctions. As counterparties to executory contracts with the Debtor, which were only terminated at the end of February, 2021, the Advisors were also "parties-in-interest" in the Bankruptcy Case, separate and apart from being creditors. *See, e.g., In re Suffolk Reg'l Off-Track Betting Corp.*, 426 B.R. 397 (Bankr. E.D.N.Y. 2011). As a "party-in-interest," the Advisors "may raise and may appear and be heard on any issue in a case under this chapter," at least until the rejection of the shared services agreements. 11 U.S.C. § 1109(b). As unsecured and as postpetition administrative creditors—with claims that have not been disallowed or paid—the Advisors have full standing for all matters in the Bankruptcy Case due to their unsatisfied pecuniary interests. *See, e.g., In re Mandel*, 2016 U.S. App. LEXIS 4274 (5th Cir. 2016) (holding that pecuniary interest confers bankruptcy standing); *In re Gulley*, 436 B.R. 878, 892 (Bankr. N.D. Tex. 2010) ("a mortgage servicer has standing to participate in a debtor's bankruptcy case by virtue of its pecuniary interest in collecting payments under the terms of a note").

11. The Court was correct in previously holding that the Advisors had standing, and there is no legal or factual ground to reconsider that ruling. Furthermore, the interests of the

Advisors are different from various of the other entities affiliated with Mr. Dondero. As the Court knows, the Advisors are fiduciaries to many third-party clients. The injunctions on the Advisors place the Advisors in a difficult position that other entities affiliated with Mr. Dondero do not have. The Advisors' postpetition claims are based on executory contracts under which they paid tens of millions of dollars to the Debtor—something that other entities affiliated with Mr. Dondero did not do. The Advisors' prepetition claims are based on claims acquired from former employees, something that is categorically different from the claims of other entitles affiliated with Mr. Dondero. Other than on plan related matters, the Advisors do not believe that there are at present, or are likely to be in the future, contested matters and motion practice that would be suitable for combined pleadings with other entities affiliated with Mr. Dondero, and the Advisors would object to any such proposal or requirement.[1]

II. DISCLOSURES

HCMFA is owned by the following:

(i) Strand Advisors XVI, Inc., general partner with a 1% interest;
(ii) Highland Capital Management Services, Inc., limited partner with a 89.6667% interest; and
(iii) Okada Family Revocable Trust, limited partner with a 9.3333% interest.

HCMFA is managed by its general partner, Strand Advisors XVI, Inc., which is managed by the following:

(i) James Dondero, Director
(ii) Dustin Norris, Executive Vice President
(iii) Frank Waterhouse, Treasurer
(iv) Will Mabry, Assistant Treasurer
(v) Stephanie Vitiello, Secretary
(vi) Jason Post, Chief Compliance Officer/Anti-Money Laundering Officer

[1] Finally, and respectfully, the Advisors would note the seeming inequity in requiring detailed disclosures from the Advisors, implying that the Advisors had acted inappropriately, while apparently relieving the Debtor of its obligations (or not enforcing those obligations) under Bankruptcy Rule 2015.3 regarding tens or hundreds of millions of dollars of indirect value in the estate at the same hearing. Just as the Debtor forced contested hearings against the Advisors (losing several), yet labeled the Advisors "vexatious" and "Dondero Tentacles," so too the Court appears to be applying a different standard of disclosure to the Advisors than to the Debtor

Strand Advisors XVI, Inc. is owned 100% by James Dondero.

Highland Capital Management Services, Inc. is owned 75% by James Dondero and 25% by Mark Okada.

Highland Capital Management Services, Inc. is managed by the following:

(i) James Dondero, Director
(ii) James Dondero, President
(iii) Scott Ellington, Secretary
(iv) Frank Waterhouse, Treasurer

It is not known who is interested in the Okada Family Revocable Trust, but it is not believed to be James Dondero or any of his family and is believed instead to me Mr. Mark Okada and his family members.

HCMFA is a postpetition creditor of the Debtor, holding an administrative claim together with NexPoint in the combined amount of approximately $14 million, which amount has not been broken down between HCHFA and NexPoint, pending discovery. The claim has been objected to and neither allowed nor disallowed as of this filing.

HCMFA is not a prepetition creditor of the Debtor.

NexPoint is owned by the following:

(i) NexPoint Advisors GP, LLC, general partner with 1% ownership; and
(ii) The Dugaboy Investment Trust, limited partner with 99% ownership.

NexPoint is managed by its general partner, NexPoint Advisors GP, LLC, which is managed by the following:

(i) James Dondero, Member
(ii) James Dondero, President
(iii) Dustin Norris, Executive Vice President
(iv) Frank Waterhouse, Treasurer
(v) Will Mabry, Assistant Treasurer
(vi) Stephanie Vitello, Secretary
(vii) D.C. Sauter, General Counsel
(viii) Jason Post, Chief Compliance Officer/Anti-Money Laundering Officer

NexPoint Advisors GP, LLC is owned 100% by James Dondero.

The Dugaboy Investment Trust is affiliated with Mr. Dondero and, as it will be filing its own disclosure pursuant to the Order, the Advisors would respectfully refer the Court to said disclosure.

NexPoint is a postpetition creditor of the Debtor, holding an administrative claim together with HCMFA in the combined amount of approximately $14 million, which amount has not been

broken down between HCHFA and NexPoint, pending discovery. The claim has been objected to and neither allowed nor disallowed as of this filing.

NexPoint is a prepetition creditor of the Debtor by virtue of having acquired five (5) former employee claims, as identified above. The amount of these claims is not known, as this depends, in part, on certain "award letters" issued by the Debtor that have not been produced in discovery yet, pending confirmation from the employees that the same may be released to NexPoint. The claims have been objected to and neither allowed nor disallowed as of this filing.

RESPECTFULLY SUBMITTED this 9th day of July, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	

SECOND AMENDED RESPONSE OF DUGABOY INVESTMENT TRUST TO ORDER REQUIRING DISCLOSURES

COMES NOW Dugaboy Investment Trust ("Dugaboy") and files this response of Dugaboy Investment Trust to *Order Requiring Disclosures* [Dkt. # 2460] (the "Order"), entered by the Court *sua sponte* in the above styled and numbered Chapter 11 bankruptcy case (the "Bankruptcy Case") of Highland Capital Management, L.P. (the "Debtor"), respectfully stating as follows:

I. RESPONSE

1. The Court has entered an order requiring Dugaboy to make certain disclosures relative to its standing in connection with the above captioned matter. The Court has already

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ruled on a number of matters before this Court that Dugaboy has possessed the requisite standing on matters that it has taken a position or filed a support pleading.

2. Dugaboy is named as a "Related Entity" and is enjoined by the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* (the "Plan"). *See* Dkt. No. 1811-9 at p. 19. As an enjoined party, Dugaboy has standing to seek relief from the Plan. *See, e.g., Samnorwood Indep. Sch. Dist. v. Tex. Educ. Agency*, 533 F.3d 258, 265 (5th Cir. 2008) ("a third party had standing to appeal an injunction which adversely affects its interest, even when it was not a party to the litigation").

3. Dugaboy is a named defendant in the matter styled *Official Committee of Unsecured Creditors vs. CLO Holdco, Ltd., Charitable DAF Holdco, Ltd., Charitable DAF Fund, LP, Highland Dallas Foundation, Inc., The Dugaboy Investment Trust, Grant James Scott III in his individual capacity, as Trustee of The Dugaboy Investment Trust, and as Trustee of The Get Good Nonexempt Trust, and James D. Dondero* (Case No. 20-03195) and has been advised that it will be added as a defendant in an additional adversary proceeding to be filed going forward. In the adversary proceeding where Dugaboy is named as a defendant the standing of Dugaboy is not at issue. What will be at issue in those cases is whether Dugaboy should be a named party and whether the Plaintiff in those cases has asserted a recognizable cause of action against Dugaboy.

4. Further, Dugaboy has standing based upon the proofs of claim that it filed in this bankruptcy case. Although the Debtor has challenged Dugaboy's claims, it has the right to assert the claims and participate in these bankruptcy proceedings as a party in interest.

II. DISCLOSURES

5. Dugaboy is a Delaware Trust. As a Trust, it has no owners, rather, beneficiaries and a trustee. Distributions out of the Trust and the decisions made on behalf of the Trust are governed by the Trust documents. The Trust Agreement is dated October 2010 and it is styled "Trust Agreement between Dana Scott Breault, Settlor and James D. Dondero and Commonwealth Trust Company, Trustees."

6. The Trust has three (3) trustees each with a different function. The Trust creates an Administrative Trustee, a Family Trustee and an Independent Trustee. The initial Trustees were Commonwealth Trust Company as Administrative Trustee, James D. Dondero as Family Trustee and Grant Scott as Independent Trust. The current Family Trustee is Nancy Dondero, the sister of James D. Dondero.

7. The Trust Agreement creates three (3) separate trusts under the Dugaboy Investment Trust. The first is for the benefit of James D. Dondero, the second is for children and the third is for descendants.

8. The Trust owns an 0.1866% Class A interest in the Debtor and has filed proofs claim numbered 113, 131, and 177.

9. Proof of Claim No. 177 is an administrative proof of claim for the mismanagement of certain funds by the Debtor.

10. Proof of Claim No. 113 relates to the Debtor's 2008 tax return, which is currently being audited, which audit may result in the Debtor being liable to its limited partners, including Dugaboy. Proof of Claim No. 113 also relates to the Debtor's failure to make certain tax distributions to the limited partners, including Dugaboy, from 2004 through 2018. The amount of this claim is uncertain, but Dugaboy has requested certain information from the Debtor in order

to calculate a precise amount. Dugaboy obtained its status as a limited partner in the Debtor through its status as successor-in-interest to the Canis Major Trust.

11. Lastly, Proof of Claim 131 relates to two Master Securities Lending Agreements that Dugaboy entered into with Highland Select Equity Master Fund in 2014 and 2015. Dugaboy made various loans to Highland Select in the form of 2,015,000 shares of NexPoint Credit Strategies Fund valued at $20,270,900. Dugaboy made various other loans in 2015. The Master Securities Lending Agreements were mostly terminated in July 2019. Pursuant to the Termination of Loan, Select and Dugaboy agreed to terminate the 2015 MSLA and partially terminate the 2014 MSLA such that a large number of the loaned securities remained due and owing to Dugaboy under the Loan Agreements.

12. From 2015 until the termination of the Loan Agreements in 2019, Select and/or the Debtor made numerous repayments of the securities loaned by Dugaboy. However, a substantial number of the loaned securities have not been repaid and remain outstanding.

13. As of the Petition Date, Dugaboy has not been repaid the outstanding shares and is owed repayment of the loaned securities or the cash value of the loaned securities, plus accrued interest, in the amount of $12,041,438. A summary of the loan account is attached as Exhibit B to the *Response of the Dugaboy Investment Trust to the Debtor's First Omnibus Objection to Certain Proofs of Claim* [Dkt. No. 1153].

14. The gist of Dugaboy's claim is premised on the fact that the Debtor was general partner or *de facto* general partner of Highland Select and directed that the loaned funds be used for the sole benefit of the Debtor, thereby obligating the Debtor on the loans.

15. Objections are pending to each of the proofs of claim that have been filed.

16. In addition, Dugaboy is the maker of a note held by the Debtor that is the subject of the Creditors' Committee Adversary Proceeding.

July 9, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas S. Draper, counsel for The Dugaboy Investment Trust, do hereby certify that I caused a copy of the above and foregoing to be served on **July 9, 2021**, via the Court's ECF Notification System as follows:

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
CHARITABLE DAF HOLDCO, LTD. (In Official Liquidation),[1]	Case No. 25-11376 (BLS)
	Re: D.I. 21, 22, 23, 25, 27
Debtor in a foreign proceeding.	

PETITIONERS': (I) OMNIBUS REPLY IN SUPPORT OF MOTION OF PETITIONERS FOR ENTRY OF AN ORDER GRANTING PROVISIONAL RELIEF COMPELLING TURNOVER OF THE DEBTOR'S BOOKS AND RECORDS PURSUANT TO BANKRUPTCY CODE SECTIONS 105(A), 542, 1519 AND 1521; AND (II) OBJECTION TO THE PATRICK ENTITIES' EMERGENCY CROSS MOTION FOR ADJOURNMENT OF MOTION

Margot MacInnis and Sandipan Bhowmik of Grant Thornton Specialist Services (Cayman) Limited (the "Petitioners"),[2] the duly appointed joint official liquidators (the "JOLs") of Charitable DAF HoldCo, Ltd (In Official Liquidation) ("HoldCo" or the "Debtor"), a Cayman Islands exempted company in official liquidation in the Cayman Islands (the "Cayman Proceeding"),[3] before the Grand Court of the Cayman Islands (the "Cayman Court"), by its undersigned United States counsel, Reed Smith LLP, hereby file this omnibus reply and objection (this "Omnibus Reply")[4] to: (1) *Hunton Andrews Kurth LLP's Response and Limited Objection to Motion of*

[1] The Debtor is incorporated in the Cayman Islands as an exempted company and registered with registration number 263805. The Debtor's registered office is located at HSM Corporate Services Limited, P.O. Box 31726, 68 Fort Street, George Town, Grand Cayman, KY1-1207, Cayman Islands.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Motion of Petitioners for Entry of Order Granting Provisional Relief Compelling Turnover of the Debtor's Books and Records Pursuant to Bankruptcy Code Sections 105(A), 542, 1519 And 1521* [D.I. 21] (the "Motion") or the *Verified Petition for (i) Recognition of the Foreign Main Proceeding, (ii) Recognition of the Foreign Representatives, and (iii) Certain Related Relief* [D.I. 2] (the "Verified Petition"), as applicable.

[3] Entitled *In the matter of section 131 of the Companies Act (2025 Revision) and in the matter of Charitable DAF HoldCo Ltd*. FSD 116 of 2025 (JAJ).

[4] In further support of this Omnibus Reply, the Petitioners are concurrently filing the *Further Supplemental Declaration of Margot MacInnis in Support of Motion of Petitioners for Entry of an Order Granting Provisional*

EXHIBIT
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Petitioners for Entry of Order Granting Provisional Relief Compelling Turnover of the Debtor's Books and Records Pursuant to Bankruptcy Code Sections 105(A), 542, 1519 and 1521 [D.I. 25] (the "Hunton Limited Objection"); and (2) *CDM Parties' (A) Emergency Cross Motion for Adjournment of Motion of Petitioners for Entry of Order Granting Provisional Relief Compelling Turnover of the Debtor's Books and Records Pursuant to Bankruptcy Code Sections 105(A), 542, 1519 and 1521 and (B) Limited Objection and Reservation of Rights with Respect Thereto* [D.I. 27] (the "Cross-Motion and Limited Objection"), filed by various entities associated with Mark Patrick (the "Patrick Entities").[5]

PRELIMINARY STATEMENT

1. The Patrick Entities—who are not, themselves, Turnover Targets—use the Cross-Motion and Limited Objection to confuse and distract from the simple and limited relief that Petitioners seek—which is the turnover of HoldCo's books and records—by wading into their view of the merits of the Cayman Litigation. The Cayman Litigation is not before this Court and its merits are irrelevant to the requested relief.f[6] All that the Patrick Entities' characterization of the complexity of the 20-year history that they allege is necessary to contextualize the dispute that is the subject of the Cayman Litigation does is amplify the urgency with which the Petitioners

Relief Compelling Turnover of the Debtor's Books and Records Pursuant to Bankruptcy Code Sections 105(a), 542,, 1519 and 1521 (the "Further Supplemental MacInnis Decl.").

[5] The Patrick Entities' emergency motion to adjourn the hearing on the Motion shall be referred to as the "Cross-Motion".

[6] The Cross Motion and Limited Objection is replete with statements regarding the Cayman Proceeding and the history of dispute between the purported parties that are irrelevant, misleading or both. *See, e.g.*, Cross-Motion and Limited Objection, at ¶¶ 6 -20. The Petitioners will not waste this Court's time by exhaustively responding to each of these allegations but reserves the right to do so. For now, the Petitioners' merely note that the Patrick Entities' characterization of the Petitioners, who are each licensed insolvency practitioners employed by Grant Thornton Special Services (Cayman) Limited, as "Dondero Affiliates" [*see* Cross-Motion and Limited Objection, at ¶ 1] is demonstrably false.

must be afforded access to the books and records that the Turnover Targets are withholding so that they may progress their investigation.

2. The Patrick Entities do not meaningfully contest any of the objective facts relevant to the provisional relief requested by the Petitioners because they cannot. It is uncontroverted that: (1) the Cayman Proceeding is a foreign proceeding pending in HoldCo's jurisdiction of incorporation; (2) the Cayman Court appointed the Petitioners to serve as HoldCo's joint official liquidators, expressly authorizing them to seek chapter 15 recognition of the Cayman Proceeding; and (3) the JOLs have been actively and diligently discharging their statutory duties as joint official liquidators since their appointment. Indeed, the Patrick Entities themselves concede that Mark Patrick and Paul Murphy commenced voluntary liquidation proceedings with respect to HoldCo in the Cayman Islands on or around April 2, 2025, before consenting to the entry of the Supervision Order commencing HoldCo's official liquidation under the supervision of the Cayman Court and appointing the Petitioners as joint official liquidators on May 6, 2025. Cross-Motion and Limited Objection, at ¶¶ 2 and 13.

3. Instead, the Patrick Entities ask the Court to adjourn the hearing on the Petitioners' Motion on the grounds, remarkably, that the Motion "violates the spirit" of the Stipulation. It does not. The language of the Stipulation literally states that the JOLs may seek provisional relief in furtherance of their ongoing investigation into the business and affairs of HoldCo, which they are duty-bound to pursue under Cayman law. This is not a case of the Petitioners hiding the ball. Like any request for provisional relief, granting the Motion does not preclude or otherwise prejudice the Patrick Entities from objecting to recognition whenever the Adjourned Recognition Hearing Date (as defined in the Stipulation) is scheduled.

4. Next, the Patrick Entities attempt to use DFW's application to remove the JOLs (the "Removal Application") as a basis to defer this Court's consideration of the Motion given the supposed cloud on the JOLs' appointment that DFW has self-servingly sought to create. Unsurprisingly, the Patrick Entities cite no precedent to support the proposition that a chapter 15 case should be halted pending the outcome of a motion filed by a defendant to replace court-appointed fiduciaries charged with liquidating the plaintiff's estate, because there is none. The Cayman Court is well-equipped to decide the Removal Application, if it goes forward, at the appropriate time. In the meantime, the JOLs remain expressly authorized by the Cayman Court to discharge their duties as HoldCo's joint official liquidators to, among other things, recover HoldCo's books and records consistent with their mandate (and the mandate of any insolvency practitioner appointed to act as official liquidator) under Cayman law.[7]

5. The Patrick Entities' conclusory protestations aside, confirming, on a provisional basis, the JOLs' authority to obtain the Debtor's books and records from the Turnover Targets is urgently needed to enable the JOLs to discharge their statutory duties under Cayman law, and, in so doing, protect HoldCo's assets and the interests of its creditors. The limited availability of the Named Defendants' many advisors has resulted in significant delays in scheduling the inter-parties hearing on the Injunction Summons (the "Injunction Summons Hearing"), which could cause the Adjourned Recognition Hearing Date to occur three (3) months or more later than the JOLs had expected, has made the Provisional Relief all the more critical.

6. Accordingly, this Court should see the Patrick Entities' Cross-Motion and Limited Objection for what it is: a desperate measure by litigation targets to avoid or, at least, defer scrutiny

[7] Pursuant to Order 26, Rule 3 (1) of the Companies Winding Up Rules (As Amended), it is the JOLs' duty to take possession of, or assume control over, all of the HoldCo's books and records, including those maintained in electronic format.

of their actions by independent, court-appointed fiduciaries and deny the Cross-Motion and overrule their Limited Objection.

7. Hunton Andrews Kurth LLP ("Hunton"), the only Turnover Target to respond to the Motion, takes no position on the merits of the relief sought by the JOLs, but takes issue with timing and procedures regarding the turnover of their apparently voluminous files going back to 2011.

8. Concurrently with filing this Omnibus Reply, the Petitioners are filing a revised Proposed Order (the "Revised Proposed Order") to address both the logistical concerns raised by Hunton and the concerns raised by the Patrick Entities regarding the alleged overbreadth of the Provisional Relief.

OBJECTION TO CROSS-MOTION

9. The Cross-Motion to continue the hearing on the Motion to an uncertain date should be denied because the Provisional Relief: (1) is exactly the type of relief contemplated by the Stipulation, which recognizes the Cayman Consent Order; and (2) is not premature and must be urgently provided.

A. Provisional Relief is Entirely Consistent with the Stipulation

10. Throughout their Cross-Motion and Limited Objection, the Patrick Entities argue that the Motion runs afoul of the "spirit" of the Stipulation, by alleging, among other things, that the Petitioners are expediting resolution of recognition issues. Cross-Motion and Limited Objection, at ¶¶ 4, 23 and 26-27. Despite the Patrick Entities' assertions to the contrary, the Provisional Relief is not only consistent with the Stipulation but seeks relief that was specifically contemplated by the Cayman Consent Order, which has been recognized by this Court. The Asset Preservation Protocol (as defined in the Stipulation), specifically provides that "the JOLs reserve their right to seek provisional relief against parties as they deem necessary or appropriate in

furtherance of their duties as joint official liquidators, including in furtherance of their ongoing investigation of the business and affairs of the Company from the date hereof through the Adjourned Recognition Hearing Date." Stipulation, at pp. 20. The Motion—which requests turnover of documents key to the JOLs' investigations—is exactly what was envisioned in the Asset Preservation Protocol. This is a plain reading of the Stipulation, not a "technical argument," as asserted by the Patrick Entities. Cross-Motion and Limited Objection, at ¶ 27.[8]

11. Moreover, requesting the Provisional Relief is not intended to front run recognition issues to the Patrick Entities' detriment. To grant provisional relief, the Court must find, among other things, that there is a likelihood of recognition, that the Debtor will be irreparably harmed absent provisional relief, and that the relief is in the public interest—all of which the Petitioners have demonstrated in the Motion, this Omnibus Reply, and the Verified Petition. Motion, at ¶¶ 38-48; Omnibus Reply, at ¶¶ 1-20; Verified Petition, at ¶¶ 115-151, 162-167 and 189; Further Supplemental MacInnis Decl., at ¶¶ 2-4. Granting the Provisional Relief does not preclude or otherwise prejudice the Patrick Entities from objecting to recognition in this Chapter 15 Case. Regardless, the Revised Proposed Order clarifies that the Patrick Entities' rights are reserved with respect to all Recognition Hearing issues by limiting any finding as to the likelihood of success on the merits of recognition applicable solely for the purposes of granting the Provisional Relief. *See* Revised Proposed Order at ¶ E.

12. Finally, the Petitioners are surprised that the Patrick Entities take issue with the Motion when the Stipulation and Cayman Consent Order specifically facilitates the provision of certain information by the Patrick Entities to the Petitioners. See Stipulation, at pp. 18-19. The

[8] Technically, the Patrick Entities' argument that the Stipulation affords them the right to "propound[] discovery" is not stated anywhere in the Stipulation or Cayman Consent Order. *See* Cross-Motion and Limited Objection, at ¶ 3.

Turnover Targets were not party to the Stipulation. And, they have affirmatively resisted or otherwise failed to turnover the Debtor's books and records even after the Patrick Entities and the Petitioners were able to agree to the terms of the Stipulation. While the Petitioners determined that the terms of the Stipulation were sufficient, on a temporary basis, to postpone the Injunction Summons Hearing, the Stipulation does not provide, and was never intended to provide, that the Petitioners' investigation into the business and affairs of the Debtor and its efforts to obtain the Debtor's books and records, wherever they may be located, would cease.

13. For all these reasons, despite the Patrick Entities' statements to the contrary, granting the Provisional Relief is entirely consistent with both the letter and the spirit of the Stipulation.

B. Provisional Relief is Urgently Needed to Protect the Assets of the Estate and their Creditors

14. Expressly preserving the right to seek provisional relief in this Chapter 15 Case was critical to the JOLs in agreeing to the Stipulation because, while the parties expected the Injunction Summons Hearing and, in turn, the Adjourned Recognition Hearing Date to be scheduled in late September or early October based on the Cayman Court's availability, the hearing date had not been determined. Further Supplemental MacInnis Decl., at ¶ 2. Accordingly, it was and remains critical for the JOLs to maintain flexibility to progress the Chapter 15 Case during the gap period. When they agreed to adjourn the Recognition Hearing, originally scheduled for August 14, 2025, the JOLs never expected that, as of September 8, 2025, the Adjourned Recognition Hearing Date would still not be known. *Id*., at ¶ 3.[9] The JOLs now understand that the Injunction Summons

[9] While the Patrick Entities are capably represented by one firm in this Chapter 15 Case, in the Cayman Proceeding, the Patrick Entities have engaged no less than two firms. DFW is represented by Baker & Partners. Mr. Patrick, in his personal capacity, and CDM, CDH and CLO HoldCo are represented by Campbells. Mr. Murphy, as director, is represented by Kobre & Kim (and Kobre & Kim still act for Mr. Patrick in the Cayman Proceeding). It has proved challenging to coordinate schedules among these many advisors with respect to the Injunction Summons. On the other

Hearing may not be scheduled until mid-December, approximately three (3) months after September 18, 2025, which the parties identified as the earliest date to return to the Cayman Court. *Id.*

15. The urgent need for the Provisional Relief arises from this delay. Deferring the turnover of HoldCo's books and records by the Turnover Targets to the JOLs impedes the JOLs' ability to conduct their investigation to the detriment of the Debtor's estate and all of its stakeholders.

16. Delay needlessly interferes in the JOLs' ability to take steps in the liquidation and increases the expense of liquidation, which drains and jeopardizes HoldCo's assets and harms its creditors. Further Supplemental MacInnis Decl., at ¶ 4. The Provisional Relief is urgently needed both to protect HoldCo's assets and the interests of its creditors. *Id.*

C. The Patrick Entities' Attempt to use the Removal Application to Defer Consideration of the Motion is Baseless and Absurd

17. Predictably, the Patrick Entities seek to bootstrap the Removal Application to cast doubt on the JOLs' authority to obtain the Provisional Relief. They cite no case law to support this theory because there is none. They completely ignore the instructive approach that Judge Mark adopted in the *In re Sam Industrias S.A.* case, in which, under far more extreme facts, Judge Mark permitted the discovery requests propounded by the foreign representative to proceed, even though the foreign representative had, *sua sponte*, been ordered to be removed by the foreign bankruptcy court supervising the foreign proceeding, where the foreign bankruptcy court's order was stayed pending appeal. *See* Sam Industrias Transcript. The same approach, which is for the

hand, we understand that DFW, which is the sole party bringing the Removal Application, has sought the Cayman Court's availability for a two-day hearing after September 25, 2025 (excluding October 13-20, 2025) although a hearing date for the Removal Application has not yet been fixed.

Court to defer operative orders from a foreign court then in effect, rather than speculate regarding what may occur in a foreign proceeding in the future, applies equally here with respect to the Supervision Order. *Id*., at Tr. 11:20-12:20; *see* Supervision Order.[10]

18. Just as it would be absurd in a plenary case under the Bankruptcy Code for a U.S. bankruptcy court to stay a chapter 11 trustee from progressing its bankruptcy case simply because a litigation defendant moved for the appointment of a replacement trustee, the Patrick Entities' position is equally absurd here. *See In re Sillerman*, 605 B.R. 631 (Bankr. S.D.N.Y. 2019) (while the creditors' committee's motion to appoint a chapter 11 trustee was pending, the bankruptcy case continued and the debtor in possession prosecuted matters); *In re Breland*, No. 16-2272-JCO (Bankr. S.D. Ala. Oct. 25, 2017) (the bankruptcy court rejected the debtor's request to prohibit the chapter 11 trustee from acting during the pendency of its appeal of the bankruptcy court's order appointing a chapter 11 trustee, noting "timely and efficient administration of the estate – regardless of the pending appeal – " serves the public interest.).

19. For all these reasons, the Cross-Motion should be denied and the hearing on the Motion should not be continued.

REPLY TO LIMITED OBJECTIONS

20. Both Hunton and the Patrick Entities filed limited objections to the Motion, in which the Patrick Entities, in particular attempted to frame the Provisional Relief as so overbroad that non-HoldCo files are in danger of being transferred to the JOLs if the Proposed Order is entered. Hunton Limited Objection, at ¶¶ 1-5; Cross-Motion and Limited Objection, at ¶ 37 and

[10] Moreover, while the merits of the Removal Application are irrelevant to the Motion and will be assessed by the Cayman Court in due course, the Removal Application is so factually flawed and legally meritless that the JOLs' Cayman counsel has put DFW's Cayman counsel on notice that if the Removal Application is not withdrawn, the JOLs will seek costs from Mr. Patrick, personally, and not from assets of the DAF Structure, when it fails. *See* Exhibit 1, the September 5, 2025 Letter.

¶¶ 39-40. Of course, that was not the Petitioners' intention, and it is incumbent on the Turnover Targets, not the Petitioners, to ensure that only the Debtor's client files are turned over. Regardless, the Patrick Entities note that they "are willing to engage in discussions with the JOLs regarding a production protocol for the Debtor's documents." Cross-Motion and Limited Objection, at ¶ 40. To the extent Hunton and the Patrick Entities take issue with the Proposed Order, the Revised Proposed Order resolves most of those concerns. To the extent it does not, Hunton's and the Patrick Entities' limited objections should be overruled.

21. Any suggestion that the Patrick Entities and Hunton are not sufficiently protected or that the Provisional Relief might extend beyond the Debtor's documents can be—and, the Petitioners' believe, have been—resolved by implementation of negotiated protocols in the Revised Proposed Order. The Petitioners have provided safeguards in the Revised Proposed Order to ensure that the Debtor's documents, and not documents that are subject to a claim of privilege, including, but not limited, to attorney-client privilege, work product protection, or any other applicable privilege or protection recognized by law, will be turned over to the Petitioners. Specifically, the Revised Proposed Order establishes a detailed protocol whereby all Turnover Targets—including Hunton—may identify, on a privilege log, any otherwise responsive documents that have been withheld because they are subject to assertions of privilege, while also offering the Petitioners a mechanism to challenge any such assertions.

22. Therefore, any concern from the Patrick Entities and Hunton that non-Debtor documents might be produced have been resolved through the Revised Proposed Order. Moreover, the Revised Proposed Order extends the deadline for the Turnover Targets to turn over documents, thus satisfying Hunton's concerns regarding the timeframe to turn over the Debtor's files. However, to the extent that the Patrick Entities and Hunton remain concerned about

the potential turnover of non-Debtor files or timing to comply with the Revised Proposed Order, the Petitioners are more than happy to engage in discussions to resolve their issues.[11]

CONCLUSION

WHEREFORE, the Petitioners respectfully request that the Court: (i) deny the Patrick Entities' Cross-Motion, (ii) enter the Revised Proposed Order, and (iii) grant the Petitioners such other relief as is appropriate.

[11] In fact, the Petitioners have always been willing to engage in discussions regarding the Proposed Order and suggested that counsel to the Patrick Entities propose a resolution to the Motion prior to them filing the Patrick Entities' Cross-Motion and Limited Objection.

Dated: September 8, 2025
Wilmington, Delaware

Respectfully submitted,

REED SMITH LLP

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Counsel to Margot MacInnis and Sandipan Bhowmik, as Joint Official Liquidators of Chapter 15 Debtor

EXHIBIT 1

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By Email

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Cayman Islands

Attn: Jennifer Colegate and Nia Statham

5 September 2025

Dear Counsel

In the Matter of Charitable DAF HoldCo, Ltd (in Official Liquidation) (the "Company")

FSD Cause No: 116 of 2025 (JAJ)

1 We refer to your client's application made by way of a summons dated 19 August 2025 seeking to remove our clients as joint official liquidators of the Company (the "**Application**"). In this letter, defined terms in the Application have the same meaning herein.

2 While the Court will ultimately determine the Application in due course should your client seek to pursue it, our clients consider it prudent to identify now its fatal deficiencies and the improper motives underpinning it. In short, the Application is misconceived, vexatious, and destined to fail, and the costs should not be borne by the charitable structure to which the Company is asserting a proprietary claim.

<u>The circumstances in which DFW became a shareholder</u>

3 Your client's standing derives solely from the 7 February 2025 issue of 318 participating shares — an issue engineered to dilute the then-existing shareholders and manufacture economic rights for DFW. Contemporary documents obtained from the Company's former attorneys, Walkers (Cayman) LLP, are unequivocal. We note, amongst other things, the following:

3.1 On 26 November 2024, Mr Murphy wrote that the issuance would "*weaken any petition based on the just and equitable grounds*" but warned that "*we must be careful that they don't point to this as [a] ground to wind up i.e. the existing foundations say we're artificially*

trying to weaken their position by diluted them therefore the company should be wound up or an order made for change of management / revocation of the share issuances"

3.2 On 30 January 2025, Mr Brandon Schaller sent an email to (amongst others) Mark Patrick and Paul Murphy under the subject "DAF – Potential Dilution" proposing the issuance.

3.3 On 7 February 2025, the Company resolved to issue 318 Participating Shares (giving DFW 51.04% of the Company's Participating Shares).

3.4 On 2 April 2025, the Company's directors recommended to Mark Patrick (being the sole holder of voting shares in the Company) that the Company be placed into voluntary liquidation. Without notice to the Company's existing participating shareholder, the Company was placed into voluntary liquidation later that day.

4 By that time, the sole asset of the Company had already been transferred to CDMCFAD LLC ("**CDM**"). The only conceivable purpose of the share issue was, therefore, to confer on Mr Patrick — acting through DFW—rights that he would not otherwise have had in his capacity as a director or management shareholder of the Company, namely (i) standing to resist any winding-up petition or (ii) a platform to disrupt the liquidation of the Company. That is a fundamental breach of the proper-purpose rule by Mr Patrick and Mr Murphy.[1] Indeed, the proper-purpose rule can prevent even the honest exercise of a discretionary power by a director. This position has been made plain in the Company's pleadings in the FSD Proceedings.

5 As DFW's shareholding in the Company is clearly tainted, the Court is likely to give its views negligible weight when assessing whether the JOLs should be replaced. This is before one considers the motive for, and merits of, the Application itself.

Motive for the removal application

6 The Application appears to be a tactical device designed by Mr Patrick (through DFW) to derail the FSD Proceedings, which the JOLs are pursuing against him, Mr Murphy, CDM, and related entities. The JOLs took independent advice, obtained Court sanction, and are duty-bound to advance those claims. The fact that the defendants dislike being sued is not a ground to replace court-appointed officeholders.

7 The bar for removing court-appointed liquidators is exceedingly high. The following principles (amongst others) are particularly relevant in the present case:

7.1 The Court will only remove a liquidator if satisfied that (i) there is a real risk that he or she will not carry out his or her duties fairly and impartially, or (ii) his or her continuance would jeopardise the liquidation.[2] The applicant bears a heavy burden; bare assertion is insufficient. The scant authority on point in the Cayman Islands is indicative of how rare such applications are, perhaps unsurprisingly given the exceedingly high threshold required to be successful.

[1] *Howard Smith Ltd v Ampol Petroleum* [1974] AC 821.

[2] *AMP Enterprises Ltd v Hoffman* [2002] BCC 966.

7.2 Conversely, the Court will be slow to appoint a liquidator who is the nominee of a person whose conduct is under investigation or against whom the company has potential claims.[3] Your client's position is precisely that.

8 We note that the legal costs of this Application appear to be met from funds ultimately traceable to the charitable foundation structure in which the Company formerly held an interest. Mr Patrick therefore litigates risk-free, using property subject to proprietary claims by the Company. That is an abuse which the Court will not overlook.

9 For the avoidance of doubt, the JOLs do not know, and have never met or spoken to, Mr Dondero. Allegations that the JOLs are biased toward him, or are otherwise doing his bidding, are baseless and pure supposition on the part of your client.

Allegations

10 The Application levels six headline allegations. All are either factually wrong, legally irrelevant, or both.

11 Turning to the specific allegations:

11.1 Use of *ex parte* proceedings:

(a) Your client alleges that the JOLs have proceeded *ex parte*, not to preserve matters in the FSD Proceedings but "*to deprive DFW of the ability to participate in the intended proceedings and to obtain a tactical advantage by avoiding due process where possible*." You then point to the following applications in support of this allegation: sanction to commence the FSD Proceedings and Funding Agreement; sanction of legal counsel; and the Cayman Injunction.

Sanction to commence FSD Proceedings and Funding Agreement

(b) The JOLs sought sealing orders and *ex parte* relief only where strictly necessary to protect confidentiality or prevent asset dissipation. The Court granted those orders in full knowledge of DFW's position (indeed, that was the reason for the relief being granted). In any event, DFW is conflicted: it cannot credibly suggest it should have been consulted in connection with proceedings brought against it.

(c) It is entirely routine for sanction applications with respect to commencing proceedings and associated funding to be made *ex parte* and with sealing orders in circumstances where disclosing details might prejudice the claims or the recoveries to the liquidation estate. This need to preserve the confidentiality of those applications was clearly vindicated by the Honourable Judge in granting the sealing orders.

Sanction of legal counsel

(d) There is, again, nothing to this point. The JOLs' sanction application for the engagement of counsel was first presented to the Court on an *ex parte* basis inviting the Court to make orders on the papers with a view to saving the Company's

[3] *Fielding v Seery* [2004] BCC 315.

liquidation estate expense. At the direction of the Honourable Judge, the application then proceeded *inter partes* and has since been determined.

Cayman Injunction

(e) The injunction application was filed and served on 15 July 2025. On that same day, we wrote to the Court and to the parties to seek availability for a hearing of the application on 29, 30 or 31 July 2025 (i.e. in the days before the long Court recess). Both letters also set out the basis for the JOLs' request that the hearing be listed on those dates, namely the urgency in having the application determined before the Texas Rule 11 Agreement may have fallen away (as the defendants to the TRO Proceedings had filed a jurisdiction challenge to be heard at or around that time).

(f) In your email to the Court sent on 16 July 2025 at 9:41 am, you informed the Court that Ms Colegate was unavailable on the above dates and therefore requested if the Court could provide alternative dates. In our response sent at 11:17 am, on the basis of the urgency described above, the JOLs informed the Court that should any of the Defendants not be available for the hearing on one of the above dates, the JOLs would proceed with the application on an *ex parte* on notice basis. The Court acceded to the JOLs' request on that basis and listed the hearing for 31 July 2025.

(g) In the above circumstances, your client's allegation that it was somehow improper for the JOLs to seek a listing before the Court recess on an *ex parte* on notice basis after having: (i) explained the JOLs' case on urgency to the Court; and (ii) invited the Defendants to appear and participate on the dates proposed if they were available, is risible. The Court decided to list the hearing accordingly.

11.2 Full and frank disclosure:

(a) Your client alleges that the JOLs have failed to provide full and frank disclosure on their *ex parte* applications. As set out below, this is not correct. In any event, if your client genuinely believes that the JOLs are in breach of their disclosure obligations, its remedy is to seek a discharge of the *ex parte* orders. No such applications have been made. This is because your client's real issue is not with disclosure, but with the JOLs' conclusions—yet another appeal on the merits of your client's (and Mr Patrick and Mr Murphy's) conduct dressed up as a disclosure complaint.

(b) As to the specific allegations:

DFW Summons

(i) Your client alleges that, in seeking Court sanction to commence the FSD Proceedings and seek the Cayman Injunction, the JOLs failed to mention the Summons filed by DFW seeking directions and orders from the Court to provide that the JOLs enter into a Protocol with the CDM entities and that an inter partes proceeding be established in the liquidation for the validity of the DAF Restructuring. As you acknowledge, the existence of the DFW Summons was properly raised by Ms Moran at the hearing of the sanction application, and the Honourable Judge said that he would deal with the DFW Summons in due course if necessary. Accordingly, there was no

failure to disclose this fact. Further, the Court was already aware of the DFW Summons (with your client's Leading Counsel labouring the point at the hearing of the application to sanction the engagement of counsel).

Andrew Ayres KC

(ii) Your client alleges that the JOLs redacted Andrew Ayres KC's name in MacInnis 5, as being the leading counsel who provided advice in respect of the commencement of the FSD Proceedings. This allegation is factually incorrect. We have already confirmed that: (i) the King's Counsel engaged to provide our clients with a merits opinion in respect of the FSD Proceedings was not Mr Ayres KC; and (ii) that aspect of the evidence is sealed. That ought to be sufficient for your client. Maples has engaged Mr Ayres KC in the FSD Proceedings and he acts on the instructions of Maples. Of course, should your client wish to make allegations of conflict against a senior member of the English Bar (and an admitted Cayman Islands attorney), that is entirely a matter for your firm and for him, but you will undoubtedly be aware that this is a very serious matter.

(iii) Separately, we do not follow the statement in Mr Patrick's evidence that "… *no notice of Mr Ayers [sic] KC's engagement was provided despite requirements to do so under this Court's practice directions*." If this is a reference to limited admission applications with respect to Leading Counsel, this clearly does not apply to Mr Ayres KC as he is generally admitted in the Cayman Islands.

Weaver Opinion

(iv) Your client alleges that, in seeking sanction to commence FSD Proceedings, the JOLs failed to disclose the Weaver Opinion (which opined that the proceeds paid to the Highland Foundations in their capacity as Participating Shareholders following the DAF Restructuring were fair). It is worth remembering that, in opposition to the JOLs' sanction application with respect to the engagement of counsel, your client, Mr Patrick, and Mr Murphy produced three voluminous affidavits (running to 142 pages of text and 1,699 pages of exhibits) outlining their justifications for the transactions in issue, all of which were sworn very shortly after the date of the Weaver Opinion. It is telling that in the volume of evidence filed, the Weaver Opinion was not mentioned once. Clearly that indicates that neither your client (nor Mr Patrick nor Mr Murphy) considers it material. We agree.

(v) Your client's recent reliance on the Weaver Opinion (obtained after the date of the JOLs' appointment) completely misses the point. The interposition of CDM between the Company and its interest in the Fund was part of the overall scheme that removed the Company's interest in the Fund from its economic stakeholders. The fact that CDM has managed to obtain a fairness opinion with respect to CDM's redemption of the Company does not answer the question of the propriety of interposing CDM between the Company and the Fund in the first place (or the broader transactions).

Mercer Report

(vi) Your client alleges that the JOLs failed to bring to the Court's attention the recommendations of the Mercer Report which deals with the level of compensation paid to Mr Patrick. Again, this allegation is factually incorrect. Paragraph 52 of Ms MacInnis's Fifth Affidavit specifically states that Mr Patrick relies on the Mercer Report to support his remuneration increases and draws the Court's attention to the fact that the Mercer Report was commissioned three years after Mr Patrick commenced his role as a director of the Company and purports to justify three years of back-pay (plus bonuses). The Mercer Report is also exhibited to Ms MacInnis's affidavit.

Nature of DAF LP Business

(vii) Your client takes issue with the JOLs' characterisation in their evidence of DAF LP as "passive". It is unclear how, you say, our clients have failed in their duty of full and frank disclosure by way of a reference to the Fund as "passive". If you are referring to paragraph 27 of Ms MacInnis's first affidavit filed in the FSD Proceedings, that application is now proceeding inter partes; plainly no full and frank duty arises. In any event, the statement to which your client is presumably referring was qualified as being on the basis of the JOLs' understanding.

Failure to disclose DFW responses filed in FSD 116 of 2025 (JAJ)

(viii) Your client alleges that the JOLs failed to detail in the JOLs' skeleton argument for the *ex parte* on notice hearing of the Cayman Injunction DFW's responses to the JOLs' allegations in respect of the increase in the Fund's annual expenses. This allegation is again factually incorrect. The thrust of this complaint appears to be that the JOLs failed to disclose a point made in one paragraph of the affidavit of Mark Patrick sworn 4 June 2025 and filed in FSD 116 of 2025 (JAJ). However, that affidavit, together with all other affidavits filed in the liquidation proceedings, was included in the bundle for the hearing on 31 July 2025. In any event, the point in the paragraph in question is not of any material relevance to the issues raised for determination on the injunction application.

Liquidation Committee

(ix) Your client alleges that there is a discrepancy in MacInnis 5 and MacInnis 6 as to the timing of the establishment of a Liquidation Committee. Again, there is nothing to this allegation. MacInnis 5 was provided to the Court in approved but unsworn form on 4 July 2025 (i.e., before the Liquidation Committee was formed) and then sworn on 10 July 2025. As you identify, the point was made clear in MacInnis 6 and before the sanction applications were determined by the Court.

(x) Mr Patrick (on behalf of DFW) states in his evidence that he is "… *advised…that no minutes of that meeting have been circulated*.". This allegation (made on advice presumably from your firm) is incorrect. Mr Michael Aquino (on behalf of our clients) circulated the minutes of the

meeting in an email to (amongst others) Ms Jennifer Colegate of your firm on 1 August 2025.

11.3 Funding arrangements:

(a) This allegation again misses the point. It appears that the complaint is two-fold: that Crossvine or Mr Dondero purportedly has control over the JOLs' actions and that the JOLs obtained sanction to enter into the Funding Agreement *ex parte* (the latter of which has already been addressed above).

(b) In respect of the allegation that the JOLs are allowing Mr Dondero to control the litigation as a result of the Funding Agreement, this is obviously wrong. As you should be well aware, the threshold question for sanction of a funding arrangement is that the funder cannot control the litigation or the actions of the JOLs more generally.[4] The Court sanctioned the Funding Agreement with Crossvine after scrutinising the terms and concluding that Crossvine had no such control. The fact that the JOLs obtained sanction is dispositive of this allegation.

(c) Separately, what Mr Dondero might have said with respect to prospective funding arrangements is not a matter for the JOLs. The JOLs are experienced professionals who sought, and obtained, sanction of the Court to enter into the Funding Agreement. To suggest that the JOLs, as court-appointed officers, would allow a third party to control the direction of a liquidation (either directly or indirectly), is a baseless affront to the JOLs' integrity and professionalism. We assume that this allegation is simply your client's own misplaced views, which was made contrary to the advice from your firm, but we would welcome confirmation from you on the point.

(d) As to there being no reference to the Funding Agreement at the Company's meeting of contributories on 9 July 2025, there is plainly nothing improper about this. As outlined above, the JOLs appropriately (as accepted by the Court) sought sanction to commence the FSD Proceedings and enter into the Funding Agreement on an *ex parte* basis.

(e) In any event, the initial funding provided by Crossvine has been exhausted. Now that the JOLs have developed the claims in the FSD Proceedings, they are able to obtain funding from third-party litigation funders. The JOLs are in advanced discussions with several third-party funders to obtain funding through to the completion of the FSD Proceedings. The JOLs anticipate that this process will be completed within the coming weeks (subject, of course, to obtaining the sanction of the Court).

11.4 The protocol:

(a) Your client states that the FSD Consent Order was unnecessary because CDM proposed a protocol to address similar concerns. The so-called “protocol” offered by CDM was cosmetic. It failed to preserve the Company’s position in any meaningful way – most egregiously it included no asset preservation undertakings whatsoever. The FSD Consent Order now in place, obtained in response to the JOLs' application, is materially stronger (although still not to the level of protection

[4] *Re ICP Strategic Credit Income Fund Ltd* (Unreported, Grand Court, 4 April 2014, at paragraph 18, per Jones J).

that the JOLs will seek at the *inter partes* hearing, it was simply an interim preservation measure).

(b) The inadequacies of the three versions of the "protocol" proposed by CDM, each of which only marginally differed from the last, were fulsomely explained in our letters to Campbells dated 19 June 2025 and 27 July 2025 (copies enclosed). One only needs to look at the differences between the protocol contained in Campbells' letter of 30 May as against the FSD Consent Order to identify the glaring issues with CDM's first protocol. By way of example:

(i) As noted above, despite multiple requests from the JOLs, the CDM protocols included no asset preservation undertakings whatsoever. That was a fundamental inadequacy given preserving the assets to which the Company has a proprietary claim was the clear overarching purpose of any protocol and the main form of relief that would be sought on any injunction application. The FSD Consent Order contains robust asset preservation undertakings.

(ii) CDM's protocols allowed the Defendants to take any action with the assets they pleased if they considered it reasonably necessary to comply with their legal obligations. There were no checks and balances on this right, which was said to apply "*notwithstanding anything to the contrary in this Protocol*". This was, in essence, the exact opposite of asset preservation undertakings.

(iii) CDM initially sought a value limit of US$5,000,000 on reportable transactions – reduced to all transactions of any value in the FSD Consent Order.

(iv) CDM offered retrospective monthly transaction reporting in its draft protocols, whereas the FSD Consent Order provided for seven days' advance written notice to the JOLs of all transactions made by any of the Defendants or CDM Entities above US$50,000, in addition to a retrospective monthly transaction report of all transactions undertaken by the Defendants or CDM Entities of any value. In addition, the FSD Consent Order gave the JOLs a right to seek and obtain further clarification from the Defendants of any particular transactions (not limited to whether those transactions were in the "ordinary course of business").

(v) The FSD Consent Order provided that the individual Defendants (Mr Patrick and Mr Murphy) must give 7 days' advance notice of any transactions above US$100,000, whereas no such offer was made in the CDM protocols.

(vi) The FSD Consent Order provided for recognition of the undertakings given by the Defendants in the United States through Chapter 15 proceedings, which was important given many of the Defendants are located in the United States and/or hold assets there.

(vii) The FSD Consent Order preserved the JOLs' right to challenge, at the inter partes hearing, the Defendants' ability to use assets deriving directly or indirectly from the limited partner interest in the Fund to pay their legal fees.

(viii) The FSD Consent Order requires the Defendants and CDM Entities to provide all balance sheets, financial statements and other records for each of them dating back to 30 June 2024 and on an ongoing monthly basis moving forward. The CDM protocols at their highest offered only a balance sheet for the Fund on an ongoing monthly basis moving forward (not retrospectively and not in respect of the other Defendants and CDM Entities).

(c) In light of the above, Mr Patrick's evidence on this issue is clearly misleading. That said, our clients will, of course, deal with the point in their responsive evidence should your client insist on pursuing the Application.

11.5 Leveraging the Liquidation Proceedings:

Failure to sanction Highland Foundations

(a) With respect to the TRO Proceedings, the JOLs have consistently maintained that they will act in the best interests of the Company and will take steps should it be necessary to protect those interests. That position has not changed.

(b) More to the point, as the JOLs understand the position, as things stand the TRO Proceedings are aimed at safeguarding the assets to which the Company is entitled, which is consistent with the objectives of the JOLs. Moreover, at this preliminary stage in the TRO Proceedings, the court is considering threshold procedural and jurisdictional issues, which have yet to be determined. The JOLs will continue to monitor these proceedings and reserve their rights.

Solvency declaration

(c) The solvency declaration issue has been ventilated at length with your firm. Given the one variable determining the appropriate solvency analysis in the liquidation context is the FSD Proceedings, and your client is a defendant to those proceedings, it is perhaps unsurprising that our respective clients do not agree on the prospects of success of those proceedings (and, by extension, the solvency determination). The JOLs have made a determination as to the solvency of the Company based on the JOLs' view of the facts and circumstances currently known.

DFW Summons

(d) Your client complains that the JOLs ignored the DFW Summons, pursuant to which DFW proposed that an inter partes proceeding be established in the liquidation for the validity of the DAF Restructuring. The DFW Summons was an inappropriate way to resolve the matters in issue. While we understand your client's motivation for pursuing it—to stymie the JOLs' investigations—it sought to cut across the JOLs' investigative powers and was premised on the JOLs not pursuing Chapter 15 proceedings. The importance of the Chapter 15 proceedings, and by extension the inappropriateness of the DFW Summons, is most currently underscored by the fact that the Company's service providers (Valuescope, LLC, Carrington, Coleman, Sloman & Blumenthal, L.L.P. and Seyfarth Shaw LLP), all of which provided advice on which Mr Patrick and Mr Murphy are seeking to rely, have refused to provide the Company's property without Chapter 15 recognition. If obtaining U.S. court

authority is allegedly required to enable service providers to share the Company's books and records, the JOLs would be foolish to assume that parties located in the United States would willingly return assets, should they be ordered to do so by the Cayman Court, without similar compulsion (or immediate threat of compulsion) by a U.S. court. Additionally, and separate from the Chapter 15 recognition, the Company's fourth shareholder prior to the share issuance to your client (CFNT) was not proposed to be included in those *inter partes* proceedings.

Interference in the Highland Bankruptcy Proceedings

(e) As to the letter the JOLs sent with respect to HMIT, there is, of course, nothing inappropriate about the JOLs, at the outset of the liquidation and pending their investigations, attempting to preserve the assets to which the Company might be entitled. The JOLs have not appeared in these proceedings. Correspondence between estate fiduciaries is plainly not "interference".

11.6 Investigations:

(a) Our clients, being responsible court officers, obtained the appropriate legal advice before commencing the Proceedings (as they needed to satisfy themselves, and the Court, of the prospects of success of the FSD Proceedings). This advice ranged from US legal advice with respect to tax and purported alter-ego risks, Cayman Islands legal advice in connection with the prospects of success of the Proceedings as well (with an independent opinion from King's Counsel). The reference to, and contents of, that advice are appropriately subject to sealing orders made by the Court.

(b) With respect to the complaint that neither Mr Patrick nor Mr Murphy was interviewed by the JOLs, as outlined above, in opposition to the JOLs' sanction application with respect to the engagement of counsel, your client, Mr Patrick, and Mr Murphy filed extensive evidence outlining their justifications for the transactions in issue.

(c) The JOLs were entitled to form the view—after considering that evidence and obtaining independent Cayman and US advice—that viable claims exist. This point was made clear to the Court in seeking sanction to commence the FSD Proceedings. The JOLs' investigations have been thorough; your client simply dislikes the outcome.

(d) Had your client (and Mr Patrick and Mr Murphy) not elected to put their case in evidence in opposition to the JOLs' sanction application, then interviews might have been appropriate. It is telling that neither your client, nor Mr Patrick nor Mr Murphy, has been able to articulate any meaningful additional facts to justify the transactions undertaken (such that an interview would have been warranted).

Moving forward

12 As is clear from the above, the Application is fundamentally flawed and brought with an ulterior motive. It is particularly telling that, instead of contesting the FSD Proceedings on the merits (for example, to bring a summary judgment application in circumstances where you say that the claims have no merit), your client has elected to bring the Application.

13 In light of the above, we invite your client to withdraw the Application. If your client insists on pursuing it, our clients' position is that the Application is destined to fail and the adverse costs arising from the Application should not be paid by DFW from proceeds it receives from the Fund or elsewhere within the charitable structure. Should the Application be pursued, our clients anticipate seeking orders that costs be reserved for the purpose of adding Mr Patrick as a party to the Application and seeking an order for costs against him personally on the indemnity basis.

Yours faithfully

Maples and Calder (Cayman) LLP

Maples and Calder (Cayman) LLP

cc Sam Dawson and Nigel Smith, Carey Olsen

Resignation Letter

October 2, 2024

Via Email (sellington@skyviewgroup.com) and FedEx

Skyview Group
c/o Scott Ellington
2101 Cedar Springs Road
Suite 1200
Dallas, Texas 75201

Dear Scott:

Please accept this letter as my formal notice of resignation as an employee from Skyview Group, effective immediately. The associations I've made during my employment here will truly be memorable for years to come.

Thank you very much for the opportunity to work here.

Sincerely,

Mark Patrick, Managing Director

Cc: legal@skyviewgroup.com
Jsevilla@skyviewgroup.com
fwaterhouse@skyviewgroup.com

EXHIBIT
M

New York State Unified Court System

UCS COURTS

WebCivil Supreme - Appearance Detail

Court: **New York Supreme Court**
Index Number: **650744/2023**
Case Name: **UBS Securities LLC et al vs. Dondero, James et al**
Case Type: **Comm-Other**
Track: **Standard**

Appearance Information:

Appearance Date	Time	Court Date Purpose	Fully Virtual	Court Date Type	Outcome Type	Justice Part	Remarks	Motion Seq
09/29/2025	09:30 AM	Motion-Notice of Petition	Yes	Remote		Crane, Hon. Melissa A. 60M	ORAL ARGUMENT - REMOTE DATE CHANGED FROM 9/22 PER PART'S REQUEST (9/17)	2
05/14/2025	09:30 AM	Motion-Notice of Petition	No	Administrative - No Appearance Required	Adjourned	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	SO ORDERED. NYSCEF DOC. #446.	2
04/16/2025	12:00 PM	Conference-Status	Yes	Remote	Held	Crane, Hon. Melissa A. 60		
04/02/2025	11:00 AM	Conference-Status	Yes	Remote	Held	Crane, Hon. Melissa A. 60	MS TEAMS	
07/08/2024	02:15 PM	Motion-Notice of Motion	Yes	Remote	Fully Submitted	Crane, Hon. Melissa A. 60M	ORAL ARGUMENT - REMOTE PRIOR DATE AND TIME CHANGED PER PART'S REQUEST	11
07/08/2024	02:15 PM	Motion-Notice of Motion	Yes	Remote	Fully Submitted	Crane, Hon. Melissa A. 60M	ORAL ARGUMENT - REMOTE PRIOR DATE AND TIME CHANGED PER PART'S REQUEST.	12
07/08/2024	02:15 PM	Motion-Notice of Motion	Yes	Remote	Fully Submitted	Crane, Hon. Melissa A. 60M	ORAL ARGUMENT - REMOTE PRIOR DATE AND TIME CHANGED PER PART'S REQUEST.	13
06/28/2024	09:30 AM	Motion-Notice of Petition	No	Administrative - No Appearance Required	Adjourned	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	SO ORDERED. NYSCEF DOC. #208. MOTION DECIDED	2
05/17/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	15
05/17/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	16
05/17/2024	10:30 AM	Conference-Preliminary	Yes	Remote	Held	Crane, Hon. Melissa A. 60	VIA MS TEAMS	
05/15/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	14
05/09/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Adjourned	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS NO APPEARANCE NECESSARY	11
05/09/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Adjourned	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS NO APPEARANCE NECESSARY	12
05/09/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Adjourned	Crane, Hon. Melissa A.	ROOM 130 SUBMISSIONS NO APPEARANCE NECESSARY	13

EXHIBIT N

						SUBMISSION - NO APPEARANCE		
02/16/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	10
02/14/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS NO APPEARANCE NECESSARY	6
02/14/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS NO APPEARANCE NECESSARY	7
02/14/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS NO APPEARANCE NECESSARY	8
02/14/2024	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS NO APPEARANCE NECESSARY	9
04/28/2023	09:30 AM	Motion-Notice of Petition	No	Administrative - No Appearance Required	Adjourned	Lebovits, Hon. Gerald SUBMISSION - NO APPEARANCE	PER SO-ORDERED STIP DOC#175/ROOM 130 SUBMISSIONS	2
03/24/2023	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	4
03/24/2023	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Crane, Hon. Melissa A. SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	5
03/24/2023	09:30 AM	Motion-Notice of Petition	No	Administrative - No Appearance Required	Adjourned	Lebovits, Hon. Gerald SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	2
03/24/2023	09:30 AM	Motion-Notice of Motion	No	Administrative - No Appearance Required	Fully Submitted - No Opposition	Lebovits, Hon. Gerald SUBMISSION - NO APPEARANCE	ROOM 130 SUBMISSIONS	3
03/20/2023	02:15 PM	Motion-Order to Show Cause (Returnable)	No	Administrative - No Appearance Required	Fully Submitted	Crane, Hon. Melissa A. 60M	ORAL ARGUMENT VIA MICROSOFT TEAMS - NO PERSONAL APPEARANCE	1

Close

Subject: Canceled: 650744/2023 - UBS Securities LLC et al v. James Dondero et al
Location: OA MS 02

Start: Mon 9/29/2025 9:30 AM
End: Mon 9/29/2025 10:30 AM
Show Time As: Free

Recurrence: (none)

Organizer: SFC PART 60

Importance: High

External Email – Use Caution

The court is taking this motion in on submission.

EXHIBIT
O

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

	:	Index No. 650744/2023
UBS SECURITIES LLC and UBS AG LONDON BRANCH,	:	Hon. Melissa A. Crane
Petitioners,	:	Motion Sequence No. 13
- against -	:	**NOTICE OF APPEAL**
JAMES DONDERO, SCOTT ELLINGTON, HIGHLAND CDO HOLDING COMPANY, HIGHLAND CDO OPPORTUNITY MASTER FUND, L.P., HIGHLAND FINANCIAL PARTNERS, L.P., HIGHLAND SPECIAL OPPORTUNITIES HOLDING COMPANY, CLO HOLDCO, LTD., MAINSPRING, LTD., and MONTAGE HOLDINGS, LTD.,	:	
Respondents.	:	

PLEASE TAKE NOTICE, that Respondent James Dondero ("Dondero"), by and through the undersigned counsel, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from the Decision and Order, dated March 25, 2025, issued in this action by the Honorable Melissa A. Crane, Justice of the Supreme Court, County of New York, denying Dondero's Motion to Dismiss the Special Turnover Petition, which Decision and Order was entered in the Office of the County Clerk on March 26, 2025, and notice of entry of which was served on March 27, 2025.

EXHIBIT
P

Dated: New York, New York

April 25, 2025

Respectfully submitted,

/s/ Deborah Deitsch-Perez

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Attorneys for Defendant James Dondero

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

UBS SECURITIES LLC AND UBS AG LONDON BRANCH, Petitioners, v. JAMES DONDERO, et al., Respondents.	Index No. 650744/2023 Hon. Melissa Anne Crane Motion Seq. Nos. 011 and 013 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that a Decision + Order on Motion of the Honorable Melissa Anne Crane dated March 25, 2025, a true and correct copy of which is attached as Exhibit A, was duly entered in the office of the Clerk of the Supreme Court of New York, County of New York on March 26, 2025 (NYSCEF Nos. 430-431).

Dated: March 27, 2025
New York, New York

LATHAM & WATKINS LLP

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Counsel for Petitioners UBS Securities LLC and UBS AG London Branch

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

----------X

UBS SECURITIES LLC,UBS AG LONDON BRANCH,

Plaintiff,

- v -

JAMES DONDERO, SCOTT ELLINGTON, HIGHLAND CDO HOLDING COMPANY, HIGHLAND CDO OPPORTUNITY MASTER FUND, L.P., HIGHLAND FINANCIAL PARTNERS, L.P., HIGHLAND SPECIAL OPPORTUNITIES HOLDING COMPANY, CLO HOLDCO, LTD., MAINSPRING, LTD., MONTAGE HOLDINGS, LTD.,

Defendant.

----------X

INDEX NO. 650744/2023

MOTION DATE 02/26/2024, 02/26/2024

MOTION SEQ. NO. 011 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 366, 367

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 394, 395, 416

were read on this motion to/for DISMISS.

Motion sequence numbers 011 and 013 are consolidated for disposition.

Petitioners UBS Securities LLC and UBS AG London Branch (together, "UBS") bring this turnover proceeding under CPLR Article 52 to enforce the judgments that UBS obtained in *UBS Secs. LLC v Highland Cap. Mgmt., L.P.,* index No. 650097/2009 (Sup Ct, NY County) (the "Underlying Action") against respondents Highland CDO Opportunity Master Fund, L.P. ("CDO Fund"), Highland Special Opportunities Holding Company ("SOHC," together with CDO Fund, the "Funds"), and Highland Financial Partners, L.P. ("HFP," together with the Funds, the

"Judgement Debtors"). The petition asserts four causes of action. The first claim is for turnover of certain allegedly fraudulent transfers, asserted against respondents CLO HoldCo, Ltd. ("CLO HoldCo"), Scott Ellington ("Ellington"), Mainspring, Ltd. ("Mainspring"), and Montage Holdings, Ltd. ("Montage"). In its second claim, UBS seeks to: (i) pierce the corporate veils of the Judgment Debtors to hold respondents James Dondero ("Dondero") and Ellington personally liable for the judgments in the Underlying Actions; (ii) pierce the corporate veils of Mainspring and Montage to hold Dondero (as alter ego of Mainspring) and Ellington (as alter ego of Montage) personally liable for the allegedly fraudulent transfers made to these entities; and (iii) reverse-pierce the corporate veil of respondent Highland CDO Holding Company ("CDO Holding"), a wholly owned subsidiary of HFP, to hold CDO Holding liable, as the alter ego of HFP, for the allegedly fraudulent transfers made in 2010 to CLO HoldCo and for HFP's portion of the judgments in the Underlying Action. The petition additionally asserts two now stayed claims for violations the Racketeer Influence and Corrupt Organizations Act ("RICO").

Ellington and Dondero (in motion sequence numbers 011 and 013, respectively) move to dismiss the petition pursuant to CPLR 404 (a) and 3211 (a) (1), (5), (7), and (8).

I. Background

The following facts are taken from the petition and are presumed to be true for purposes of the these motions (*see Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]).

A. Dondero and Ellington's Alleged Control Over a Web of Entities

Dondero, a resident of Texas, co-founded Highland Capital Management, L.P. ("HCM") in 1993 and was its majority owner, President, and Chief Executive Officer until his removal in

2020 (NYSCEF Doc No. 186, petition ¶¶ 6, 27). Dondero exercised control over HCM and its web of funds and other entities, in part, through his status as the sole stockholder and director of Strand Advisors, Inc. ("Strand"), HCM's general partner (*id.* ¶ 29). According to the expert report in the Underlying Action, from his position as President and majority owner of HCM, Dondero controlled HCM and many related entities— including SOHC, CDO Fund, Highland Financial Corp. ("HFC"), HFP, and CDO Holding (*id.* ¶¶ 28, 33, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 40-41). Dondero also served as chairman of HFP's board of directors, as the sole director of SOHC, and as President of the ultimate general partner of CDO Fund. Through these various positions, Dondero was responsible for the day-to-day operations of HFP, SOHC and CDO Fund. (*See id.* ¶¶ 28, 33, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 4-5, 41-42). Further, Dondero was able to alter the Judgment Debtors' structures to ensure his control. For example, "[i]n 2009, Dondero eliminated the requirement that HFP have independent directors and made himself [its] sole director" and, thus, "the direct decision maker for HFP and its subsidiaries, including SOHC and CDO Holding" (*id.* ¶ 33, exhibit 88 [NYSCEF Doc No. 94], email with Apr. 9, 2009 HFP board minutes at UBSPROD1854773, UBSPROD1854782 [stating that the Independent Directors were eliminated and Dondero was left solely responsible for the "management and operation" of HFP]; exhibit 113 [NYSCEF Doc No. 118], Dondero deposition tr at 48:8-13 [admitting that he was "generally" the "decision maker" for HFP and its subsidiaries]).

Ellington, who also resides in Texas, was an officer of Strand. He was also HCM's Chief Legal Officer and General Counsel from 2010 until his removal in January 2021. (*Id.* ¶¶ 7, 27, 31.) According to UBS, "Ellington operated as one of Dondero's top lieutenants and confidants" (*id.* ¶ 27). "Dondero delegated and entrusted many decisions related to SOHC, CDO Fund, and

related entities to Ellington, including signatory authority and litigation strategy" (*id.* ¶ 31 [internal quotation marks omitted]; *see id.*, exhibit 50 [NYSCEF Doc No. 56], documents transferring interest in a limited partnership at UBSPROD2630461-463 [showing Ellington's signature on behalf of CDO Fund to transfer assets]).

HCM and its related entities, including the Judgement Debtors, "utilized the same offices, employees, and internal counsel" (*id.* ¶ 35, exhibit 92 [NYSCEF Doc No. 98], Cash Warehouse Agreement ¶ 9 [listing HCM's Dallas office for CDO Fund and SOHC], exhibit 121 [NYSCEF Doc No. 194], Leventon deposition tr at 31:6- 19 [explaining that various entities, including SOHC, would have their business offices "co-located" with HCM's office]). HCM's employees performed all work for all HCM-related entities based on instructions from Dondero and Ellington (*id.* ¶¶ 34-36). Employees also regularly worked on personal matters for Dondero and Ellington. For example, HCM employees handled Dondero's divorce, litigated a lemon law claim on his behalf and managed tenant issues at a building he owned (*id.* ¶ 37). Personal work for Ellington included conducting diligence and analysis for personal investments, paying rent on a warehouse he leased, and managing his personal trust (*id.* ¶ 39). Regardless of whether they performed work for a specific entity or worked on personal matters for Dondero or Ellington, employees received all their compensation from HCM (*id.* ¶¶ 36-38). As Ellington explained during deposition, HCM compensation was "the only compensation . . . that anyone ever received" and it was based on the "amalgamation of total efforts as directed by Mr. Dondrero as the [General Partner]." This included "personal assignments for Mr. Dondero, [because] it was still seen as value to Mr. Dondero as the GP, and he set the overall compensation numbers." (*Id.* ¶ 34, exhibit 117 [NYSCEF Doc No. 192], Ellington deposition tr at 113:5-16.)

"HFP and its subsidiaries did not employ any specific limitations or procedures that governed when one HFP subsidiary could cover the debt of HFP or another subsidiary" (*id.* ¶ 52). HFP freely used the assets of its wholly owned subsidiary, CDO Holding (*see id.* ¶¶ 11, 52, 53). In 2008, to cover SOHC losses, HFP withdrew about $15 million from CDO Holding (*id.* ¶ 53). Both transfers, from CDO Holding to HFP and from HFP to SOHC, were approved with a one-word email from HFP's Chief Operating Officer (*id.* ¶¶ 52, 53). "HFP also used money from CDO Holding to pay legal invoices related to the Underlying Action, even though CDO Holding was not a party" (*id.* ¶ 53). On another occasion, also in 2008, SOHC recorded a dividend of $10.5 million to HFP, that HFP then purportedly paid to CDO Holding. In reality, the money moved directly from SOHC to CDO Holding. (*Id.* ¶ 54.) That same month, "HFP also raised $40 million from other HCM entities and transferred the money to CDO Holding to distribute it" (*id.* ¶ 54, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 43, 48).

The expert in the Underlying Action concluded that "'Dondero exercised his ability to dominate and control HCM, SOHC, CDO Fund and HFP, amongst other [HCM] [e]ntities,' to his own benefit, including to 'authorize loans to himself' and facilitate transfers among these entities— 'which were not at arm's length or executed in accordance with corporate formalities'" (*id.* ¶ 33, quoting NYSCEFF Doc No. 8, Dudley Report at 54-56). As an example, the expert pointed to a $3.7 million payment made to Dondero in December 2008. This was purportedly a repayment of a short-term loan to CDO Holding. However, the expert could find no evidence of a loan agreement and the funds originated from SOHC. (NYSCEFF Doc No. 8, Dudley Report at 48, 54.) More specifically, "'as part of a single set of instructions to Bank of New York Mellon, SOHC transferred $3.7 million to HFP, which was then transferred to CDO Hold[ing]

and ultimately to James Dondero'" (NYSCEF Doc No. 186, petition ¶ 54, quoting NYSCEF Doc No. 8, Dudley Report at 48).

B. The Underlying Action and the Allegedly Fraudulent Transfers

In 2007 and 2008, UBS agreed to pursue a complex securitization transaction involving collateralized debt obligations and collateralized loan obligations with HCM, CDO Fund and SOHC (the "Knox Transaction") (*id.* ¶ 41). The warehouse agreements governing the transaction (the "Knox Agreements") contain forum selection clauses, by which UBS, CDO Fund and SOHC agreed to submit to the exclusive jurisdiction of New York courts (*id.* ¶ 18, exhibit 92 [NYSCEF Doc No. 98], Cash Warehouse Agreement ¶ 15, exhibit 93 [NYSCEF Doc No. 99], Synthetic Warehouse Agreement ¶ 15). As part of the transaction, CDO Fund and SOHC agreed to be responsible for 100% of any losses (*id.* ¶ 42). They breached this obligation as losses continued to mount amid the 2008 financial crisis. In December 2008, losses had grown to $519,374,149 and UBS terminated the Knox Agreements (*id.* ¶ 43).

In February 2009, UBS commenced the Underlying Action against HCM, CDO Fund, SOHC and several other affiliated entities, including HFP, for breach of the Knox Agreements (*id.* ¶ 44).

In late October 2010, the court in the Underlying Action heard arguments on the defendants' motion to dismiss UBS's claim to hold HFP liable as SOHC's alter ego (*id.* ¶ 49). UBS claims that Dondero and Ellington, anticipating a negative outcome, acted to transfer HFP's assets out of the reach of any future UBS judgments (*id.* ¶¶ 49, 51). On December 23, 2010, CDO Holding, one of the primary repositories of HFP's assets, transferred substantially all its assets, valued at $39,638,160, to CLO HoldCo in exchange for $6,597,862.00 in cash and a promissory note for $32,801,593.00 plus interest payable in fifteen years (the "2010 Transfer")

(*id.* ¶¶ 51, 52, 59). CLO HoldCo is a Cayman Islands company and a wholly owned subsidiary of Charitable DAF Fund, L.P., that Dondero indirectly controls and has funded from his personal assets, his family trusts, and HCM (*id.* ¶ 12). It was incorporated on December 13, 2010, specifically for the 2010 Transfer (*id.* ¶ 55).

In March 2017, the Judgement Debtors suffered summary judgment losses and Dondero and Ellington anticipated a $1.2 billion judgment (*id.* ¶¶ 61, 62, 64). They then devised a way for the Judgement Debtors to transfer all their remaining assets (the "2017 Transfers") to Sentinel Reinsurance, Ltd. ("Sentinel"). The Judgement Debtors would transfer their assets, pursuant to an attendant Asset Purchase Agreement (the "APA"), as payment of the premium for an after-the-event insurance policy (the "ATE Policy") to insure CDO Fund, SOHC and CDO Holding (together, the "Insureds") against liability in the Underlying Action (*id.* ¶¶ 63, 64). During the development of the ATE Policy, Sentinel's outside counsel raised concerns about the "legal validity of such a transfer," warning that using the "hedge funds' investment portfolios" to satisfy the premium would put "these assets . . . beyond the reach of the plaintiffs in the [Underlying Action]" and risked the "'premium' [being] returned or . . . set aside as some unlawful preference" (*id.* ¶ 72, exhibit 42 [NYSCEF Doc No. 48], email from Solomon Harris at BC SEN0000745905).

In August 2017, Dondero executed the ATE Policy and the APA, transferring assets valued at $105,647,679.00 (the "2017 Transferred Assets") to satisfy a $25,000,000 premium (*id.* ¶ 72). The face value of the transferred cash and promissory notes alone was nearly twice the ATE Policy's premium (*see id.* ¶ 73, exhibit 98 [NYSCEF Doc No. 104], APA at BC SEN0000089127-28 [listing assets]). Dondero signed the ATE Policy on behalf of all the

Insureds and the APA on behalf of all transferors (*id.* ¶ 77). According to UBS, he also attempted "to sign a corollary to the APA on behalf of the [t]ransferors and Sentinel" (*id.*).

Under the ATE Policy, Sentinel agreed to indemnify CDO Fund, SOHC and CDO Holding for up to a $100 million, in the aggregate, against any adverse judgment or settlement with UBS (*id.* ¶ 75, exhibit 51 [NYSCEF Doc No. 57], ATE Policy at UBSPROD1973070). Although not a party to the Underlying Action, CDO Holding was included among the Insureds because, as a primary asset repository for HFP, it had liability (*see id.* ¶ 75, exhibit 121 [NYSCEF Doc No. 194], Leventon deposition tr at 32:10-15 [stating that any collection against HFP "would then expose CDO Hold[ing]'s assets to seizure"]). CDO Opportunity Fund, HFC, and HFP also transferred their assets to Sentinel. However, they were not insured under the ATE Policy. Notably, CDO Opportunity Fund and HFC were not party to the Underlying Action. (*Id.* ¶ 76, exhibit 98 [NYSCEF Doc No. 104], APA at BC SEN000089127-28.)

Ellington devised the ATE Policy without any input from Sentinel or Beecher Carlson ("Beecher"), Sentinel's insurance manager (*id.* ¶ 65). The terms of the policy were carefully tailored to enable the Insureds to claim reimbursements unrelated the Underlying Action. First, the terms were revised to permit reimbursement even if the Insureds could not afford to litigate the Underlying Action (*id.* ¶ 69). Then, coverage was extended to include Insureds' "own costs and expenses," and this was later broadened to include the "costs and expenses of the Representative and other service providers in the normal course, including related tax, which are incurred during the conduct of the legal action on behalf of the insured" (*id.* ¶ 69, exhibit 42 [NYSCEF Doc No. 48] email exchange between HCM's Assistant General Counsel and Solomon Harris at BC SEN0000745902-03 [finalizing the terms of the ATE Policy]).

Sentinel is a Cayman Island based reinsurance company (*id.* ¶ 63). Respondent Montage, a Cayman Islands company of which Ellington is the ultimate beneficial owner, owns 30% of Sentinel and respondent Mainspring, a Cayman Islands company of which Dondero is the ultimate beneficial owner, owns the remaining 70% (*id.* ¶¶ 13, 14, 63, exhibit 68 [NYSCEF Doc No. 74], email to the Cayman Islands Monetary Authority at DISCEN0008410 [containing chart of Sentinel's ownership structure]). "Dondero tasked Ellington with setting up and managing Sentinel through HCM's in-house legal team" (*id.* ¶ 80). Until 2021, Sentinel was run exclusively by HCM employees, who took direction from Ellington and Dondero (*id.*).

Dondero and Ellington also arranged to be appointed as sole members of the Sentinel Advisory Board of ITA Trust, the entity with ultimate voting control over Sentinel. Although Sentinel had been operating for several years, Dondero and Ellington's tenure on the Sentinel Advisory Board commenced around the same time as the ATE Policy and APA were executed. (*See id.* ¶ 71, exhibit 66 [NYSCEF Doc No. 72], Sentinel's board minutes with annexed Aug. 10, 2017 resolution of ITA Trust at BC SEN0000076075 [establishing the advisory board and appointing Dondero and Ellington as its sole members].) As the sole members of the Sentinel Advisory Board, Dondero and Ellington "guide[d] the decision making of the Trustee of the ITA Trust in its role as an indirect shareholder in Sentinel" (*id.*).

The ATE Policy was the first and only time that Sentinel issued an after-the-event policy. Previously, it had only issued director and officer liability policies to Dondero and Ellington-related entities and these policies contained significantly more modest coverage limits than that of the ATE Policy. (*Id.* ¶ 66.) Additionally, without the 2017 Transferred Assets, Sentinel did not have the means to pay the $100 million under the ATE Policy. Based on an actuary's limited analysis of the ATE Policy, "[e]ven under reasonably optimistic assumptions," the premium was

going to be exceeded (*id.* ¶ 70, exhibit 41 [NYSCEF Doc No. 47], Bartlett Actuarial Group, Ltd.'s analysis of the ATE Policy at BC SEN0000745987). As of December 2016, Sentinel had $19,193,823.23 in total assets, $5,886,746.39 of which were cash (*id.* ¶ 66).

In 2018, "Sentinel (on behalf of Dondero and Ellington) tried to hide the fraudulent nature of the transfers by ascribing only $68 million in value to the 2017 Transferred Assets" (*id.* ¶ 84). However, this did not resolve the issue of the obvious overpayment for the premium. Beecher noted that the failure to "return [] overpayment of premium, [would] give[] rise to the question 'is this an arms-length transaction?'" (*id.*, exhibit 55 [NYSCEF Doc No. 61], email exchange between HCM and Beecher at BC SEN0000707457). In June 2018, Sentinel executed endorsements to the ATE Policy, one of which adjusted the premium to $68,362,333.62, purportedly "to include the total fair value of received assets" (*id.* ¶¶ 85, 86, exhibit 52 [NYSCEF Doc No 58], endorsements at DISCEN0007912).

The Cayman Island Monetary Authority ("CIMA") conducted an onsite inspection of Sentinel in March 2019 (*id.* ¶ 88). CIMA raised numerous concerns regarding the ATE Policy and the APA. For example, CIMA found that Sentinel's actuary "was not involved in the determination of premium pricing . . . to any extent at all" (*id.*, exhibit 67 [NYSCEF Doc No. 73], CIMA's Final Inspection Reports at BC SEN0000078822). It also found that those charged with governance could not explain: "the basis upon which the [2017 Transferred Assets] had been valued on or about August 1, 2017 for the purpose of premium settlement"; "the reason why the information that was relied on to value the [2017 Transferred Assets] could not be readily provided to the auditors upon request"; and "why the premium was adjusted from US$25 million to US$68.3 million without a commensurate adjustment to the indemnity limit provided or why the initial pricing for the policy was subsequently deemed not sufficient." CIMA

concluded that these facts, as well as the seven-fold increase in Sentinel's portfolio due to the 2017 Transferred Assets, "cast significant doubt on the economic substance and business purpose of the transactions relating to the ATE coverage" *(id.*, at BC SEN0000078819).

In the meantime, the Underlying Action advanced. The court bifurcated the trial into two phases (NYSCEF Doc No. 186, petition ¶ 1). At the end of phase one, by decision and order dated November 14, 2019, the court awarded UBS $1,042,391,031.79, ordering CDO Fund to pay $531,619,426.24 and SOHC to pay $510,771,605.55 ("Phase I Judgment") (*id.* ¶ 2, exhibit 11 [NYSCEF Doc No. 17], Phase I Judgment at 2-3). Prior to trial of the second phase, HCM filed for bankruptcy, staying the Underlying Action.

UBS alleges that "[i]n the months after the November 2019 Phase I [Judgment], Dondero and Ellington spent, transferred, and otherwise dissipated the 2017 Transferred Assets" and that "[t]hey did this in two main ways" (*id.* ¶ 99). First, Ellington sough reimbursement from the ATE Policy for personal expenses (*id.* ¶ 100). Second, Dondero and Ellington directed Sentinel to pay "dividends" to Mainspring and Montage (*id.* ¶ 101). In this way, UBS alleges, Dondero and Ellington exercised their control over Sentinel to enrich themselves and to diminished the assets available to UBS to satisfy its judgments (*id.* ¶ 98).

Ellington is alleged to have made the following improper reimbursement claims: (1) on December 16, 2019, for $21,557.04 in expenses for travel to Los Angeles, New York City, and Chicago (*id.* ¶ 104); (2) on December 19, 2019, for $318,934.88 in expenses for a single day in Austin and seven days in Las Vegas, which included $42,324 in charges from a single night at a Las Vegas strip club and $97,706.19 in charges at a Las Vegas nightclub (*id.* ¶ 105); (3) on January 30, 2020, for reimbursement of $78,841.93 in expenses for personal trips to London and Paris with his girlfriend (*id.* ¶ 108) and $140,000 in expenses for a trip to Toronto that included

$43,353.54 spent on a private jet (*id.* ¶ 109); and (4) on March 12, 2020, for $273,662.82 in expenses for a six-day trip to London, that included approximately $18,000 in airfare for three individuals unaffiliated with Sentinel and $75,914.86 spent in a single day at two restaurants and a night club (*id.* ¶ 110). Sentinel reimbursed all of these expenses without questioning their validity, relying on Dondero and Ellington's determinations, as the ultimate beneficial owners of Sentinel, that such reimbursements were appropriate (*see id.* ¶¶ 104, 105-107, 111-112).

In January 2020, an independent board of directors of Strand (the "Independent Board") took over HCM's operations, management of its assets, and its bankruptcy proceeding (*id.* ¶ 45).

On April 24, 2020, Sentinel paid $6.4 million in dividends to Mainspring and Montage. $4,480,000.00 was paid to Mainspring, as Dondero's 70% share of the dividend. $1,920,000.00 was paid to Montage, as Ellington's 30% share of the dividend (*id.* ¶ 114).

In late 2020, UBS participated in bankruptcy court-ordered mediation. At this time, Ellington repeatedly told UBS that CDO Fund and SOHC were "ghost funds" (*id.* ¶ 46, exhibit 87 [NYSCEF Doc No. 93] Aug. 15, 2020 Ellington email at UBSPROD1738891 [stating that the Funds were "ghost funds . . . that (did) not have directors, custodians, administrators, bank accounts etc. that s(a)t dormant and NO ONE kn(ew) what they truly retain(ed)" and that "UBS (was) aware of this situation . . . because (Ellington) ha(d) personally discussed it with (Andy Clubok, UBS's counsel,) several dozen times"]). Neither Ellington nor Dondero ever disclosed the existence of the ATE Policy to UBS, the bankruptcy court or the Independent Board (*id.* ¶ 91).

On January 12, 2021, a year after the Phase I Judgment, Sentinel paid another $1,750,000.00 to Mainspring and $750,000.00 to Montage (*id.* ¶ 117). UBS alleges that the issuance of these dividends, as well as the April 2020 dividends, were against a representation

that Matthew DiOrio ("DiOrio"), Managing Director of HCM and trusted lieutenant to Ellington and Dondero (*id.* ¶¶ 36, 40), had made to Beecher in 2018— that Sentinel would "not be entertaining any dividend issuance while the ATE policy [was] active" (*id.* ¶ 115, exhibit 62 [NYSCEF Doc No. 68] at DISCSEN0006464-65). In addition, UBS alleges that the second dividend violated CIMA's regulations, requiring that CIMA be notified before a dividend is issued. UBS points to the notice Sentinel provided CIMA three months after the fact, in which it represented that it was "notifying the Authority of a $2,500,00 dividend *to b*e declared and paid" (*id.* ¶ 117, exhibit 91 [NYSCEF Doc No. 97] at BC SEN0000083961 [emphasis added]).

Sentinel had no schedule for issuing dividends to Mainspring and Montage and did so at the request of its ultimate beneficial owners, Dondero and Ellington (*id.* ¶ 113, 116, exhibit 111 [NYSCEF Doc No. 190], DiOrio deposition tr at 195:12-197:3). As DiOrio explained during deposition, Ellington and Dondero "could ask [for dividends] every day of the year," and Sentinel's board would have to approve it (*id.* ¶ 116, exhibit 111 [NYSCEF Doc No. 190], DiOrio deposition tr at 196:13-14).

According to UBS, Dodero and Ellington used some of these dividend payments to make bonus payments to statutory insiders, including Ellington, after the bankruptcy court denied HCM's request to make such bonus payments (*see id.* ¶¶ 119, 120). Ellington created an entity called Tall Pine Group, LLC "to enter into consulting agreements with various Dondero-controlled entities . . . and then [to] subcontract with entities owned by or affiliated with [the statutory insiders]" (*id.* ¶ 122). Under these consulting agreements, "the contributing entities," which included Mainspring, "were jointly and severally liable for the total amount on the various milestone payment dates" (*id.* ¶ 123; *see id.* at 45 n 30). "[T]he 'consultants' performed no other work on top of the services already being performed by those individuals as employees of HCM,

and in certain instances some of the employees did no work for certain contributing entities" (*id.* ¶ 124). Under these consulting agreements, the statutory insiders received approximately $8,638,536.07 in 2020, including about $5,874,203.21 from Mainspring (*id.* ¶ 126).

According to UBS, "it was only after Dondero and Ellington were removed that HCM and UBS were able to reach an agreement in principle to settle UBS's claims in the bankruptcy" (*id.* ¶ 47). Before a settlement agreement was signed, "on or about February 10, 2021, . . . HCM disclosed several fraudulent conveyances that HCM entities (at the direction of Dondero and Ellington) had conducted in concert with Sentinel" (*id.*). It was only through this disclosure that UBS learned of the 2010 Transfer and the 2017 Transfers (*id.* ¶¶ 47, 60). On March 30, 2021, UBS and HCM entered into a renegotiated settlement agreement, which settled UBS's claims against HCM and certain related entities in the Underlying Action (*id.* ¶ 47).

On July 27, 2022, the court in the Underlying Action issued a decision and order on the remaining, unsettled claims. The court awarded UBS $67,222.00 against CDO Fund, found HFP to be the alter ego of SOHC and liable for SOHC's portion of the Phase I Judgment, and awarded UBS attorney's fees ("Phase II Judgment," and together with the "Phase I Judgment," the "Judgment"). (*Id.* ¶¶ 2, 48, exhibit 24 [NYSCEF Doc No. 30], Phase II Judgment at 9-10.)

On September 1, 2022, UBS entered into a final settlement agreement with Sentinel. Sentinel agreed to transfer to UBS what remained of the 2017 Transferred Assets and UBS agreed to count those assets toward satisfaction of the Judgment (*id.* at 37 n 21, exhibit 25 [NYSCEF Doc No. 31], Partial Satisfaction-Piece for Post-Judgment Interest).

II. Procedural History

UBS commenced this proceeding on February 8, 2023 (NYSCEF Doc No. 1). On March 7, 2023, Dondero removed the case to the U.S. District Court for the Southern District of New

York pursuant to 28 USC § 1441(a). The district court remanded the first two claims to this Court on December 7, 2023 (NYSCEF Doc Nos. 176-179, 197-99).

Ellington, CLO HoldCo and Dondero (in motions sequence numbers 011, 012, 013, respectively) moved to dismiss the petition. Argument on the motions was held on July 8, 2024.

By decision and order dated July 8, 2024, this court granted CLO HoldCo's motion to dismiss for lack of personal jurisdiction. In pertinent part, the court held that CLO HoldCo was not a signatory to the agreements containing forum selection clauses and that there was no basis for long-arm jurisdiction, because: (1) the alleged 2010 fraudulent transfers occurred years before there was a judgment or a bankruptcy settlement, and so there could be no reasonable expectation of consequence in New York under CPLR 302 (a) (3) (ii); and (2) the "'original critical events' giving rise to the injury here indisputably did not occur in New York" (NYSCEF Doc No. 417, Decision and order dated July 8 2024, quoting *Deutsche Bank v Vik*, 163 AD3d 414, 415 [1st Dept 2018]).

III. Analysis

A. Personal Jurisdiction and Piercing the Corporate Veils of the Judgement Debtors

The parties dispute whether the court has personal jurisdiction over Dondero and Ellington, either as alter egos of the Judgement Debtors, bound by the forum selection clauses of Knox Agreements, or under the long-arm statute. They also dispute whether the petition contains sufficient allegations of Ellington and Dondero's close relationship with the Judgement Debtors to bind them under the Knox Agreements' forum-selection clauses.

1. Choice of Law Analysis for Veil-Piercing

As a preliminary matter, the parties dispute which jurisdiction's law should apply in determining whether to pierce the corporate veils of the Judgment Debtors. SOHC is a Cayman

Islands corporation, HFP is a Delaware limited partnership and CDO Fund is a Bermuda limited partnership (NYSCEF Doc No. 186, petition ¶¶ 8, 9, 10). Respondents contend that the court should apply the law of the place of incorporation of the company whose veil is sought to be pierced. UBS counters that, as this proceeding concerns the enforcement of a New York judgment, New York's interest is paramount and its law applies.

The first step in a choice of law analysis, is to determine "whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). "For an actual conflict to exist, the laws in question must provide different substantive rules . . . that are relevant to the issue at hand and have a significant *possible* effect on the outcome of the trial" (*TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014] [internal quotation marks and citation omitted]). If no conflict exists "between the laws of the competing jurisdictions . . . , then the court should apply the law of the forum state in which the action is being heard" (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd 3* NY3d 577 [2004]). Where a conflict exists, "under New York choice-of-law principles, courts apply the law of the forum to procedural questions and, to substantive issues, the law of the jurisdiction with the most significant relationship to the dispute" (*Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 335 [2024] [internal citations omitted]).

Generally, "the substantive law of a company's place of incorporation presumptively applies to causes of action arising from its internal affairs" (*Eccles*, 42 NY3d at 339). However, this presumption may be overcome, if a party demonstrates "both that (1) the interest of the place of incorporation is minimal—i.e., that the company has virtually no contact with the place of

incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law" (*id.*).

If the dispute concerns the application of tort law and the law is conduct-regulating, "New York courts usually apply the law of the place where the tort occurred because that jurisdiction has the greatest interest in regulating behavior that takes place within its borders" (*Elson v Defren*, 283 AD2d 109, 115 [1st Dept 2001]; *see Eccles*, 42 NY3d at 336). "Where a defendant's wrongful conduct occurs in one jurisdiction and the plaintiff suffers injuries in another, 'the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred;' that is where the plaintiffs' injuries occurred" (*Deutsche Bank AG v Vik*, 2015 NY Slip Op 30163[U], *20 [Sup Ct, NY County 2015], *affd* 142 AD3d 829 [1st Dept 2016], quoting *Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 197 [1985]).

Here, New York law applies to the veil-piercing analysis.

Because "HFP is a Delaware limited partnership" (NYSCEF Doc No. 186, petition ¶ 9) and "the standard [for piercing the corporate veil] is not materially different under Delaware law" from that under New York law (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]; *see also Spinnell v JP Morgan Chase Bank, N.A.*, 59 AD3d 361, 361 [1st Dept 2009] ["(t)he court properly applied New York law because there is no conflict with Delaware law with respect to 'reverse veil-piercing' . . ."]), New York law applies with regard to HFP (*see Excess Ins. Co. Ltd., 2* AD3d at 151]).

However, the standard for piercing the corporate veil under the laws of the Cayman Islands and Bermuda differ from that of New York. According to the parties' experts on Cayman Island and Bermuda law, because these jurisdictions are British Overseas Territories, they follow English law where there is no local authority on a particular issue (*see* NYSCEF Doc

No. 260, Lowe affirmation ¶¶ 8-9; NYSCEF Doc No. 309, Hayden affirmation ¶¶ 7-10; NYSCEF Doc No. 324, Wasty affirmation ¶¶ 12-19). In this case, the leading, applicable case on piercing the corporate veil in English law is *Prest v Petrodel Resources Limited* ([2013] 2 AC 415) (*see* NYSCEF Doc No. 260, Lowe affirmation ¶ 16; NYSCEF Doc No. 309, Hayden affirmation ¶ 11; NYSCEF Doc No. 324, Wasty affirmation ¶ 27).

Prest explains that English cases addressing the issue can be divided into two categories that have often been confused (NYSCEF Doc No. 316, *Prest* at 70). The first category of cases applies the concealment principle, which "is legally banal and does not involve piercing the corporate veil at all" (*id.*). This principle is not implicated in this proceeding. [1] The second category of cases applies the evasion principle, "which applies when a person is under an *existing* legal obligation or liability or subject to an *existing* legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control" (*id.* at 74 [emphasis added]). Because English law requires the existence of liability prior to the abuse of the corporate form, a temporal requirement not found under New York law (*see Tianbo Huang v iTV Media, Inc.*, 13 F Supp 3d 246, 258 n 4 [ED NY 2014] [explaining how "(t)he temporal requirement most clearly distinguishes New York from English

[1] In applying the concealment principle, courts look to general legal principles "to discover the facts which the corporate structure is concealing," without "disregarding the 'facade'" (NYSCEF Doc No. 316, *Prest* at 70). For example, in one of the cases discussed in *Prest*, it was not necessary to pierce the corporate veil, because the defendant company had acted as the individual defendant's "nominee for the purpose of receiving and holding the secret profit" and, as such, both had to account for it to the plaintiff (*id.* at 72).

Notably, UBS contends that, even under Bermudan and Cayman laws, the court should hold Dondero and Ellington personally liable for the Judgement under the concealment principle. However, the petition clearly seeks to hold Dondero and Ellington liable as the alter egos of the Judgement Debtors and asks the court to disregard the corporate form to find personal jurisdiction over the individuals. This cannot be accomplished by applying the concealment principle.

law"]), a choice of law analysis is necessary to determine which standard should apply to piercing the corporate veils of SOHC and CDO Fund.

Piercing the corporate veil involves holding an individual accountable to third parties for the abuse of the corporate form (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]) rather than "the relationships between directors and shareholders" or a corporation's internal administration (*Eccles*, 42 NY3d at 336, 336 n 11). Therefore, "alter ego liability and the related doctrine of piercing the corporate veil . . . do not implicate the corporation's internal affairs" and there is no presumption in favor of Bermuda or the Cayman Islands as the jurisdictions of incorporation (*see UBS Sec. LLC v Highland Capital Mgt., L.P.*, 30 Misc 3d 1230[A], 2011 NY Slip Op 50297[U], *3 [Sup Ct, NY County 2011], *affd in part, mod in part* 93 AD3d 489 [1st Dept 2012] [applying New York law to determine whether HCM was SOHC's alter ego]; *see also Highland CDO Opportunity Master Fund, L.P. v Citibank, N.A.*, 270 F Supp 3d 716, 725 [SD NY 2017] ["find[ing] that veil piercing is best treated as a species of fraud or similar tort and therefore is a conduct-regulating rule"]).

Here, New York has the greater interest in applying its law to the veil piercing claims.

Apart from SOHC and CDO Fund's status as a Cayman Islands corporation and a Bermuda limited partnership, respectively, it is not clear how those jurisdictions' interests are implicated here. Indeed, as concerns SOHC, it has already been found not to have any "obvious ties" to the Cayman Islands (*UBS Sec. LLC*, 2011 NY Slip Op 50297[U] at *3 [applying New York law to the veil piercing claim on "the ground that SOHC has almost no ties to the Cayman Islands," based upon findings that, among other things, it "conducts business in New York and Texas with entities based in New York, including UBS"]). Moreover, none of the injured parties are located in the Cayman Islands or Bermuda.

On the other hand, petitioner UBS Securities LLC has its principal place of business in New York (NYSCEF Doc No. 186, petition ¶ 4). Accordingly, at least part of the injury was felt in New York (*see Schultz*, 65 NY2d at 195; *see also Highland CDO Opportunity Master Fund, L.P., N.A.*, 270 F Supp 3d at 725 [applying New York's interest analysis and concluding that "New York ha(d) the greatest interest in applying its law to the veil piercing claims," where three of the four counterclaim plaintiffs had their principal place of business in New York and, "(a)ccordingly, the relevant injury . . . occurred in New York"]). In addition, New York has an interest in enforcing a judgment entered in the state, which resulted from the breach of the Knox Agreements, which were "largely conducted in New York" (NYSCEF Doc No. 281, Dondero brief at 13) and contain New York forum selection clauses (*see Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996] [finding New York's law applied in an action seeking to pierce the corporate veil to hold a foreign entity liable under an indemnification agreement, where, among other things, the subject agreement had been executed in New York]; *Citibank, N.A. v Aralpa Holdings L.P.*, 2025 WL 289499, *2, 2025 US App LEXIS 1559, *5 [2d Cir, Jan. 24, 2025, No. 24-423-CV] [applying New York choice of law principles and concluding that New York law applied to Citibanks' reverse veil piercing claim, because "New York clearly ha(d) the more significant relationship to th(e) dispute," where Citibank's principal place of business was in New York, the underlying contracts "contained New York choice-of-law and venue clauses," and "the judgment which Citibank (sought) to execute upon was entered in New York"]). Accordingly, New York law determines whether to pierce the Judgement Debtors' corporate veils.

2. Piercing the Corporate Veil Analysis

Dondero contends that the alter ego claim must be dismissed as against him and that it cannot serve as the basis of personal jurisdiction over him, because the petition fails to allege: (1) that he disregarded the corporate formalities of the Judgment Debtors to advance his personal interests; (2) that the Judgment Debtors were purposefully undercapitalized in 2008, when UBS entered into the Knox Agreements; (3) that he commingling his personal assets with those of the Judgment Debtors or used Judgment Debtor funds for personal use; and (4) causation, or that, in the absence of the alleged wrongful conduct, UBS would have been able to satisfy the $1.2 billion Judgement. In addition, as concerns HFP and CDO Fund, Dondero contends that alter ego claims fail as a matter of law, because veil-piercing does not apply to limited partnerships.

Ellington contends that the alter ego claim must be dismissed as against him and that it cannot serve as the basis for personal jurisdiction over him, because: (1) there are no allegations that he was using the Judgement Debtors to conduct business in his personal capacity or that he personally benefited from the Knox Transaction or from the 2017 Transfers to Sentinel when they occurred, as opposed to subsequently; (2) he had no ownership interest in the Judgment Debtors; and (3) the petition's extensive allegations of Dondero's control of the Judgement Debtors negate any claim of control by Ellington.

Dondero and Ellington both argue that to hold them liable for the Judgement would be inequitable, as it would give UBS the benefit of personal guarantees that it did not bargain for. They also urge that a fraudulent transfer claim is the proper vehicle to recover the allegedly funneled funds.

UBS responds that limited partnership status does not bar alter ego liability. In addition, it argues that the petition sufficiently alleges Dondero's control over the Judgment Debtors and explains how the commingling of assets ultimately benefitted only Dondero and his associates.

UBS also contends that the intentional undercapitalization of the Judgment Debtors near the time of the Judgment being entered is relevant to the veil-piercing analysis. Lastly, UBS contends that the Judgment Debtors' inability to pay the entirety of the Judgment does not mean that Dondero's conduct did not cause UBS injury. It argues that allegations that Dondero worked to funnel the Judgment Debtors' assets to himself and his associates are sufficient to plead causation in this case.

As concerns Ellington, UBS argues that the petition sufficiently details how he orchestrated the 2017 Transfers to Sentinel, a company for which Ellington was an ultimate beneficial owner, and then used those assets for lavish personal expenses and dividend payments to himself. UBS contends that his lack of ownership interest in the Judgement Debtors does not bar alter ego liability, as he can be held liable as an equitable owner based on his control over the Judgement Debtors. In addition, it argues, as multiple individuals may be held liable as alter egos of an entity, Dondero's alter ego status does not shield Ellington against alter ego liability. Finally, UBS contends that the absence of a personal guarantee does not render piercing the corporate veil inequitable and that to find otherwise would render alter ego liability ephemeral.

"A non-signatory may be bound by a [forum selection clause] under certain limited circumstances, including as . . . an alter ego of a signatory" (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 122 [1st Dept 2020] [internal citations omitted]). "Subjecting the foreign defendants to New York jurisdiction under an alter ego theory does not offend due process" (*Clingerman v Ali*, 212 AD3d 572, 572 [1st Dept 2023] [internal citation omitted]).

To state a claim against an individual on an alter ego theory of liability, the petitioner must allege facts that, if proved, indicate that: : "(1) the owner exercised complete domination

over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury" (*First Capital Asset Mgt. v N.A. Partners*, 300 AD2d 112, 116 [1st Dept 2002], citing *Matter of Morris*, 82 NY2d at 141). Courts consider the following factors when determining whether domination has been alleged:

> "the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity" (*Cortlandt St. Recovery Corp. v Bonderman*, 226 AD3d 103, 105 [1st Dept 2024], quoting *Tap Holdings, LLC*, 109 AD3d at 174)

"The determinative factor is whether the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends" (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 657 [1976] [internal quotation marks and citation omitted]). However, domination, standing alone, is not enough to pierce the corporate veil, which requires a showing "that the owners, through their domination, abused the privilege of doing business in the corporate form" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009], *affd* 16 NY3d 775 [2011] [internal quotation marks and citations omitted]). "Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014] [internal citation omitted]).

Pursuant to CPLR 103 (b), "procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings." On a motion to dismiss for failure to state a claim, pursuant to CPLR 3211 (a) (7), "the [petition] must be construed in the light most favorable to the [petitioner] and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co.*, 13 AD3d at 174). The court is not permitted "to assess the merits of the [pleading] or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the [pleading] states the elements of a legally cognizable cause of action" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

As a preliminary matter, to the extent that respondents claim that veil-piercing is, as a matter of law, inapplicable to limited partnership such as HFP and CDO Fund, the contention is without merit (*see e.g. Cortlandt St. Recovery Corp.*, 226 AD3d at 34 n 2, 48-50 [denying motion to dismiss where the complaint contained sufficient allegation to pierce the corporate veil of two entities, including a limited partnership]; *Pensmore Invs., LLC v Gruppo, Levey & Co.*, 184 AD3d 468, 469 [1st Dept 2020] [finding that "Supreme Court properly determined that veil piercing was appropriate against . . . Frog Pond Partners, L.P."]).

a. Dondero as Alter Ego of the Judgement Debtors

Here, the petition sufficiently alleges that Dondero is the Judgement Debtors' alter ego.

First, it alleges that Dondero, from his position as President and majority owner of HCM—as well as his positions as chairman of HFP's Board of Directors, the sole Director of SOHC and as President of the ultimate general partner of CDO Fund—controlled the day-to-day operations of the Judgment Debtors (*see* NYSCEF Doc No. 186, petition ¶¶ 28, 33, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 4-5, 41-42). Further, the petition alleges that in 2009,

Dondero eliminated the requirement that HFP have independent directors and made himself solely responsible for the "management and operation" of HFP and, by extension, its subsidiaries, including SOHC (*id.* ¶ 33, exhibit 88 [NYSCEF Doc No. 94] at UBSPROD1854782). Indeed, Dondero has stated that he was "generally" the "decision maker" for HFP and its subsidiaries (*id.* ¶ 28, exhibit 113 [NYSCEF Doc No. 118], Dondero deposition tr at 48:8-13).

Further, UBS's expert in the Underlying Action concluded that "'Dondero exercised his ability to dominate and control HCM, SOHC, CDO Fund and HFP, amongst other [HCM] [e]ntities,' to his own benefit, including to 'authorize loans to himself' and facilitate transfers among these entities— 'which were not at arm's length or executed in accordance with corporate formalities'" (*id.* ¶ 33, quoting Dudley Report [NYSCEFF Doc No. 8] at 54-56). As an example, the expert pointed to a $3.7 million payment made to Dondero in December 2008. This was purportedly a repayment of a short-term loan that Dondero made to CDO Holding, but there was no evidence of a loan agreement, and the funds originated from SOHC. The money traveled from SOHC to HFP, then from HFP to CDO Holding and only then to Dondero (*see id.* ¶¶ 43, 54, exhibit 2 [NYSCEFF Doc No.8], Dudley Report at 48, 54). Other allegations demonstrating Dondero's domination of the Judgment Debtors include an overlap of offices and employees. It was common for various entities, including the Judgment Debtors, to share HCM's office in Texas, HCM employees performed whatever work Dondero assigned them, regardless of which entity was involved or whether the work was personal in nature (e.g. handling his divorce), and Dondero determined employees' compensation based on an "amalgamation of total efforts" (*id.* ¶¶ 34-37.) These allegations sufficiently plead Dondero's domination of the Judgement Debtors (*cf Horizon Inc. v Wolkowicki*, 55 AD3d 337, 337-338 [1st Dept 2008] [affirming denial of

motion for summary judgement to dismiss "plaintiffs' claim that NYREG's corporate veil should be pierced and its principal . . . held personally liable for the corporation's obligations," where the principal "ignored the corporate form by transferring monies in and out of NYREG without any documentation or formalities"]; *Webmediabrands, Inc. v Latinvision, Inc.*, 46 Misc 3d 929, 932-933 [Sup Ct, NY County 2014] [piercing the corporate veil where, among other things, the individual defendant used corporate assets for personal purposes, terming such payments as "loans"]).

Second, the petition sufficiently alleges that Dondero used his domination of the Judgement Debtors to commit a wrong against UBS that resulted in its injury. The petition alleges that Dondero, anticipating an adverse judgment in the Underlying Action, "deliberately undercapitalized the Judgment Debtors to prevent UBS from collecting on the Judgment" by effecting the 2017 Transfers and "ensur[ing] that the Judgment Debtors would be judgment proof" (NYSCEF Doc No. 186, petition ¶ 176; *see id.* ¶¶ 61-78). "Allegations that corporate funds were purposefully diverted to make it judgment proof . . . are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory" (*Baby Phat Holding Co., LLC*, 123 AD3d at 407-408 [internal citation omitted]). The petition further alleges that by transferring the assets to Sentinel, Dondero, as one of Sentinel's ultimate beneficial owner, was able to extract millions in dividends, thereby reducing assets available to satisfy the Judgment (*see id.* ¶¶ 113-119).

Accordingly, the petition states a claim for piercing the corporate veil of the Judgement Debtors to hold Dondero liable as their alter ego (*see First Capital Asset Mgt.*, 300 AD2d at 116).

None of Dondero's contentions change the analysis.

First, he argues that the petition, at most, alleges that HCM and other entities disregarded the corporate formalities of the Judgement Debtors to advance Dondero's interest. Relying on a single case, he claims that "[i]f the fact that a corporation served its owner's interests were enough to establish a wrongful 'domination' of the corporation, then the corporate form would never be respected" (*In re Stage Presence, Inc.*, 592 BR 292, 304 [Bankr SD NY 2018], *affd* 2019 WL 2004030, 2019 US Dist LEXIS 77111 [SD NY, May 7, 2019, No. 12-10525 (MEW)]). However, in *Stage Presence, Inc.*, the court also concluded that "the evidence showed that in all important operational and financial respects the separate existence of [corporation] was honored and fully respected" (*id.*). Here, UBS alleges that the Judgement Debtors did not have operational or financial separateness from each other or Dondero.

Dondero then argues that the relevant time for undercapitalization is 2008, when UBS entered the Knox Transaction. As this is the transaction that caused the alleged injury, he argues, UBS's failure to allege Dondero's domination over it, as the "transaction attacked" (*First Capital Asset Mgt.*, 300 AD2d at 116), requires dismissal. In so arguing, Dondero ignores the fact that the Judgement exists because the Judgement Debtors' obligations under the Knox Agreements were not satisfied. According to the petition, they remain so, at least in part, due to Dondero's purposeful evasion of those obligations. Therefore, the alleged undercapitalization in 2017 is pertinent to the domination analysis (*see 265 W. 34th St., LLC v Joon Sik Chung*, 47 Misc 3d 1219[A], 2015 NY Slip Op 50704[U], *8 [Sup Ct, NY County 2015] [denying motion to dismiss an alter ego claim to hold the owners liable for the judgment previously entered against the corporate defendant in a summary non-payment proceeding in housing court, explaining that the "transaction plaintiff seeks to attack is not the execution of the lease itself, but rather, the avoidance of obligations created by the lease"]; *see also Azte Inc. v Auto Collection, Inc.*, 36

Misc 3d 1238(A), 2012 NY Slip Op 51731(U), *11-12 [Sup Ct, Kings County 2012], *affd* 124 AD3d 811 [2d Dept 2015] [declining to accept defendant's contention "that 'the transactions attacked' by the plaintiffs terminated upon the plaintiffs' transferring the money to the (defendant)," as the transaction was ongoing until the defendant performed its obligations]; *see also Grigsby v Francabandiero*, 152 AD3d 1195, 1197 [4th Dept 2017] [finding sufficient allegations to pierce the corporate veil, where plaintiff alleged that, near the time her judgment was entered against the entity, the individual defendant "took actions calculated to make (the entity) judgment-proof by undercapitalizing (it)"]).

Dondero also contends that alter ego claim must be dismissed, because UBS cannot prove proximate causation. Dondero argues that UBS cannot show it would have been able to recover $1.2 billion but for Dondero's alleged domination of the Judgement Debtors, because the petition alleges that the 2017 Transfers involved approximately $105 million in assets. For this proposition, Dondero primarily relies on a single case, *Pensmore Invs., LLC v Gruppo, Levey & Co.* (2019 NY Slip Op 31360[U] [Sup Ct, NY County 2019], *affd as mod* 184 AD3d 468 [1st Dept 2020]).

In *Pensmore*, the court initially denied summary judgment to both parties on a claim to pierce the corporate veil to hold the individual defendants personally liable. It reasoned:

> "for the fraud prong to be satisfied with respect to [the individual defendants], Pensmore [had to] prove that they unjustifiably funneled corporate funds to themselves and that, had they not done so, Pensmore would have been able to recover the amounts sought from the companies in excess of the assets they . . . ha[d] on hand." (*Pensmore Invs., LLC v Gruppo*, 2017 NY Slip Op 30661[U], *19 [NY Sup Ct, New York County 2017].)[2]

[2] Notably, UBS seeks to distinguish *Pensmore Invs., LLC*, because the court in that case applied Delaware law to the veil-piercing claim (2017 NY Slip Op 30661[U] at *11). However, as already stated, Delaware's veil-piercing law is not substantially different from that of New York (*see Tap Holdings, LLC*, 109 AD3d at 17). Moreover, after a bench trial that found that the

As Pensmore did not make such a showing and the defendants did not show that it could not do so at trial, neither side was granted summary judgment (*id.*). Additionally, the court observed that if Pensmore could not carry its burden at trial, then the individual defendants "[did] not deserve to be held personally liable because, despite their behavior, they would not have been the proximate cause of Pensmore's inability to satisfy its judgment against [the entity defendants]" (*id.* at *19 n 16). The court explained that, because "veil piercing . . . impose[s] alter ego liability [based on] to the causal relationship between malfeasance and fraud on a creditor[,] [w]ithout proving that [the individual defendants] did anything that made the companies, collectively, unable to pay Pensmore, the requisite fraud [could not] be said to be present" (*id.*).

After a bench trial, the court concluded that Pensmore made the requisite showing and pierced the corporate veil to hold the individual defendants liable (*Pensmore Invs., LLC*, 2019 NY Slip Op 31360[U] at *13-*14). However, the court also stated that it was "not decid[ing] whether, as a necessary predicate to all veil piercing claims, there must be proof that a business composed of alter ego affiliates is collectively capable of paying off the plaintiff but for the corporate malfeasance" (*id.* at *13), rather that it "[was] a predicate of the fraud prong under the circumstances" of that case (*id.*).

The Appellate Division, First Department, held that veil piercing against the individual defendants was proper (*Pensmore Invs. LLC*, 184 AD3d at 469). It observed that the evidence showed that the defendants used their domination over the entities to render them judgment proof and that "the [entites] would have had sufficient funds to satisfy the underlying debt owed to

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plaintiff made the requisite showing, the Appellate Division, First Department affirmed, holding that veil piercing against the individual defendants was proper, regardless of whether New York or Delaware law was applied (*Pensmore Invs., LLC*, 184 AD3d at 469).

Pensmore, but for appellants' fraud" (*id.*). However, it did not state whether a showing of the entities' ability to satisfy the debt was a necessary element of the claim.

While the reasoning of *Pensmore* is compelling (*see* 2017 NY Slip Op 30661[U], *19 n16), as neither the motion court, the trial court, nor the appellate court held that proof of the entity defendants' ability to satisfy the underlying debt was a prerequisite to proving veil-piercing generally, much less that it was a necessary element to state such a claim, the court declines to dismiss the petition on that ground.[3]

Dondero contends that it would be inequitable to hold him personally liable, because UBS did not negotiate a personal guarantee in the Knox Transaction, or that UBS should be limited to its fraudulent conveyance claims. This is unavailing. If the absence of a personal guarantee was sufficient to evade liability, alter ego liability would never be imposed. Additionally, UBS's ability to pursue fraudulent transfer claims, in no way bars it from pursuing alter ego liability (*see e.g. Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 50 [2018] [holding that "(s)ince the complaint allege(d) the existence of a corporate debt, created by defendants by their use of the corporate form to profit from fraudulent conveyances that left (the shell companies) insolvent, (the plaintiff) could request that the court pierce the corporate veil to impose liability upon defendants as the alter egos of (the shell companies)"]).

Finally, to the extent that Dondero seeks to demonstrate that UBS "has already recovered the allegedly funneled amounts from Sentinel" (NYSCEF Doc No. 368, Dondero's reply at 11 n

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[3] Notably, UBS relies on *AMP Servs. Ltd. v Walanpatrias Found.* for the proposition that plaintiff need not allege "that the transfer at issue had rendered the subject assets totally and permanently unavailable or diminished" (34 AD3d 231, 232 [1st Dept 2006]). That case is inapposite as it addresses the sufficiency of a fraudulent conveyance claim under Debtor and Creditor Law § 276.

5; *see* NYSCEF Doc No. 369, Leventon reply affirmation ¶¶13-23, exhibits 9-13 [purporting to demonstrate that UBS has recovered in excess of the value of the 2017 Transferred Assets]), this evidence is submitted for the first time in reply and, therefore, will not be considered (*see Dannasch v Bifulco*, 184 AD2d 415, 416-417 [1st Dept 1992]).

For the foregoing reasons, Dondero's motion to dismiss is denied with respect to the second claim, to the extent the claim seeks to hold Dondero liable as the Judgement Debtors' alter ego. The motion is also denied to the extent it seeks to dismiss the petition for lack of personal jurisdiction (*see Highland Crusader Offshore Partners, L.P.*, 184 AD3d at 122).

b. Ellington as Alter Ego of the Judgement Debtors

The Petition also sufficiently alleges that Ellington is the Judgement Debtors' alter ego. Ellington's lack of any ownership interest in the Judgement Debtors is not dispositive. "Even if an individual is not a record owner of a corporation, he may nonetheless be found to be an 'equitable owner' and alter ego thereof if he dominated and controlled [it] to such an extent that [he] may be considered its equitable owner[ ]" (*Matter of Berisha v 4042 E. Tremont Café Corp.*, 220 AD3d 608, 609 [1st Dept 2023] [internal quotation marks and citations omitted]). Here, the petition contains sufficient allegations of Ellington's domination and control over the Judgement Debtors. The petition alleges that: as an officer of Strand, he had signatory authority for the Judgment Debtors (*see* NYSCEF Doc No. 186, petition ¶ 31); as Chief Legal Officer of HCM, he oversaw the litigation strategy against UBS (*see id.*); he directed the work of HCM employees and used them to perform work on personal matters (*see id.* ¶¶ 36-39); and, with respect to the 2017 Transfers and the ATE Policy, Dondero "delegated and entrusted" many decisions to Ellington (*id.* ¶ 31, exhibit 113 [NYSCEF Doc No. 118], Dondero deposition tr at 215:19-

216:11), who "devised" the ATE Policy and "got the transaction approved and completed" (*id.* ¶¶ 64, 77).

The petition also alleges that the ATE Policy was not for the benefit of the Judgement Debtors, because: (1) the 2017 Transfers to Sentinel were for more than four times what was required under the ATE Policy for the premium and even exceeded the coverage amount (*see* NYSCEF Doc No. 186, petition ¶¶ 72, 75); and (2) HFP received no benefit from the transfer, as it was not one of the Insureds (*id.* ¶ 76). Additionally, it alleges that Ellington was one of the ultimate beneficial owners of Sentinel (*id.* ¶ 80) and was, therefore, able to deplete the 2017 Transferred Assets for personal expenses after the transfer (*id.* ¶ ¶ 79, 98-119). Accepting these allegations as true and construing the petition in the light most favorable to UBS (*see Allianz Underwriters Ins. Co.*, 13 AD3d at 174), the petition sufficiently alleges that Ellington so dominated the Judgement Debtors that they "serve[d] [his] purposes rather than [their] own" *Deutsche Bank AG*, 2015 NY Slip Op 30163[U] at *18; *see Port Chester Elec. Constr. Corp.*, 40 NY2d at 657).

Finally, as already explained above, the allegations of intentional undercapitalization of the Judgement Debtors to prevent UBS from collecting the Judgment "are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory" (*Baby Phat Holding Co., LLC*, 123 AD3d at 407-408 [internal citation omitted]). Therefore, the petition states a claim for piercing the corporate veils of the Judgement Debtors to hold Ellington liable as their alter ego (*see Chase Manhattan Bank (Natl. Assn.) v 264 Water St. Assoc.*, 174 AD2d 504, 505 [1st Dept 1991] [finding allegation sufficient to pierce the corporate veil where "plaintiff specifically alleged that (the defendants) masterminded a scheme to denude the subsidiary of its assets in order to render it unable to honor its obligations resulting in a loss

to plaintiff" and that "individual defendant dominated and controlled the corporation and caused the corporation to make fraudulent conveyances"]).

That the petition also alleges that Ellington was Dondero's second-in-command does not require a contrary result (*cf Patel v Pandya*, 2015 WL 4523283, *7, 2015 US Dist LEXIS 97665, *16 [DNJ July 27, 2015, No. 2:14-cv-08127 (WJM) [finding that the complaint sufficiently alleged that the companies were the alter egos of their owner as well as of the owner's "office manager" and "second in command"]; *Matter of Berisha*, 220 AD3d at 608-610 [finding that evidence of the defendant's equitable ownership, when opposed by evidence that he "merely provided assistance to his brother and brother-in-law . . . for which he was paid a salary," created issues of fact as to his domination and control, "precluding summary determination of the applicability of veil-piercing"]).

For the foregoing reasons, Ellington's motion to dismiss is denied with respect to the second claim. to the extent the claim seeks to hold Ellington liable as the Judgement Debtors' alter ego. The motion is also denied to the extent it seeks to dismiss the petition for lack of personal jurisdiction (*see Highland Crusader Offshore Partners, L.P.*, 184 AD3d at 122).

Having determined that alter ego liability is sufficiently pleaded against Dondero and Ellington, the court need not consider the alternate grounds for personal jurisdiction asserted against them.

B. Fraudulent Conveyances

The parties dispute the viability of the fraudulent conveyance claims and whether Dondero and Ellington may be held personally liable, as alter egos of Mainspring and Montage, respectively, for the allegedly fraudulent conveyances made to those entities. As "[a]n argument to pierce the corporate veil is not a cause of action in itself, but rather dependent on the action

against the corporation," the court must first consider the viability of the underlying fraudulent conveyance claims (*Cortlandt St. Recovery Corp.*, 31 NY3d at 50 [internal citation omitted]). Regarding these claims, respondents argue that without an actionable fraudulent conveyance claim for the initial transfers to Sentinel in 2017, UBS may not avoid any of Sentinel's subsequent transfers, including the reimbursements paid to Ellington and the dividends issued to Mainspring and Montage. The parties dispute whether the 2017 Transfers are time-barred and whether the claim for actual fraudulent conveyance is sufficiently pleaded.

1. Choice of Law Analysis

The parties dispute which jurisdiction has the greater interest in applying its laws to the fraudulent conveyance claims. Respondents contend that, because fraudulent conveyance laws are conduct-regulating, the focus of the analysis should be on where the tort occurred. They reason that, because the Judgement Debtors were operated by personnel located in Texas who worked for HCM, a Texas-based investment manager, and funds were transferred from Sentinel, utilizing at least one Texas bank account (*see* NYSCEF Doc No. 84), Texas has the greater interest in regulating the conduct and protecting the reasonable expectations of those engaging in allegedly fraudulent conveyances within its borders. In addition, they argue that, should the court conclude that Texas law does not apply, then Bermuda and the Cayman Islands have the greater interest in applying their laws to transfers made by Bermuda and Cayman entities (i.e. CDO Fund and SOHC) to Cayman entities (i.e. Sentinel, Montage and Mainspring). UBS counters that New York has the greater interest in enforcing its fraudulent conveyance laws, as the claims in this proceeding are concerned with the enforcement of New York judgements.

Here, a conflict exists between New York and Texas with respect to the timeliness of UBS's claims for actual fraudulent conveyances based on the 2017 Transfers. The Texas

Uniform Fraudulent Transfer Act contains a statute of repose. It provides, in pertinent part, that a claim for intentional fraudulent transfer "is extinguished" if it is not brought "within four years after the transfer was made . . . or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant" (*see* Tex Bus & Com Code Ann § 24.010 [a] [1]). This is substantially different to the applicable New York law, which provides that "[a] claim for actual fraud (Debtor and Creditor Law § 276) is timely if brought either within six years of the date that the fraud or conveyance occurs or within two years of the date that the fraud or conveyance is discovered or should have been discovered, whichever is longer" (*Patterson Belknap Webb & Tyler LLP v Marcus & Cinelli LLP*, 227 AD3d 505, 507 [1st Dept 2024] [internal citation omitted]).[4] While statutes of limitation are generally "matters of procedure" that are "governed by the law of the forum," statutes of repose are matters of substantive law and "fall within the course charted by choice of law analysis" (*Tanges v Heidelberg N. Am., Inc.*, 93 NY2d 48, 53, 55-56 [1999] [explaining that a statute of repose is substantive, because, unlike a statute of limitation, which "does not extinguish the underlying right, but merely bars the remedy," a statute a repose "se*rves as an absolute barrier that prevents . . . what might otherwise have been a cause of action from ever arising*" [internal quotation marks and citation omitted]).

A conflict also exists, with respect to these claims, between New York law and the laws of Bermuda and the Cayman Islands. Under New York's Debtor and Creditor Law ("DCL") § 276, which "addresses actual fraud, . . . proof of unfair consideration or insolvency" is not

[4] Notably, there is a dispute as to whether this is the applicable version of New York's law. In 2020, the Uniform Fraudulent Conveyance Act ("UFCA") was repealed and replaced by the Uniform Voidable Transaction Act. As explained below, the UFCA governs many of the issues raised on these motions. Therefore, unless indicated otherwise, all references to "Debtor and Creditor Law" or "DCL" refer to the UFCA.

required (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). Under the laws of Bermuda and the Cayman Islands, for such a transfer to be voidable, it must be made with the intent to defraud and the transaction must be for no consideration or significantly less than the value of the property transferred (*see* NYSCEF Doc No. 260, Lowe affirmation ¶¶ 27, 29, exhibits L [NYSCEF Doc No. 272], Cayman Is. Fraudulent Dispositions Law §§ 2, 4 [1]; M [NYSCEF Doc No. 273] Bermuda Conveyancing Act §§ 36A [1], 36C [1]).

As already explained, where conflicting conduct-regulating laws are at issue, "New York courts usually apply the law of the place where the tort occurred" (*Elson*, 283 AD2d at 115; *see Eccles*, 42 NY3d at 336). "[T]he place of the wrong is . . . where the last event necessary to make the actor liable occurred; that is where the plaintiffs' injuries occurred" (*Deutsche Bank AG*, 2015 NY Slip Op 30163[U] at *20 [internal quotation marks and citation omitted]; *see Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC*, 45 Misc 3d 1204[A], 2014 NY Slip Op 51461[U], *10 [Sup Ct, NY County 2014] [stating that "(i)n fraud claims, the paramount concern of a court is the locus of the fraud (,) which ( ) is where the injury is inflicted, not where the fraudulent act originated" (internal quotation marks and citations omitted)]). "Further, as the purpose of fraudulent conveyance laws is to aid creditors who have been defrauded by the transfer of property, consideration of the residency of the parties, particularly the creditors, is also required to determine their reasonable expectations" (*Wimbledon Fund, SPC (Class TT) v Weston Capital Partners Master Fund II, Ltd.*, 184 AD3d 448, 450 [1st Dept 2020] [internal quotation marks and citations omitted]; *see Taberna Preferred Funding II, Ltd.*, 2014 NY Slip Op 51461[U] at *10-*11 [explaining that "(a)pplying foreign law to foreign (debtors) does not necessarily incentivize lawful conduct by the (debtor) in the jurisdiction where the injury occurred if that (debtor) is managed and operated from a different jurisdiction"]).

Here, New York has a significant interest in applying its laws to the fraudulent conveyance claims (*see* discussion of New York's interest, *supra* at 20-21). "Since fraudulent conveyance law is an essential tool in ensuring that creditors' rights manifest into a real recovery, rather than a worthless, unrecoverable judgment, applying New York law is a sensible way to fulfill the parties' expectations" (*Taberna Preferred Funding II, Ltd.*, 2014 NY Slip Op 51461[U] at * 11). Texas' interest, on the other hand, is limited. While HCM managed the Judgment Debtors from its Texas offices, neither it nor the Judgment debtors are incorporated in Texas and no injury is alleged to have occurred there.[5] "Thus, the only interest that Texas has in this litigation is regulating the conduct of . . . foreign [entities] doing business within Texas when the conduct injures parties outside of Texas. That does not outweigh New York's significant interests in the litigation." (*Highland CDO Opportunity Master Fund, L.P.*, 270 F Supp 3d at 726.)

For previously stated reasons (*see* discussion of New York's interest, *supra* at 19-20), New York also has a greater interest in enforcing its fraudulent conveyance laws in connection with the 2017 Transfers by CDO Fund and SOHC than Bermuda and the Cayman Islands. As already explained, this is particularly so with regard to SOHC, which has no demonstrable ties to the Cayman Islands beyond the fact of its incorporation there (*see id.* at 20).

Accordingly, New York's law applies to the fraudulent conveyance claims.

2. Statute of Limitations

As a preliminary matter, respondents contend that this claim is time barred under the relatively recent changes to Article 10 of New York's Debtor and Creditor Law, formerly known

[5] The petition does not state where HMC is incorporated and the submissions on these motions do not supply that information. However, according to the court in *Highland CDO Opportunity Master Fund, L.P.*, "HCM is incorporated in Delaware, not Texas" (270 F Supp 3d at 726).

as the Uniform Fraudulent Conveyance Act ("UFCA"). The UFCA was repealed and replaced by the Uniform Voidable Transaction Act ("UVTA").

Respondents argue that the fraudulent conveyance claims must be dismissed as untimely under the UVTA, as this proceeding was commenced on February 8, 2023, more than four years after the 2017 Transfers and more than a year after their alleged discovery on February 10, 2021. Respondents insist that, despite the fact that the 2017 Transfers occurred prior to the UVTA's effective date, the UVTA is applicable, because the fraudulent transfer claim accrued upon discovery, on February 10, 2021, after the effective date

The UVTA does not apply to the 2017 Transfers. The historical note found after § 278 of the Debtor-Creditor law states that the new statute "**shall not apply to a transfer made or obligation incurred before [the effective date of the statute], nor shall it apply to a right of action that has accrued before such effective date.**"

Respondents' interpretation is contrary to this plain language. The word "nor" indicates that the UVTA "shall not apply" in either situation presented, whether it be a transfer before the effective date or the accrual of a claim before the effective date. Therefore, because the 2017 Transfers occurred before the effective date, under the plain language of the historical and statutory note, the UVTA does not apply.

Respondents rightly point out that a claim will always accrue after a transfer, as in the case of a fraud not being discovered until a later time (*see Guedj v Dana,* 11 AD3d 368, 368 [1st Dept 2004]) or where a judgment must be entered in order for the claim to accrue (*see Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 493 [1st Dept 2016]). However, this does not render "nor shall it apply to a right of action that has accrued before such effective date" superfluous. Its presence serves to emphasize the absence of its mirror opposite. Had the statute

intended otherwise, it would have provided that, in addition to "appl[ying] to a transfer made or obligation incurred on or after such effective date," it applied to causes of action that accrued on or after such date. As the statute does not so provide, the court shall not read such a provision into the statute (*see Corr*, 42 NY3d at 673). "[A] new statute is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]).

Thus, the UFCA is the operative law in this proceeding and, unless indicated otherwise, all references to the DCL refer to the version effective prior to April 4, 2020 (see *Owens v. Turkiye Halk Bankasi A.S.,* 2021 WL 638975, at *2 n. 2 (SDNY Feb. 16, 2021), *aff'd,* 2023 WL 3184617 [2d Cir. May 2, 2023]; see also *In re Diamond Fin. Co., Inc.*, 658 B.R. 748, 772 n. 18 [Bankr. EDNY 2024]["the amendments do not apply in this adversary proceeding because the transfers occurred before the effective date of the UVTA"]). The court in *Foley v Union de Banques Arabes et Francaises* (683 F Supp 3d 375 [SD NY 2023]), a case upon which respondents rely, adopted a contrary interpretation. However, this case appears to be against the weight of authority. In that case, the court treated a claim's accrual after the effective date as the determinative factor, despite the transfer having occurred before the effective date. This interpretation is clearly wrong as it ignores the language of the historical and statutory note that the new statute "**shall not apply to a transfer made". . . before such effective date**.

3. Sufficiency of the Pleadings

Respondents contend that the petition fails to state a claim for fraudulent conveyance, because the underlying contention, that the Judgement Debtors intended to defraud UBS by buying insurance to cover the Judgment, is implausible. Next, respondents argue that, because the petition does not specify the value of the assets each entity contributed to the 2017 Transfer,

it fails to allege that the value of the insurance the Funds received was significantly less than the value of the assets they transferred. Respondents also contend that the remaining badges of fraud are insufficiently pleaded to support an intentional fraud claim, because: (1) there was no secret and hasty transfer, as the ATE policy was planned and executed over the course of several months; (2) there were no "dummy" entities involved, as all entities were pre-existing rather than created for the purpose of the transaction; and (3) Sentinel, a regulated insurance company, rather than the transferors, owned the assets after the 2017 Transfers. Finally, respondents argue that because UBS cannot demonstrate that the 2017 Transfers to Sentinel are voidable, neither are any of the subsequent transfers from Sentinel to Ellington, Montage and Mainspring.

UBS responds that the petition sufficiently alleges all of the badges of fraud and that respondents' contention that such allegations are "implausible" and attempts at raising issues of fact are inappropriate on a motion to dismiss on the pleadings.

DCL § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." To establish actual intent, a petitioner may "rely on 'badges of fraud' to support [its] case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent" (*Wall St. Assoc.*, 257 AD2d at 529 [internal quotation marks and citations omitted]). These include:

> "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance" (*id.*; *see also Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]).

The allegations of fraudulent intent must be pleaded with particularity pursuant to CPLR 3016 (b) (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]). On a motion to dismiss pursuant to CPLR 3211, the court must accept the petition's factual allegation as true and, "in the absence of proof that an alleged material fact is untrue or beyond significant dispute, must not dismiss the [petition]" (*Wall St. Assoc.*, 257 AD2d at 526-527 [internal citations omitted]).

Here, the petition alleges numerous badges of fraud with sufficient particularity to state a claim for actual fraudulent conveyance under DCL § 276 with respect to the 2017 Transfers. The Petition alleges that the 2017 Transfers to Sentinel were carried out after negative summary judgment outcomes in the Underlying Action, at a time when respondents anticipated a $1.2 billion judgment (*see* NYSCEF Doc No. 186, petition ¶¶ 61-64, exhibit 38 [NYSCEF Doc No. 44], HCM's Settlement Analysis [identifying risks to Dondero and the HCM-related entities associated with the Underlying Action, including a $1.2 billion judgment, and analyzing how transferring assets away from the transferors could obviate these risks]).

The petition also alleges that the ATE Policy was outside the usual course of business for Sentinel. Sentinel had never previously issued an after-the-even policy or a policy as large as the ATE Policy and would not have had the means to pay on the policy without the 2017 Transferred Assets (*id.* ¶¶ 66, 70). Additionally, the petition alleges that outside counsel raised possible issues with "the idea that the premium [would] be satisfied by the transfer of the hedge funds' investment portfolios," as it risked the "'premium' [being] returned or . . . set aside as some unlawful preference" (*id.* ¶ 72, exhibit 42 [NYSCEF Doc No. 48], email from Solomon Harris at BC SEN0000745905). CIMA is also alleged to have raised numerous concerns about the ATE Policy, including that: no one could explain the "basis upon which the [2017 Transferred Assets]

had been valued on or about August 1, 2017 for the purpose of premium settlement"; and Sentinel's actuary "was not involved in the determination of premium pricing . . . to any extent at all" (*id.* ¶ 88, exhibit 67 [NYSCEF Doc No. 73], CIMA's Final Inspection Reports at BC SEN0000078822, BC SEN0000078819).

Further, the petition alleges that Ellington and Dondero were involved with both sides of the transaction (*see id.* ¶ ¶¶ 63-65, 77, 80) and that they retained control of the 2017 Transferred Assets through their control of Sentinel as its ultimate beneficial owners and as the sole members of the Sentinel Advisory Board (*see id.* ¶¶ 13, 14, 63, 71).

Finally, the petition alleges the inadequacy of consideration, as the 2017 Transfers to Sentinel were for more than four times what was required under the contract for the premium and exceeded the coverage of the policy (*see id.* ¶¶ 72, 75).

While respondents scoff at the implausibility of the fraudulent scheme set out in the petition, they do not refute any of its allegations.

Respondents point to internal communications and documents demonstrating that "the ATE policy was designed as a way for the Funds to settle with UBS" and that using all of their assets as a premium payment was intended "to convert illiquid securities into cash" and to "protect against crushing tax liability" (NYSCEF Doc No. 257, Ellington brief at 16, 17; *see* NYSCEF Doc No. 46, HCM's Settlement Analysis at HCMUBS005254, HCMUBS005257-59). However, this does not refute fraudulent intent, but merely creates an issue of fact. Neither does the fact that UBS was ultimately able to recover a substantial portion of the 2017 Transferred Assets through its settlement with Sentinel (*see* NYSCEF Doc No. 257, Ellington brief 17-18; NYSCEF Doc No. 186, petition ¶ 98 n 21, exhibit 25 [NYSCEF Doc No. 31], Partial Satisfaction-Piece for Post-Judgment Interest at 3) demonstrate that the ATE Policy was created

for that purpose. This is especially so in light of the allegations that: Ellington and Dondero never disclosed the existence of the ATE Policy; Ellington told UBS that CDO Fund and SOHC were ghost funds; and it was only after Ellington and Dondero were removed from HCM, that the Independent Board disclosed the existence of the ATE Policy (*see* NYSCEF Doc No. 186, petition ¶¶ 90-92).

Respondents also rely on the fact that Sentinel had approximately $19.2 million in assets and $17.6 million in equity in December 2016 (*see* NYSCEF Doc No. 257, Ellington brief at 17; *see* NYSCEF Doc No. 55, Sentinel's December 2016 Financial Statements at HCMUBS001071). However, this does not establish that Sentinel's subsequent transfers to Ellington, Montage and Mainspring, occurring three to five years later (between 2019 and 2021) did not intrude into 2017 Transferred Assets. Additionally, the fact that the subsequent transfers were made at least two years after the 2017 Transfers, does not "undermine[] the claim of fraudulent intent" (*Carlyle, LLC*, 160 AD3d at 477), particularly as the petition alleges that dissipation of the 2017 Transferred Assets started shortly after issuance of the Phase I Judgment (*see* NYSCEF Doc No. 186, petition ¶¶ 99-101; *contra Carlyle, LLC*, 160 AD3d at 477 [finding the "the timing of the allegedly fraudulent transfers—beginning two years before the judgment debtors incurred the subject debts—undermines the claim of fraudulent intent"]).

Respondents also contend that the allegation that "the Funds transferred assets 'valued at over $105,647,679.00 to satisfy a $25,000,000 premium" is impermissibly vague and disregards the economic substance of the transaction" (NYSCEF Doc No. 257, Ellington brief at 18, quoting petition ¶ 72). They argue that the allegations of the petition refute UBS's claim that the value of the insurance the Funds received was significantly less than the value of the transfers they made, because: (1) each fund received a policy with a $100 million limit of liability; and

(2) a review of the APA's Schedule A, listing the transferred assets, shows that CDO Fund contributed only about half, and SOHC contributed only a handful (*see* NYSCEF Doc No. 104, APA at BC SEN0000089127-28). Therefore, they argue, there is no basis for the allegation that each of the Funds transferred more value than the $100 million in insurance they received. However, as the stated purpose of the 2017 Transfer was to satisfy the premium of $25 million, the transfer of assets valued at more than four times that amount alleges an overpayment. Additionally, the statement that "each Fund received . . . an ATE policy with a $100 million limit of liability" is misleading (NYSCEF Doc No. 257, Ellington brief at 18). The $100 million limit was in the aggregate for all three Insureds, CDO Fund, SOHC and CDO Holding (*see* NYSCEF Doc No. 186, petition ¶ 75, exhibit 51 [NYSCEF Doc No. 57], ATE Policy at UBSPROD1973070). Moreover, respondents gloss over the allegation that HFP, one of the Judgement Debtors, received no consideration whatsoever, as it was not a named insured (*id.* ¶ 76).

Lastly, respondents point to the alternate valuations for the 2017 Transferred Assets, contained in the exhibits annexed to the petition: a valuation of $94 million in April 2017 (*see* NYSCEF Doc No. 46, HCM's Settlement Analysis at HCMUBS005261) and a valuation of $68 million in June 2018 (NYSCEF Doc No. 75, Sentinel Presentation to CIMA at UBSPROD2572277). Thus, they argue, the petition itself refutes any suggestion that the Funds overpaid for the $100 million ATE Policy. Considering the petition's allegation concerning the manner in which HCM employees generate these valuations, i.e. that there was no explanation for "the basis upon which the [2017 Transferred Assets] had been valued" (*id.* ¶ 88, exhibit 67 [NYSCEF Doc No. 73], CIMA's Final Inspection Reports at BC SEN0000078819), and the fact

that neither valuation speaks to the value of the 2017 Transferred Assets at time of transfer, they do not refute the petition's allegation of overpayment.

For the foregoing reasons, the petition sufficiently alleges that the 2017 Transfers were actual fraudulent conveyances under DCL § 276 (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. LP*, 25 AD3d 301, 303 [1st Dept 2006] [holding that "(g)iven the 'badges of fraud,' which include the close relationship among the parties to the transaction, the inadequacy of consideration, (the judgment debtor's) knowledge of (the petitioner's) claims and its inability to pay them, and the timing of the transfer . . . (a) sworn explanation that the transfer was in partial satisfaction of an antecedent rent debt (did) not negate the inference as to intent"]).

Respondents do not challenge the sufficiency of the allegations with respect to the subsequent transfer to Ellington, Mainspring and Montage, other than to challenge the underlying 2017 Transfers. Therefore, to the extent these motions seek to dismiss these turnover claims, the motions are denied.

4. Piercing the Corporate Veils of Mainspring and Montage

Dondero contends that there is no basis to hold him liable as Mainspring's alter ego, because the petition fails to allege the elements of veil-piercing in a nonconclusory way. UBS responds that this ignores the plethora of facts alleged that reveal his personal domination over Mainspring.

Ellington does not challenge the sufficiency of the allegations seeking to hold him liable as Montage's alter ego. Instead, he argues that the claim fails because he had only a 9% voting share in Montage, with the remaining 91% controlled by a trust for the benefit of the Cayman Islands Red Cross (*see* NYSCEF Doc No. 74, Sentinel email to CIMA at DISCSEN0008408,

DISCSEN0008410). UBS responds that, because Ellington guided the decision making of the trustee of the ITA Trust, he was, in fact, controlling Montage's voting shares.[6]

Here, the petition sufficiently alleges that Dondero is Mainspring's alter ego. In addition to alleging that "Dondero is the ultimate beneficial owner of Mainspring" (NYSCEF Doc No. 186, petition ¶ 13), who "owned 99.5% of Mainspring" (*id.* ¶ 113), it alleges that he used Mainspring to enter into fake service agreements in order to pay HCM insiders bonuses that they were otherwise ineligible to receive in HCM's bankruptcy. The petition alleges that Mainspring received no benefit from these agreements and would even pay the obligations of other entities. In this way, the petition alleges, Dondero used Mainspring to reward HCM employees who were loyal to him. (*See id.* ¶¶ 119-128.) Viewed in the light most favorable to petitioner, these allegations permit the inference that Mainspring "is a 'dummy' for its individual stockholder[] who [is] in reality carrying on the business in [his] personal capacit[y] for purely personal rather than corporate ends" (*Port Chester Elec. Constr. Corp.*, 40 NY2d at 657 [internal quotation marks and citation omitted]).

The petition also sufficiently alleges that Dondero used his domination over Mainspring "to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury" (*First Capital Asset Mgt.*, 300 AD2d at 116, citing *Matter of Morris*, 82 NY2d at 141), as it alleges that he used his position as the ultimate beneficial owner of Mainspring, which owned 70% of Sentinel, to compel Sentinel to issue dividends, thereby draining assets that would have

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[6] UBS made this argument during oral arguments on these motions (*see* July 8, 2024 tr at 83:22-84:8). In its brief in opposition to Ellington's motion, UBS mistakenly assumes that "Ellington does not dispute, and therefore concedes, that UBS sufficiently alleged he is an alter ego of Montag" (NYSCEF Doc No. 333, opposition brief to Ellington's motion at 7).

otherwise been available for collection by UBS (*see* NYSCEF Doc No. 186, petition ¶¶ 113-119).

Accordingly, the petition sufficiently alleges that Dondero was Mainspring's alter ego.

As for Ellington's claim that he did not control the voting shares of Montage, it is contradicted by the very document he cites. In explaining Sentinel's organization chart to CIMA (*see* NYSCEF Doc No. 74, Sentinel email to CIMA at DISCSEN0008410), a Beecher employee states that "ITA acts as trustee of the shares . . . and holds the shares in trust, with the Cayman Islands Red Cross as the beneficiary" (*id.* at DISCSEN0008408). As the petition alleges that Dondero and Ellington were the sole members of the Sentinel Advisory Board of ITA Trust, and that they "guide[d] the decision making of the Trustee of the ITA Trust in its role as an indirect shareholder in Sentinel" (*id.* ¶ 71, exhibit 66 [NYSCEF Doc No. 72] at BC SEN0000076075), this contradicts Ellington's claim that he did not control Montage.

For the foregoing reasons, the motions to dismiss are denied with respect to the second claim to the extent that the claim seeks to hold Dondero liable as the alter ego of Mainspring and to hold Ellington liable as the alter ego of Montage.

C. Converting the Special Proceeding into a Plenary Action

Respondents contend that this proceeding should be converted into a plenary action, because the fact-laden claims at issue are inappropriate for summary disposition. UBS responds that the request should be denied, because there is no basis for it.

Article 52 of the CPLR provides for the enforcement of money judgments and, where the asset sought is not in the possession of the judgment debtor, the article authorizes a turnover proceeding to be brought against the transferee (*see* CPLR 5225 [b]). In fact, "when the 'property' of a judgment debtor is physically held by a third party, the applicable provision is

CPLR 5225 (b), and a special proceeding is required" (*AC Penguin Prestige Corp. v Two Thousand Fifteen Artisanal LLC*, 233 AD3d 576, 577 [1st Dept 2024].) Further, a special proceeding brought pursuant to CPLR 5225 (b) "obviates the necessity for a plenary action" under the DCL (*Siemens & Halske GmbH. v Gres*, 32 AD2d 624, 624 [1st Dept 1969]; *see Matter of WBP Cent. Assoc., LLC v DeCola*, 50 AD3d 693, 694 [2d Dept 2008]) and "may be maintained under an alter ego theory" (*Matter of Rockefeller v Statement Servs., Corp.*, 204 AD3d 922, 924 [2d Dept 2022] [internal citation omitted]).

Based on the foregoing, the request to convert this turnover proceeding into a plenary action is denied. However, petitioner has now charted its course and should not complain later should it need more recourse to discovery than this proceeding will permit.

Accordingly, it is hereby

ORDERED that the motion of respondent Scott Ellington (motion sequence number 011) to dismiss the petition is denied; and it is further

ORDERED that the motion of respondent James Dondero (motion sequence number 013) to dismiss the petition is denied; and it is further

ORDERED that respondents are directed to serve their answers to the petition within 20 days after the electronic filing of this decision and order; and it is further

ORDERED that counsel are directed to appear for a status conference over Microsoft Teams on April 2, 2025 at 11:00 a.m.

25
3/25/2025
DATE

HON. MELISSA A. CRANE
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

650744/2023 UBS SECURITIES LLC ET AL vs. DONDERO, JAMES ET AL
Motion No. 011 013

Page 48 of 48

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE **PART** 60M

Justice

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UBS SECURITIES LLC,UBS AG LONDON BRANCH,

Plaintiff,

- v -

JAMES DONDERO, SCOTT ELLINGTON, HIGHLAND CDO HOLDING COMPANY, HIGHLAND CDO OPPORTUNITY MASTER FUND, L.P., HIGHLAND FINANCIAL PARTNERS, L.P., HIGHLAND SPECIAL OPPORTUNITIES HOLDING COMPANY, CLO HOLDCO, LTD., MAINSPRING, LTD., MONTAGE HOLDINGS, LTD.,

Defendant.

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INDEX NO. 650744/2023

MOTION DATE 02/26/2024, 02/26/2024

MOTION SEQ. NO. 011 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 366, 367

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 394, 395, 416

were read on this motion to/for DISMISS.

Motion sequence numbers 011 and 013 are consolidated for disposition.

Petitioners UBS Securities LLC and UBS AG London Branch (together, "UBS") bring this turnover proceeding under CPLR Article 52 to enforce the judgments that UBS obtained in *UBS Secs. LLC v Highland Cap. Mgmt., L.P.,* index No. 650097/2009 (Sup Ct, NY County) (the "Underlying Action") against respondents Highland CDO Opportunity Master Fund, L.P. ("CDO Fund"), Highland Special Opportunities Holding Company ("SOHC," together with CDO Fund, the "Funds"), and Highland Financial Partners, L.P. ("HFP," together with the Funds, the

"Judgement Debtors"). The petition asserts four causes of action. The first claim is for turnover of certain allegedly fraudulent transfers, asserted against respondents CLO HoldCo, Ltd. ("CLO HoldCo"), Scott Ellington ("Ellington"), Mainspring, Ltd. ("Mainspring"), and Montage Holdings, Ltd. ("Montage"). In its second claim, UBS seeks to: (i) pierce the corporate veils of the Judgment Debtors to hold respondents James Dondero ("Dondero") and Ellington personally liable for the judgments in the Underlying Actions; (ii) pierce the corporate veils of Mainspring and Montage to hold Dondero (as alter ego of Mainspring) and Ellington (as alter ego of Montage) personally liable for the allegedly fraudulent transfers made to these entities; and (iii) reverse-pierce the corporate veil of respondent Highland CDO Holding Company ("CDO Holding"), a wholly owned subsidiary of HFP, to hold CDO Holding liable, as the alter ego of HFP, for the allegedly fraudulent transfers made in 2010 to CLO HoldCo and for HFP's portion of the judgments in the Underlying Action. The petition additionally asserts two now stayed claims for violations the Racketeer Influence and Corrupt Organizations Act ("RICO").

Ellington and Dondero (in motion sequence numbers 011 and 013, respectively) move to dismiss the petition pursuant to CPLR 404 (a) and 3211 (a) (1), (5), (7), and (8).

I. Background

The following facts are taken from the petition and are presumed to be true for purposes of the these motions (*see Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]).

A. Dondero and Ellington's Alleged Control Over a Web of Entities

Dondero, a resident of Texas, co-founded Highland Capital Management, L.P. ("HCM") in 1993 and was its majority owner, President, and Chief Executive Officer until his removal in

2020 (NYSCEF Doc No. 186, petition ¶¶ 6, 27). Dondero exercised control over HCM and its web of funds and other entities, in part, through his status as the sole stockholder and director of Strand Advisors, Inc. ("Strand"), HCM's general partner (*id.* ¶ 29). According to the expert report in the Underlying Action, from his position as President and majority owner of HCM, Dondero controlled HCM and many related entities— including SOHC, CDO Fund, Highland Financial Corp. ("HFC"), HFP, and CDO Holding (*id.* ¶¶ 28, 33, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 40-41). Dondero also served as chairman of HFP's board of directors, as the sole director of SOHC, and as President of the ultimate general partner of CDO Fund. Through these various positions, Dondero was responsible for the day-to-day operations of HFP, SOHC and CDO Fund. (*See id.* ¶¶ 28, 33, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 4-5, 41-42). Further, Dondero was able to alter the Judgment Debtors' structures to ensure his control. For example, "[i]n 2009, Dondero eliminated the requirement that HFP have independent directors and made himself [its] sole director" and, thus, "the direct decision maker for HFP and its subsidiaries, including SOHC and CDO Holding" (*id.* ¶ 33, exhibit 88 [NYSCEF Doc No. 94], email with Apr. 9, 2009 HFP board minutes at UBSPROD1854773, UBSPROD1854782 [stating that the Independent Directors were eliminated and Dondero was left solely responsible for the "management and operation" of HFP]; exhibit 113 [NYSCEF Doc No. 118], Dondero deposition tr at 48:8-13 [admitting that he was "generally" the "decision maker" for HFP and its subsidiaries]).

Ellington, who also resides in Texas, was an officer of Strand. He was also HCM's Chief Legal Officer and General Counsel from 2010 until his removal in January 2021. (*Id.* ¶¶ 7, 27, 31.) According to UBS, "Ellington operated as one of Dondero's top lieutenants and confidants" (*id.* ¶ 27). "Dondero delegated and entrusted many decisions related to SOHC, CDO Fund, and

related entities to Ellington, including signatory authority and litigation strategy" (*id.* ¶ 31 [internal quotation marks omitted]; *see id.*, exhibit 50 [NYSCEF Doc No. 56], documents transferring interest in a limited partnership at UBSPROD2630461-463 [showing Ellington's signature on behalf of CDO Fund to transfer assets]).

HCM and its related entities, including the Judgement Debtors, "utilized the same offices, employees, and internal counsel" (*id.* ¶ 35, exhibit 92 [NYSCEF Doc No. 98], Cash Warehouse Agreement ¶ 9 [listing HCM's Dallas office for CDO Fund and SOHC], exhibit 121 [NYSCEF Doc No. 194], Leventon deposition tr at 31:6- 19 [explaining that various entities, including SOHC, would have their business offices "co-located" with HCM's office]). HCM's employees performed all work for all HCM-related entities based on instructions from Dondero and Ellington (*id.* ¶¶ 34-36). Employees also regularly worked on personal matters for Dondero and Ellington. For example, HCM employees handled Dondero's divorce, litigated a lemon law claim on his behalf and managed tenant issues at a building he owned (*id.* ¶ 37). Personal work for Ellington included conducting diligence and analysis for personal investments, paying rent on a warehouse he leased, and managing his personal trust (*id.* ¶ 39). Regardless of whether they performed work for a specific entity or worked on personal matters for Dondero or Ellington, employees received all their compensation from HCM (*id.* ¶¶ 36-38). As Ellington explained during deposition, HCM compensation was "the only compensation . . . that anyone ever received" and it was based on the "amalgamation of total efforts as directed by Mr. Dondrero as the [General Partner]." This included "personal assignments for Mr. Dondero, [because] it was still seen as value to Mr. Dondero as the GP, and he set the overall compensation numbers." (*Id.* ¶ 34, exhibit 117 [NYSCEF Doc No. 192], Ellington deposition tr at 113:5-16.)

"HFP and its subsidiaries did not employ any specific limitations or procedures that governed when one HFP subsidiary could cover the debt of HFP or another subsidiary" (*id.* ¶ 52). HFP freely used the assets of its wholly owned subsidiary, CDO Holding (*see id.* ¶¶ 11, 52, 53). In 2008, to cover SOHC losses, HFP withdrew about $15 million from CDO Holding (*id.* ¶ 53). Both transfers, from CDO Holding to HFP and from HFP to SOHC, were approved with a one-word email from HFP's Chief Operating Officer (*id.* ¶¶ 52, 53). "HFP also used money from CDO Holding to pay legal invoices related to the Underlying Action, even though CDO Holding was not a party" (*id.* ¶ 53). On another occasion, also in 2008, SOHC recorded a dividend of $10.5 million to HFP, that HFP then purportedly paid to CDO Holding. In reality, the money moved directly from SOHC to CDO Holding. (*Id.* ¶ 54.) That same month, "HFP also raised $40 million from other HCM entities and transferred the money to CDO Holding to distribute it" (*id.* ¶ 54, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 43, 48).

The expert in the Underlying Action concluded that "'Dondero exercised his ability to dominate and control HCM, SOHC, CDO Fund and HFP, amongst other [HCM] [e]ntities,' to his own benefit, including to 'authorize loans to himself' and facilitate transfers among these entities— 'which were not at arm's length or executed in accordance with corporate formalities'" (*id.* ¶ 33, quoting NYSCEFF Doc No. 8, Dudley Report at 54-56). As an example, the expert pointed to a $3.7 million payment made to Dondero in December 2008. This was purportedly a repayment of a short-term loan to CDO Holding. However, the expert could find no evidence of a loan agreement and the funds originated from SOHC. (NYSCEFF Doc No. 8, Dudley Report at 48, 54.) More specifically, "'as part of a single set of instructions to Bank of New York Mellon, SOHC transferred $3.7 million to HFP, which was then transferred to CDO Hold[ing]

and ultimately to James Dondero'" (NYSCEF Doc No. 186, petition ¶ 54, quoting NYSCEF Doc No. 8, Dudley Report at 48).

B. The Underlying Action and the Allegedly Fraudulent Transfers

In 2007 and 2008, UBS agreed to pursue a complex securitization transaction involving collateralized debt obligations and collateralized loan obligations with HCM, CDO Fund and SOHC (the "Knox Transaction") (*id.* ¶ 41). The warehouse agreements governing the transaction (the "Knox Agreements") contain forum selection clauses, by which UBS, CDO Fund and SOHC agreed to submit to the exclusive jurisdiction of New York courts (*id.* ¶ 18, exhibit 92 [NYSCEF Doc No. 98], Cash Warehouse Agreement ¶ 15, exhibit 93 [NYSCEF Doc No. 99], Synthetic Warehouse Agreement ¶ 15). As part of the transaction, CDO Fund and SOHC agreed to be responsible for 100% of any losses (*id.* ¶ 42). They breached this obligation as losses continued to mount amid the 2008 financial crisis. In December 2008, losses had grown to $519,374,149 and UBS terminated the Knox Agreements (*id.* ¶ 43).

In February 2009, UBS commenced the Underlying Action against HCM, CDO Fund, SOHC and several other affiliated entities, including HFP, for breach of the Knox Agreements (*id.* ¶ 44).

In late October 2010, the court in the Underlying Action heard arguments on the defendants' motion to dismiss UBS's claim to hold HFP liable as SOHC's alter ego (*id.* ¶ 49). UBS claims that Dondero and Ellington, anticipating a negative outcome, acted to transfer HFP's assets out of the reach of any future UBS judgments (*id.* ¶¶ 49, 51). On December 23, 2010, CDO Holding, one of the primary repositories of HFP's assets, transferred substantially all its assets, valued at $39,638,160, to CLO HoldCo in exchange for $6,597,862.00 in cash and a promissory note for $32,801,593.00 plus interest payable in fifteen years (the "2010 Transfer")

(*id.* ¶¶ 51, 52, 59). CLO HoldCo is a Cayman Islands company and a wholly owned subsidiary of Charitable DAF Fund, L.P., that Dondero indirectly controls and has funded from his personal assets, his family trusts, and HCM (*id.* ¶ 12). It was incorporated on December 13, 2010, specifically for the 2010 Transfer (*id.* ¶ 55).

In March 2017, the Judgement Debtors suffered summary judgment losses and Dondero and Ellington anticipated a $1.2 billion judgment (*id.* ¶¶ 61, 62, 64). They then devised a way for the Judgement Debtors to transfer all their remaining assets (the "2017 Transfers") to Sentinel Reinsurance, Ltd. ("Sentinel"). The Judgement Debtors would transfer their assets, pursuant to an attendant Asset Purchase Agreement (the "APA"), as payment of the premium for an after-the-event insurance policy (the "ATE Policy") to insure CDO Fund, SOHC and CDO Holding (together, the "Insureds") against liability in the Underlying Action (*id.* ¶¶ 63, 64). During the development of the ATE Policy, Sentinel's outside counsel raised concerns about the "legal validity of such a transfer," warning that using the "hedge funds' investment portfolios" to satisfy the premium would put "these assets . . . beyond the reach of the plaintiffs in the [Underlying Action]" and risked the "'premium' [being] returned or . . . set aside as some unlawful preference" (*id.* ¶ 72, exhibit 42 [NYSCEF Doc No. 48], email from Solomon Harris at BC SEN0000745905).

In August 2017, Dondero executed the ATE Policy and the APA, transferring assets valued at $105,647,679.00 (the "2017 Transferred Assets") to satisfy a $25,000,000 premium (*id.* ¶ 72). The face value of the transferred cash and promissory notes alone was nearly twice the ATE Policy's premium (*see id.* ¶ 73, exhibit 98 [NYSCEF Doc No. 104], APA at BC SEN0000089127-28 [listing assets]). Dondero signed the ATE Policy on behalf of all the

Insureds and the APA on behalf of all transferors (*id.* ¶ 77). According to UBS, he also attempted "to sign a corollary to the APA on behalf of the [t]ransferors and Sentinel" (*id.*).

Under the ATE Policy, Sentinel agreed to indemnify CDO Fund, SOHC and CDO Holding for up to a $100 million, in the aggregate, against any adverse judgment or settlement with UBS (*id.* ¶ 75, exhibit 51 [NYSCEF Doc No. 57], ATE Policy at UBSPROD1973070). Although not a party to the Underlying Action, CDO Holding was included among the Insureds because, as a primary asset repository for HFP, it had liability (*see id.* ¶ 75, exhibit 121 [NYSCEF Doc No. 194], Leventon deposition tr at 32:10-15 [stating that any collection against HFP "would then expose CDO Hold[ing]'s assets to seizure"]). CDO Opportunity Fund, HFC, and HFP also transferred their assets to Sentinel. However, they were not insured under the ATE Policy. Notably, CDO Opportunity Fund and HFC were not party to the Underlying Action. (*Id.* ¶ 76, exhibit 98 [NYSCEF Doc No. 104], APA at BC SEN000089127-28.)

Ellington devised the ATE Policy without any input from Sentinel or Beecher Carlson ("Beecher"), Sentinel's insurance manager (*id.* ¶ 65). The terms of the policy were carefully tailored to enable the Insureds to claim reimbursements unrelated the Underlying Action. First, the terms were revised to permit reimbursement even if the Insureds could not afford to litigate the Underlying Action (*id.* ¶ 69). Then, coverage was extended to include Insureds' "own costs and expenses," and this was later broadened to include the "costs and expenses of the Representative and other service providers in the normal course, including related tax, which are incurred during the conduct of the legal action on behalf of the insured" (*id.* ¶ 69, exhibit 42 [NYSCEF Doc No. 48] email exchange between HCM's Assistant General Counsel and Solomon Harris at BC SEN0000745902-03 [finalizing the terms of the ATE Policy]).

Sentinel is a Cayman Island based reinsurance company (*id.* ¶ 63). Respondent Montage, a Cayman Islands company of which Ellington is the ultimate beneficial owner, owns 30% of Sentinel and respondent Mainspring, a Cayman Islands company of which Dondero is the ultimate beneficial owner, owns the remaining 70% (*id.* ¶¶ 13, 14, 63, exhibit 68 [NYSCEF Doc No. 74], email to the Cayman Islands Monetary Authority at DISCEN0008410 [containing chart of Sentinel's ownership structure]). "Dondero tasked Ellington with setting up and managing Sentinel through HCM's in-house legal team" (*id.* ¶ 80). Until 2021, Sentinel was run exclusively by HCM employees, who took direction from Ellington and Dondero (*id.*).

Dondero and Ellington also arranged to be appointed as sole members of the Sentinel Advisory Board of ITA Trust, the entity with ultimate voting control over Sentinel. Although Sentinel had been operating for several years, Dondero and Ellington's tenure on the Sentinel Advisory Board commenced around the same time as the ATE Policy and APA were executed. (*See id.* ¶ 71, exhibit 66 [NYSCEF Doc No. 72], Sentinel's board minutes with annexed Aug. 10, 2017 resolution of ITA Trust at BC SEN0000076075 [establishing the advisory board and appointing Dondero and Ellington as its sole members].) As the sole members of the Sentinel Advisory Board, Dondero and Ellington "guide[d] the decision making of the Trustee of the ITA Trust in its role as an indirect shareholder in Sentinel" (*id.*).

The ATE Policy was the first and only time that Sentinel issued an after-the-event policy. Previously, it had only issued director and officer liability policies to Dondero and Ellington-related entities and these policies contained significantly more modest coverage limits than that of the ATE Policy. (*Id.* ¶ 66.) Additionally, without the 2017 Transferred Assets, Sentinel did not have the means to pay the $100 million under the ATE Policy. Based on an actuary's limited analysis of the ATE Policy, "[e]ven under reasonably optimistic assumptions," the premium was

going to be exceeded (*id.* ¶ 70, exhibit 41 [NYSCEF Doc No. 47], Bartlett Actuarial Group, Ltd.'s analysis of the ATE Policy at BC SEN0000745987). As of December 2016, Sentinel had $19,193,823.23 in total assets, $5,886,746.39 of which were cash (*id.* ¶ 66).

In 2018, "Sentinel (on behalf of Dondero and Ellington) tried to hide the fraudulent nature of the transfers by ascribing only $68 million in value to the 2017 Transferred Assets" (*id.* ¶ 84). However, this did not resolve the issue of the obvious overpayment for the premium. Beecher noted that the failure to "return [] overpayment of premium, [would] give[] rise to the question 'is this an arms-length transaction?'" (*id.*, exhibit 55 [NYSCEF Doc No. 61], email exchange between HCM and Beecher at BC SEN0000707457). In June 2018, Sentinel executed endorsements to the ATE Policy, one of which adjusted the premium to $68,362,333.62, purportedly "to include the total fair value of received assets" (*id.* ¶¶ 85, 86, exhibit 52 [NYSCEF Doc No 58], endorsements at DISCEN0007912).

The Cayman Island Monetary Authority ("CIMA") conducted an onsite inspection of Sentinel in March 2019 (*id.* ¶ 88). CIMA raised numerous concerns regarding the ATE Policy and the APA. For example, CIMA found that Sentinel's actuary "was not involved in the determination of premium pricing . . . to any extent at all" (*id.*, exhibit 67 [NYSCEF Doc No. 73], CIMA's Final Inspection Reports at BC SEN0000078822). It also found that those charged with governance could not explain: "the basis upon which the [2017 Transferred Assets] had been valued on or about August 1, 2017 for the purpose of premium settlement"; "the reason why the information that was relied on to value the [2017 Transferred Assets] could not be readily provided to the auditors upon request"; and "why the premium was adjusted from US$25 million to US$68.3 million without a commensurate adjustment to the indemnity limit provided or why the initial pricing for the policy was subsequently deemed not sufficient." CIMA

concluded that these facts, as well as the seven-fold increase in Sentinel's portfolio due to the 2017 Transferred Assets, "cast significant doubt on the economic substance and business purpose of the transactions relating to the ATE coverage" *(id.*, at BC SEN0000078819).

In the meantime, the Underlying Action advanced. The court bifurcated the trial into two phases (NYSCEF Doc No. 186, petition ¶ 1). At the end of phase one, by decision and order dated November 14, 2019, the court awarded UBS $1,042,391,031.79, ordering CDO Fund to pay $531,619,426.24 and SOHC to pay $510,771,605.55 ("Phase I Judgment") (*id.* ¶ 2, exhibit 11 [NYSCEF Doc No. 17], Phase I Judgment at 2-3). Prior to trial of the second phase, HCM filed for bankruptcy, staying the Underlying Action.

UBS alleges that "[i]n the months after the November 2019 Phase I [Judgment], Dondero and Ellington spent, transferred, and otherwise dissipated the 2017 Transferred Assets" and that "[t]hey did this in two main ways" (*id.* ¶ 99). First, Ellington sough reimbursement from the ATE Policy for personal expenses (*id.* ¶ 100). Second, Dondero and Ellington directed Sentinel to pay "dividends" to Mainspring and Montage (*id.* ¶ 101). In this way, UBS alleges, Dondero and Ellington exercised their control over Sentinel to enrich themselves and to diminished the assets available to UBS to satisfy its judgments (*id.* ¶ 98).

Ellington is alleged to have made the following improper reimbursement claims: (1) on December 16, 2019, for $21,557.04 in expenses for travel to Los Angeles, New York City, and Chicago (*id.* ¶ 104); (2) on December 19, 2019, for $318,934.88 in expenses for a single day in Austin and seven days in Las Vegas, which included $42,324 in charges from a single night at a Las Vegas strip club and $97,706.19 in charges at a Las Vegas nightclub (*id.* ¶ 105); (3) on January 30, 2020, for reimbursement of $78,841.93 in expenses for personal trips to London and Paris with his girlfriend (*id.* ¶ 108) and $140,000 in expenses for a trip to Toronto that included

$43,353.54 spent on a private jet (*id.* ¶ 109); and (4) on March 12, 2020, for $273,662.82 in expenses for a six-day trip to London, that included approximately $18,000 in airfare for three individuals unaffiliated with Sentinel and $75,914.86 spent in a single day at two restaurants and a night club (*id.* ¶ 110). Sentinel reimbursed all of these expenses without questioning their validity, relying on Dondero and Ellington's determinations, as the ultimate beneficial owners of Sentinel, that such reimbursements were appropriate (*see id.* ¶¶ 104, 105-107, 111-112).

In January 2020, an independent board of directors of Strand (the "Independent Board") took over HCM's operations, management of its assets, and its bankruptcy proceeding (*id.* ¶ 45).

On April 24, 2020, Sentinel paid $6.4 million in dividends to Mainspring and Montage. $4,480,000.00 was paid to Mainspring, as Dondero's 70% share of the dividend. $1,920,000.00 was paid to Montage, as Ellington's 30% share of the dividend (*id.* ¶ 114).

In late 2020, UBS participated in bankruptcy court-ordered mediation. At this time, Ellington repeatedly told UBS that CDO Fund and SOHC were "ghost funds" (*id.* ¶ 46, exhibit 87 [NYSCEF Doc No. 93] Aug. 15, 2020 Ellington email at UBSPROD1738891 [stating that the Funds were "ghost funds . . . that (did) not have directors, custodians, administrators, bank accounts etc. that s(a)t dormant and NO ONE kn(ew) what they truly retain(ed)" and that "UBS (was) aware of this situation . . . because (Ellington) ha(d) personally discussed it with (Andy Clubok, UBS's counsel,) several dozen times"]). Neither Ellington nor Dondero ever disclosed the existence of the ATE Policy to UBS, the bankruptcy court or the Independent Board (*id.* ¶ 91).

On January 12, 2021, a year after the Phase I Judgment, Sentinel paid another $1,750,000.00 to Mainspring and $750,000.00 to Montage (*id.* ¶ 117). UBS alleges that the issuance of these dividends, as well as the April 2020 dividends, were against a representation

that Matthew DiOrio ("DiOrio"), Managing Director of HCM and trusted lieutenant to Ellington and Dondero (*id.* ¶¶ 36, 40), had made to Beecher in 2018— that Sentinel would "not be entertaining any dividend issuance while the ATE policy [was] active" (*id.* ¶ 115, exhibit 62 [NYSCEF Doc No. 68] at DISCSEN0006464-65). In addition, UBS alleges that the second dividend violated CIMA's regulations, requiring that CIMA be notified before a dividend is issued. UBS points to the notice Sentinel provided CIMA three months after the fact, in which it represented that it was "notifying the Authority of a $2,500,00 dividend *to b*e declared and paid" (*id.* ¶ 117, exhibit 91 [NYSCEF Doc No. 97] at BC SEN0000083961 [emphasis added]).

Sentinel had no schedule for issuing dividends to Mainspring and Montage and did so at the request of its ultimate beneficial owners, Dondero and Ellington (*id.* ¶ 113, 116, exhibit 111 [NYSCEF Doc No. 190], DiOrio deposition tr at 195:12-197:3). As DiOrio explained during deposition, Ellington and Dondero "could ask [for dividends] every day of the year," and Sentinel's board would have to approve it (*id.* ¶ 116, exhibit 111 [NYSCEF Doc No. 190], DiOrio deposition tr at 196:13-14).

According to UBS, Dodero and Ellington used some of these dividend payments to make bonus payments to statutory insiders, including Ellington, after the bankruptcy court denied HCM's request to make such bonus payments (*see id.* ¶¶ 119, 120). Ellington created an entity called Tall Pine Group, LLC "to enter into consulting agreements with various Dondero-controlled entities . . . and then [to] subcontract with entities owned by or affiliated with [the statutory insiders]" (*id.* ¶ 122). Under these consulting agreements, "the contributing entities," which included Mainspring, "were jointly and severally liable for the total amount on the various milestone payment dates" (*id.* ¶ 123; *see id.* at 45 n 30). "[T]he 'consultants' performed no other work on top of the services already being performed by those individuals as employees of HCM,

and in certain instances some of the employees did no work for certain contributing entities" (*id.* ¶ 124). Under these consulting agreements, the statutory insiders received approximately $8,638,536.07 in 2020, including about $5,874,203.21 from Mainspring (*id.* ¶ 126).

According to UBS, "it was only after Dondero and Ellington were removed that HCM and UBS were able to reach an agreement in principle to settle UBS's claims in the bankruptcy" (*id.* ¶ 47). Before a settlement agreement was signed, "on or about February 10, 2021, . . . HCM disclosed several fraudulent conveyances that HCM entities (at the direction of Dondero and Ellington) had conducted in concert with Sentinel" (*id.*). It was only through this disclosure that UBS learned of the 2010 Transfer and the 2017 Transfers (*id.* ¶¶ 47, 60). On March 30, 2021, UBS and HCM entered into a renegotiated settlement agreement, which settled UBS's claims against HCM and certain related entities in the Underlying Action (*id.* ¶ 47).

On July 27, 2022, the court in the Underlying Action issued a decision and order on the remaining, unsettled claims. The court awarded UBS $67,222.00 against CDO Fund, found HFP to be the alter ego of SOHC and liable for SOHC's portion of the Phase I Judgment, and awarded UBS attorney's fees ("Phase II Judgment," and together with the "Phase I Judgment," the "Judgment"). (*Id.* ¶¶ 2, 48, exhibit 24 [NYSCEF Doc No. 30], Phase II Judgment at 9-10.)

On September 1, 2022, UBS entered into a final settlement agreement with Sentinel. Sentinel agreed to transfer to UBS what remained of the 2017 Transferred Assets and UBS agreed to count those assets toward satisfaction of the Judgment (*id.* at 37 n 21, exhibit 25 [NYSCEF Doc No. 31], Partial Satisfaction-Piece for Post-Judgment Interest).

II. Procedural History

UBS commenced this proceeding on February 8, 2023 (NYSCEF Doc No. 1). On March 7, 2023, Dondero removed the case to the U.S. District Court for the Southern District of New

York pursuant to 28 USC § 1441(a). The district court remanded the first two claims to this Court on December 7, 2023 (NYSCEF Doc Nos. 176-179, 197-99).

Ellington, CLO HoldCo and Dondero (in motions sequence numbers 011, 012, 013, respectively) moved to dismiss the petition. Argument on the motions was held on July 8, 2024.

By decision and order dated July 8, 2024, this court granted CLO HoldCo's motion to dismiss for lack of personal jurisdiction. In pertinent part, the court held that CLO HoldCo was not a signatory to the agreements containing forum selection clauses and that there was no basis for long-arm jurisdiction, because: (1) the alleged 2010 fraudulent transfers occurred years before there was a judgment or a bankruptcy settlement, and so there could be no reasonable expectation of consequence in New York under CPLR 302 (a) (3) (ii); and (2) the "'original critical events' giving rise to the injury here indisputably did not occur in New York" (NYSCEF Doc No. 417, Decision and order dated July 8 2024, quoting *Deutsche Bank v Vik*, 163 AD3d 414, 415 [1st Dept 2018]).

III. Analysis

A. Personal Jurisdiction and Piercing the Corporate Veils of the Judgement Debtors

The parties dispute whether the court has personal jurisdiction over Dondero and Ellington, either as alter egos of the Judgement Debtors, bound by the forum selection clauses of Knox Agreements, or under the long-arm statute. They also dispute whether the petition contains sufficient allegations of Ellington and Dondero's close relationship with the Judgement Debtors to bind them under the Knox Agreements' forum-selection clauses.

1. Choice of Law Analysis for Veil-Piercing

As a preliminary matter, the parties dispute which jurisdiction's law should apply in determining whether to pierce the corporate veils of the Judgment Debtors. SOHC is a Cayman

Islands corporation, HFP is a Delaware limited partnership and CDO Fund is a Bermuda limited partnership (NYSCEF Doc No. 186, petition ¶¶ 8, 9, 10). Respondents contend that the court should apply the law of the place of incorporation of the company whose veil is sought to be pierced. UBS counters that, as this proceeding concerns the enforcement of a New York judgment, New York's interest is paramount and its law applies.

The first step in a choice of law analysis, is to determine "whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). "For an actual conflict to exist, the laws in question must provide different substantive rules . . . that are relevant to the issue at hand and have a significant *possible* effect on the outcome of the trial" (*TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014] [internal quotation marks and citation omitted]). If no conflict exists "between the laws of the competing jurisdictions . . . , then the court should apply the law of the forum state in which the action is being heard" (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd 3* NY3d 577 [2004]). Where a conflict exists, "under New York choice-of-law principles, courts apply the law of the forum to procedural questions and, to substantive issues, the law of the jurisdiction with the most significant relationship to the dispute" (*Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 335 [2024] [internal citations omitted]).

Generally, "the substantive law of a company's place of incorporation presumptively applies to causes of action arising from its internal affairs" (*Eccles*, 42 NY3d at 339). However, this presumption may be overcome, if a party demonstrates "both that (1) the interest of the place of incorporation is minimal—i.e., that the company has virtually no contact with the place of

incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law" (*id.*).

If the dispute concerns the application of tort law and the law is conduct-regulating, "New York courts usually apply the law of the place where the tort occurred because that jurisdiction has the greatest interest in regulating behavior that takes place within its borders" (*Elson v Defren*, 283 AD2d 109, 115 [1st Dept 2001]; *see Eccles*, 42 NY3d at 336). "Where a defendant's wrongful conduct occurs in one jurisdiction and the plaintiff suffers injuries in another, 'the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred;' that is where the plaintiffs' injuries occurred" (*Deutsche Bank AG v Vik*, 2015 NY Slip Op 30163[U], *20 [Sup Ct, NY County 2015], *affd* 142 AD3d 829 [1st Dept 2016], quoting *Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 197 [1985]).

Here, New York law applies to the veil-piercing analysis.

Because "HFP is a Delaware limited partnership" (NYSCEF Doc No. 186, petition ¶ 9) and "the standard [for piercing the corporate veil] is not materially different under Delaware law" from that under New York law (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]; *see also Spinnell v JP Morgan Chase Bank, N.A.*, 59 AD3d 361, 361 [1st Dept 2009] ["(t)he court properly applied New York law because there is no conflict with Delaware law with respect to 'reverse veil-piercing' . . ."]), New York law applies with regard to HFP (*see Excess Ins. Co. Ltd., 2* AD3d at 151]).

However, the standard for piercing the corporate veil under the laws of the Cayman Islands and Bermuda differ from that of New York. According to the parties' experts on Cayman Island and Bermuda law, because these jurisdictions are British Overseas Territories, they follow English law where there is no local authority on a particular issue (*see* NYSCEF Doc

No. 260, Lowe affirmation ¶¶ 8-9; NYSCEF Doc No. 309, Hayden affirmation ¶¶ 7-10; NYSCEF Doc No. 324, Wasty affirmation ¶¶ 12-19). In this case, the leading, applicable case on piercing the corporate veil in English law is *Prest v Petrodel Resources Limited* ([2013] 2 AC 415) (*see* NYSCEF Doc No. 260, Lowe affirmation ¶ 16; NYSCEF Doc No. 309, Hayden affirmation ¶ 11; NYSCEF Doc No. 324, Wasty affirmation ¶ 27).

Prest explains that English cases addressing the issue can be divided into two categories that have often been confused (NYSCEF Doc No. 316, *Prest* at 70). The first category of cases applies the concealment principle, which "is legally banal and does not involve piercing the corporate veil at all" (*id.*). This principle is not implicated in this proceeding.[1] The second category of cases applies the evasion principle, "which applies when a person is under an *existing* legal obligation or liability or subject to an *existing* legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control" (*id.* at 74 [emphasis added]). Because English law requires the existence of liability prior to the abuse of the corporate form, a temporal requirement not found under New York law (*see Tianbo Huang v iTV Media, Inc.*, 13 F Supp 3d 246, 258 n 4 [ED NY 2014] [explaining how "(t)he temporal requirement most clearly distinguishes New York from English

[1] In applying the concealment principle, courts look to general legal principles "to discover the facts which the corporate structure is concealing," without "disregarding the 'facade'" (NYSCEF Doc No. 316, *Prest* at 70). For example, in one of the cases discussed in *Prest*, it was not necessary to pierce the corporate veil, because the defendant company had acted as the individual defendant's "nominee for the purpose of receiving and holding the secret profit" and, as such, both had to account for it to the plaintiff (*id.* at 72).

Notably, UBS contends that, even under Bermudan and Cayman laws, the court should hold Dondero and Ellington personally liable for the Judgement under the concealment principle. However, the petition clearly seeks to hold Dondero and Ellington liable as the alter egos of the Judgement Debtors and asks the court to disregard the corporate form to find personal jurisdiction over the individuals. This cannot be accomplished by applying the concealment principle.

law"]), a choice of law analysis is necessary to determine which standard should apply to piercing the corporate veils of SOHC and CDO Fund.

Piercing the corporate veil involves holding an individual accountable to third parties for the abuse of the corporate form (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]) rather than "the relationships between directors and shareholders" or a corporation's internal administration (*Eccles*, 42 NY3d at 336, 336 n 11). Therefore, "alter ego liability and the related doctrine of piercing the corporate veil . . . do not implicate the corporation's internal affairs" and there is no presumption in favor of Bermuda or the Cayman Islands as the jurisdictions of incorporation (*see UBS Sec. LLC v Highland Capital Mgt., L.P.*, 30 Misc 3d 1230[A], 2011 NY Slip Op 50297[U], *3 [Sup Ct, NY County 2011], *affd in part, mod in part* 93 AD3d 489 [1st Dept 2012] [applying New York law to determine whether HCM was SOHC's alter ego]; *see also Highland CDO Opportunity Master Fund, L.P. v Citibank, N.A.*, 270 F Supp 3d 716, 725 [SD NY 2017] ["find[ing] that veil piercing is best treated as a species of fraud or similar tort and therefore is a conduct-regulating rule"]).

Here, New York has the greater interest in applying its law to the veil piercing claims.

Apart from SOHC and CDO Fund's status as a Cayman Islands corporation and a Bermuda limited partnership, respectively, it is not clear how those jurisdictions' interests are implicated here. Indeed, as concerns SOHC, it has already been found not to have any "obvious ties" to the Cayman Islands (*UBS Sec. LLC*, 2011 NY Slip Op 50297[U] at *3 [applying New York law to the veil piercing claim on "the ground that SOHC has almost no ties to the Cayman Islands," based upon findings that, among other things, it "conducts business in New York and Texas with entities based in New York, including UBS"]). Moreover, none of the injured parties are located in the Cayman Islands or Bermuda.

On the other hand, petitioner UBS Securities LLC has its principal place of business in New York (NYSCEF Doc No. 186, petition ¶ 4). Accordingly, at least part of the injury was felt in New York (*see Schultz*, 65 NY2d at 195; *see also Highland CDO Opportunity Master Fund, L.P., N.A.*, 270 F Supp 3d at 725 [applying New York's interest analysis and concluding that "New York ha(d) the greatest interest in applying its law to the veil piercing claims," where three of the four counterclaim plaintiffs had their principal place of business in New York and, "(a)ccordingly, the relevant injury . . . occurred in New York"]). In addition, New York has an interest in enforcing a judgment entered in the state, which resulted from the breach of the Knox Agreements, which were "largely conducted in New York" (NYSCEF Doc No. 281, Dondero brief at 13) and contain New York forum selection clauses (*see Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996] [finding New York's law applied in an action seeking to pierce the corporate veil to hold a foreign entity liable under an indemnification agreement, where, among other things, the subject agreement had been executed in New York]; *Citibank, N.A. v Aralpa Holdings L.P.*, 2025 WL 289499, *2, 2025 US App LEXIS 1559, *5 [2d Cir, Jan. 24, 2025, No. 24-423-CV] [applying New York choice of law principles and concluding that New York law applied to Citibanks' reverse veil piercing claim, because "New York clearly ha(d) the more significant relationship to th(e) dispute," where Citibank's principal place of business was in New York, the underlying contracts "contained New York choice-of-law and venue clauses," and "the judgment which Citibank (sought) to execute upon was entered in New York"]). Accordingly, New York law determines whether to pierce the Judgement Debtors' corporate veils.

2. Piercing the Corporate Veil Analysis

Dondero contends that the alter ego claim must be dismissed as against him and that it cannot serve as the basis of personal jurisdiction over him, because the petition fails to allege: (1) that he disregarded the corporate formalities of the Judgment Debtors to advance his personal interests; (2) that the Judgment Debtors were purposefully undercapitalized in 2008, when UBS entered into the Knox Agreements; (3) that he commingling his personal assets with those of the Judgment Debtors or used Judgment Debtor funds for personal use; and (4) causation, or that, in the absence of the alleged wrongful conduct, UBS would have been able to satisfy the $1.2 billion Judgement. In addition, as concerns HFP and CDO Fund, Dondero contends that alter ego claims fail as a matter of law, because veil-piercing does not apply to limited partnerships.

Ellington contends that the alter ego claim must be dismissed as against him and that it cannot serve as the basis for personal jurisdiction over him, because: (1) there are no allegations that he was using the Judgement Debtors to conduct business in his personal capacity or that he personally benefited from the Knox Transaction or from the 2017 Transfers to Sentinel when they occurred, as opposed to subsequently; (2) he had no ownership interest in the Judgment Debtors; and (3) the petition's extensive allegations of Dondero's control of the Judgement Debtors negate any claim of control by Ellington.

Dondero and Ellington both argue that to hold them liable for the Judgement would be inequitable, as it would give UBS the benefit of personal guarantees that it did not bargain for. They also urge that a fraudulent transfer claim is the proper vehicle to recover the allegedly funneled funds.

UBS responds that limited partnership status does not bar alter ego liability. In addition, it argues that the petition sufficiently alleges Dondero's control over the Judgment Debtors and explains how the commingling of assets ultimately benefitted only Dondero and his associates.

UBS also contends that the intentional undercapitalization of the Judgment Debtors near the time of the Judgment being entered is relevant to the veil-piercing analysis. Lastly, UBS contends that the Judgment Debtors' inability to pay the entirety of the Judgment does not mean that Dondero's conduct did not cause UBS injury. It argues that allegations that Dondero worked to funnel the Judgment Debtors' assets to himself and his associates are sufficient to plead causation in this case.

As concerns Ellington, UBS argues that the petition sufficiently details how he orchestrated the 2017 Transfers to Sentinel, a company for which Ellington was an ultimate beneficial owner, and then used those assets for lavish personal expenses and dividend payments to himself. UBS contends that his lack of ownership interest in the Judgement Debtors does not bar alter ego liability, as he can be held liable as an equitable owner based on his control over the Judgement Debtors. In addition, it argues, as multiple individuals may be held liable as alter egos of an entity, Dondero's alter ego status does not shield Ellington against alter ego liability. Finally, UBS contends that the absence of a personal guarantee does not render piercing the corporate veil inequitable and that to find otherwise would render alter ego liability ephemeral.

"A non-signatory may be bound by a [forum selection clause] under certain limited circumstances, including as . . . an alter ego of a signatory" (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 122 [1st Dept 2020] [internal citations omitted]). "Subjecting the foreign defendants to New York jurisdiction under an alter ego theory does not offend due process" (*Clingerman v Ali*, 212 AD3d 572, 572 [1st Dept 2023] [internal citation omitted]).

To state a claim against an individual on an alter ego theory of liability, the petitioner must allege facts that, if proved, indicate that: : "(1) the owner exercised complete domination

over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury" (*First Capital Asset Mgt. v N.A. Partners*, 300 AD2d 112, 116 [1st Dept 2002], citing *Matter of Morris*, 82 NY2d at 141). Courts consider the following factors when determining whether domination has been alleged:

> "the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity" (*Cortlandt St. Recovery Corp. v Bonderman*, 226 AD3d 103, 105 [1st Dept 2024], quoting *Tap Holdings, LLC*, 109 AD3d at 174)

"The determinative factor is whether the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends" (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 657 [1976] [internal quotation marks and citation omitted]). However, domination, standing alone, is not enough to pierce the corporate veil, which requires a showing "that the owners, through their domination, abused the privilege of doing business in the corporate form" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009], *affd* 16 NY3d 775 [2011] [internal quotation marks and citations omitted]). "Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014] [internal citation omitted]).

Pursuant to CPLR 103 (b), "procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings." On a motion to dismiss for failure to state a claim, pursuant to CPLR 3211 (a) (7), "the [petition] must be construed in the light most favorable to the [petitioner] and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co.*, 13 AD3d at 174). The court is not permitted "to assess the merits of the [pleading] or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the [pleading] states the elements of a legally cognizable cause of action" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

As a preliminary matter, to the extent that respondents claim that veil-piercing is, as a matter of law, inapplicable to limited partnership such as HFP and CDO Fund, the contention is without merit (*see e.g. Cortlandt St. Recovery Corp.*, 226 AD3d at 34 n 2, 48-50 [denying motion to dismiss where the complaint contained sufficient allegation to pierce the corporate veil of two entities, including a limited partnership]; *Pensmore Invs., LLC v Gruppo, Levey & Co.*, 184 AD3d 468, 469 [1st Dept 2020] [finding that "Supreme Court properly determined that veil piercing was appropriate against . . . Frog Pond Partners, L.P."]).

a. Dondero as Alter Ego of the Judgement Debtors

Here, the petition sufficiently alleges that Dondero is the Judgement Debtors' alter ego.

First, it alleges that Dondero, from his position as President and majority owner of HCM—as well as his positions as chairman of HFP's Board of Directors, the sole Director of SOHC and as President of the ultimate general partner of CDO Fund—controlled the day-to-day operations of the Judgment Debtors (*see* NYSCEF Doc No. 186, petition ¶¶ 28, 33, exhibit 2 [NYSCEF Doc No. 8], Dudney Report at 4-5, 41-42). Further, the petition alleges that in 2009,

Dondero eliminated the requirement that HFP have independent directors and made himself solely responsible for the "management and operation" of HFP and, by extension, its subsidiaries, including SOHC (*id.* ¶ 33, exhibit 88 [NYSCEF Doc No. 94] at UBSPROD1854782). Indeed, Dondero has stated that he was "generally" the "decision maker" for HFP and its subsidiaries (*id.* ¶ 28, exhibit 113 [NYSCEF Doc No. 118], Dondero deposition tr at 48:8-13).

Further, UBS's expert in the Underlying Action concluded that "'Dondero exercised his ability to dominate and control HCM, SOHC, CDO Fund and HFP, amongst other [HCM] [e]ntities,' to his own benefit, including to 'authorize loans to himself' and facilitate transfers among these entities— 'which were not at arm's length or executed in accordance with corporate formalities'" (*id.* ¶ 33, quoting Dudley Report [NYSCEFF Doc No. 8] at 54-56). As an example, the expert pointed to a $3.7 million payment made to Dondero in December 2008. This was purportedly a repayment of a short-term loan that Dondero made to CDO Holding, but there was no evidence of a loan agreement, and the funds originated from SOHC. The money traveled from SOHC to HFP, then from HFP to CDO Holding and only then to Dondero (*see id.* ¶¶ 43, 54, exhibit 2 [NYSCEFF Doc No.8], Dudley Report at 48, 54). Other allegations demonstrating Dondero's domination of the Judgment Debtors include an overlap of offices and employees. It was common for various entities, including the Judgment Debtors, to share HCM's office in Texas, HCM employees performed whatever work Dondero assigned them, regardless of which entity was involved or whether the work was personal in nature (e.g. handling his divorce), and Dondero determined employees' compensation based on an "amalgamation of total efforts" (*id.* ¶¶ 34-37.) These allegations sufficiently plead Dondero's domination of the Judgement Debtors (*cf Horizon Inc. v Wolkowicki*, 55 AD3d 337, 337-338 [1st Dept 2008] [affirming denial of

motion for summary judgement to dismiss "plaintiffs' claim that NYREG's corporate veil should be pierced and its principal . . . held personally liable for the corporation's obligations," where the principal "ignored the corporate form by transferring monies in and out of NYREG without any documentation or formalities"]; *Webmediabrands, Inc. v Latinvision, Inc.*, 46 Misc 3d 929, 932-933 [Sup Ct, NY County 2014] [piercing the corporate veil where, among other things, the individual defendant used corporate assets for personal purposes, terming such payments as "loans"]).

Second, the petition sufficiently alleges that Dondero used his domination of the Judgement Debtors to commit a wrong against UBS that resulted in its injury. The petition alleges that Dondero, anticipating an adverse judgment in the Underlying Action, "deliberately undercapitalized the Judgment Debtors to prevent UBS from collecting on the Judgment" by effecting the 2017 Transfers and "ensur[ing] that the Judgment Debtors would be judgment proof" (NYSCEF Doc No. 186, petition ¶ 176; *see id.* ¶¶ 61-78). "Allegations that corporate funds were purposefully diverted to make it judgment proof . . . are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory" (*Baby Phat Holding Co., LLC*, 123 AD3d at 407-408 [internal citation omitted]). The petition further alleges that by transferring the assets to Sentinel, Dondero, as one of Sentinel's ultimate beneficial owner, was able to extract millions in dividends, thereby reducing assets available to satisfy the Judgment (*see id.* ¶¶ 113-119).

Accordingly, the petition states a claim for piercing the corporate veil of the Judgement Debtors to hold Dondero liable as their alter ego (*see First Capital Asset Mgt.*, 300 AD2d at 116).

None of Dondero's contentions change the analysis.

First, he argues that the petition, at most, alleges that HCM and other entities disregarded the corporate formalities of the Judgement Debtors to advance Dondero's interest. Relying on a single case, he claims that "[i]f the fact that a corporation served its owner's interests were enough to establish a wrongful 'domination' of the corporation, then the corporate form would never be respected" (*In re Stage Presence, Inc.*, 592 BR 292, 304 [Bankr SD NY 2018], *affd* 2019 WL 2004030, 2019 US Dist LEXIS 77111 [SD NY, May 7, 2019, No. 12-10525 (MEW)]). However, in *Stage Presence, Inc.*, the court also concluded that "the evidence showed that in all important operational and financial respects the separate existence of [corporation] was honored and fully respected" (*id.*). Here, UBS alleges that the Judgement Debtors did not have operational or financial separateness from each other or Dondero.

Dondero then argues that the relevant time for undercapitalization is 2008, when UBS entered the Knox Transaction. As this is the transaction that caused the alleged injury, he argues, UBS's failure to allege Dondero's domination over it, as the "transaction attacked" (*First Capital Asset Mgt.*, 300 AD2d at 116), requires dismissal. In so arguing, Dondero ignores the fact that the Judgement exists because the Judgement Debtors' obligations under the Knox Agreements were not satisfied. According to the petition, they remain so, at least in part, due to Dondero's purposeful evasion of those obligations. Therefore, the alleged undercapitalization in 2017 is pertinent to the domination analysis (*see 265 W. 34th St., LLC v Joon Sik Chung*, 47 Misc 3d 1219[A], 2015 NY Slip Op 50704[U], *8 [Sup Ct, NY County 2015] [denying motion to dismiss an alter ego claim to hold the owners liable for the judgment previously entered against the corporate defendant in a summary non-payment proceeding in housing court, explaining that the "transaction plaintiff seeks to attack is not the execution of the lease itself, but rather, the avoidance of obligations created by the lease"]; *see also Azte Inc. v Auto Collection, Inc.*, 36

Misc 3d 1238(A), 2012 NY Slip Op 51731(U), *11-12 [Sup Ct, Kings County 2012], *affd* 124 AD3d 811 [2d Dept 2015] [declining to accept defendant's contention "that 'the transactions attacked' by the plaintiffs terminated upon the plaintiffs' transferring the money to the (defendant)," as the transaction was ongoing until the defendant performed its obligations]; *see also Grigsby v Francabandiero*, 152 AD3d 1195, 1197 [4th Dept 2017] [finding sufficient allegations to pierce the corporate veil, where plaintiff alleged that, near the time her judgment was entered against the entity, the individual defendant "took actions calculated to make (the entity) judgment-proof by undercapitalizing (it)"]).

Dondero also contends that alter ego claim must be dismissed, because UBS cannot prove proximate causation. Dondero argues that UBS cannot show it would have been able to recover $1.2 billion but for Dondero's alleged domination of the Judgement Debtors, because the petition alleges that the 2017 Transfers involved approximately $105 million in assets. For this proposition, Dondero primarily relies on a single case, *Pensmore Invs., LLC v Gruppo, Levey & Co.* (2019 NY Slip Op 31360[U] [Sup Ct, NY County 2019], *affd as mod* 184 AD3d 468 [1st Dept 2020]).

In *Pensmore*, the court initially denied summary judgment to both parties on a claim to pierce the corporate veil to hold the individual defendants personally liable. It reasoned:

> "for the fraud prong to be satisfied with respect to [the individual defendants], Pensmore [had to] prove that they unjustifiably funneled corporate funds to themselves and that, had they not done so, Pensmore would have been able to recover the amounts sought from the companies in excess of the assets they . . . ha[d] on hand." (*Pensmore Invs., LLC v Gruppo*, 2017 NY Slip Op 30661[U], *19 [NY Sup Ct, New York County 2017].)[2]

[2] Notably, UBS seeks to distinguish *Pensmore Invs., LLC*, because the court in that case applied Delaware law to the veil-piercing claim (2017 NY Slip Op 30661[U] at *11). However, as already stated, Delaware's veil-piercing law is not substantially different from that of New York (*see Tap Holdings, LLC*, 109 AD3d at 17). Moreover, after a bench trial that found that the

As Pensmore did not make such a showing and the defendants did not show that it could not do so at trial, neither side was granted summary judgment (*id.*). Additionally, the court observed that if Pensmore could not carry its burden at trial, then the individual defendants "[did] not deserve to be held personally liable because, despite their behavior, they would not have been the proximate cause of Pensmore's inability to satisfy its judgment against [the entity defendants]" (*id.* at *19 n 16). The court explained that, because "veil piercing . . . impose[s] alter ego liability [based on] to the causal relationship between malfeasance and fraud on a creditor[,] [w]ithout proving that [the individual defendants] did anything that made the companies, collectively, unable to pay Pensmore, the requisite fraud [could not] be said to be present" (*id.*).

After a bench trial, the court concluded that Pensmore made the requisite showing and pierced the corporate veil to hold the individual defendants liable (*Pensmore Invs., LLC*, 2019 NY Slip Op 31360[U] at *13-*14). However, the court also stated that it was "not decid[ing] whether, as a necessary predicate to all veil piercing claims, there must be proof that a business composed of alter ego affiliates is collectively capable of paying off the plaintiff but for the corporate malfeasance" (*id.* at *13), rather that it "[was] a predicate of the fraud prong under the circumstances" of that case (*id.*).

The Appellate Division, First Department, held that veil piercing against the individual defendants was proper (*Pensmore Invs. LLC*, 184 AD3d at 469). It observed that the evidence showed that the defendants used their domination over the entities to render them judgment proof and that "the [entites] would have had sufficient funds to satisfy the underlying debt owed to

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plaintiff made the requisite showing, the Appellate Division, First Department affirmed, holding that veil piercing against the individual defendants was proper, regardless of whether New York or Delaware law was applied (*Pensmore Invs., LLC*, 184 AD3d at 469).

Pensmore, but for appellants' fraud" (*id.*). However, it did not state whether a showing of the entities' ability to satisfy the debt was a necessary element of the claim.

While the reasoning of *Pensmore* is compelling (*see* 2017 NY Slip Op 30661[U], *19 n16), as neither the motion court, the trial court, nor the appellate court held that proof of the entity defendants' ability to satisfy the underlying debt was a prerequisite to proving veil-piercing generally, much less that it was a necessary element to state such a claim, the court declines to dismiss the petition on that ground.[3]

Dondero contends that it would be inequitable to hold him personally liable, because UBS did not negotiate a personal guarantee in the Knox Transaction, or that UBS should be limited to its fraudulent conveyance claims. This is unavailing. If the absence of a personal guarantee was sufficient to evade liability, alter ego liability would never be imposed. Additionally, UBS's ability to pursue fraudulent transfer claims, in no way bars it from pursuing alter ego liability (*see e.g. Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 50 [2018] [holding that "(s)ince the complaint allege(d) the existence of a corporate debt, created by defendants by their use of the corporate form to profit from fraudulent conveyances that left (the shell companies) insolvent, (the plaintiff) could request that the court pierce the corporate veil to impose liability upon defendants as the alter egos of (the shell companies)"]).

Finally, to the extent that Dondero seeks to demonstrate that UBS "has already recovered the allegedly funneled amounts from Sentinel" (NYSCEF Doc No. 368, Dondero's reply at 11 n

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[3] Notably, UBS relies on *AMP Servs. Ltd. v Walanpatrias Found.* for the proposition that plaintiff need not allege "that the transfer at issue had rendered the subject assets totally and permanently unavailable or diminished" (34 AD3d 231, 232 [1st Dept 2006]). That case is inapposite as it addresses the sufficiency of a fraudulent conveyance claim under Debtor and Creditor Law § 276.

5; *see* NYSCEF Doc No. 369, Leventon reply affirmation ¶¶13-23, exhibits 9-13 [purporting to demonstrate that UBS has recovered in excess of the value of the 2017 Transferred Assets]), this evidence is submitted for the first time in reply and, therefore, will not be considered (*see Dannasch v Bifulco*, 184 AD2d 415, 416-417 [1st Dept 1992]).

For the foregoing reasons, Dondero's motion to dismiss is denied with respect to the second claim, to the extent the claim seeks to hold Dondero liable as the Judgement Debtors' alter ego. The motion is also denied to the extent it seeks to dismiss the petition for lack of personal jurisdiction (*see Highland Crusader Offshore Partners, L.P.*, 184 AD3d at 122).

b. Ellington as Alter Ego of the Judgement Debtors

The Petition also sufficiently alleges that Ellington is the Judgement Debtors' alter ego. Ellington's lack of any ownership interest in the Judgement Debtors is not dispositive. "Even if an individual is not a record owner of a corporation, he may nonetheless be found to be an 'equitable owner' and alter ego thereof if he dominated and controlled [it] to such an extent that [he] may be considered its equitable owner[ ]" (*Matter of Berisha v 4042 E. Tremont Café Corp.*, 220 AD3d 608, 609 [1st Dept 2023] [internal quotation marks and citations omitted]). Here, the petition contains sufficient allegations of Ellington's domination and control over the Judgement Debtors. The petition alleges that: as an officer of Strand, he had signatory authority for the Judgment Debtors (*see* NYSCEF Doc No. 186, petition ¶ 31); as Chief Legal Officer of HCM, he oversaw the litigation strategy against UBS (*see id.*); he directed the work of HCM employees and used them to perform work on personal matters (*see id.* ¶¶ 36-39); and, with respect to the 2017 Transfers and the ATE Policy, Dondero "delegated and entrusted" many decisions to Ellington (*id.* ¶ 31, exhibit 113 [NYSCEF Doc No. 118], Dondero deposition tr at 215:19-

216:11), who "devised" the ATE Policy and "got the transaction approved and completed" (*id.* ¶¶ 64, 77).

The petition also alleges that the ATE Policy was not for the benefit of the Judgement Debtors, because: (1) the 2017 Transfers to Sentinel were for more than four times what was required under the ATE Policy for the premium and even exceeded the coverage amount (*see* NYSCEF Doc No. 186, petition ¶¶ 72, 75); and (2) HFP received no benefit from the transfer, as it was not one of the Insureds (*id.* ¶ 76). Additionally, it alleges that Ellington was one of the ultimate beneficial owners of Sentinel (*id.* ¶ 80) and was, therefore, able to deplete the 2017 Transferred Assets for personal expenses after the transfer (*id.* ¶ ¶ 79, 98-119). Accepting these allegations as true and construing the petition in the light most favorable to UBS (*see Allianz Underwriters Ins. Co.*, 13 AD3d at 174), the petition sufficiently alleges that Ellington so dominated the Judgement Debtors that they "serve[d] [his] purposes rather than [their] own" *Deutsche Bank AG*, 2015 NY Slip Op 30163[U] at *18; *see Port Chester Elec. Constr. Corp.*, 40 NY2d at 657).

Finally, as already explained above, the allegations of intentional undercapitalization of the Judgement Debtors to prevent UBS from collecting the Judgment "are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory" (*Baby Phat Holding Co., LLC*, 123 AD3d at 407-408 [internal citation omitted]). Therefore, the petition states a claim for piercing the corporate veils of the Judgement Debtors to hold Ellington liable as their alter ego (*see Chase Manhattan Bank (Natl. Assn.) v 264 Water St. Assoc.*, 174 AD2d 504, 505 [1st Dept 1991] [finding allegation sufficient to pierce the corporate veil where "plaintiff specifically alleged that (the defendants) masterminded a scheme to denude the subsidiary of its assets in order to render it unable to honor its obligations resulting in a loss

to plaintiff" and that "individual defendant dominated and controlled the corporation and caused the corporation to make fraudulent conveyances"]).

That the petition also alleges that Ellington was Dondero's second-in-command does not require a contrary result (*cf Patel v Pandya*, 2015 WL 4523283, *7, 2015 US Dist LEXIS 97665, *16 [DNJ July 27, 2015, No. 2:14-cv-08127 (WJM) [finding that the complaint sufficiently alleged that the companies were the alter egos of their owner as well as of the owner's "office manager" and "second in command"]; *Matter of Berisha*, 220 AD3d at 608-610 [finding that evidence of the defendant's equitable ownership, when opposed by evidence that he "merely provided assistance to his brother and brother-in-law . . . for which he was paid a salary," created issues of fact as to his domination and control, "precluding summary determination of the applicability of veil-piercing"]).

For the foregoing reasons, Ellington's motion to dismiss is denied with respect to the second claim. to the extent the claim seeks to hold Ellington liable as the Judgement Debtors' alter ego. The motion is also denied to the extent it seeks to dismiss the petition for lack of personal jurisdiction (*see Highland Crusader Offshore Partners, L.P.*, 184 AD3d at 122).

Having determined that alter ego liability is sufficiently pleaded against Dondero and Ellington, the court need not consider the alternate grounds for personal jurisdiction asserted against them.

B. Fraudulent Conveyances

The parties dispute the viability of the fraudulent conveyance claims and whether Dondero and Ellington may be held personally liable, as alter egos of Mainspring and Montage, respectively, for the allegedly fraudulent conveyances made to those entities. As "[a]n argument to pierce the corporate veil is not a cause of action in itself, but rather dependent on the action

against the corporation," the court must first consider the viability of the underlying fraudulent conveyance claims (*Cortlandt St. Recovery Corp.*, 31 NY3d at 50 [internal citation omitted]). Regarding these claims, respondents argue that without an actionable fraudulent conveyance claim for the initial transfers to Sentinel in 2017, UBS may not avoid any of Sentinel's subsequent transfers, including the reimbursements paid to Ellington and the dividends issued to Mainspring and Montage. The parties dispute whether the 2017 Transfers are time-barred and whether the claim for actual fraudulent conveyance is sufficiently pleaded.

1. Choice of Law Analysis

The parties dispute which jurisdiction has the greater interest in applying its laws to the fraudulent conveyance claims. Respondents contend that, because fraudulent conveyance laws are conduct-regulating, the focus of the analysis should be on where the tort occurred. They reason that, because the Judgement Debtors were operated by personnel located in Texas who worked for HCM, a Texas-based investment manager, and funds were transferred from Sentinel, utilizing at least one Texas bank account (*see* NYSCEF Doc No. 84), Texas has the greater interest in regulating the conduct and protecting the reasonable expectations of those engaging in allegedly fraudulent conveyances within its borders. In addition, they argue that, should the court conclude that Texas law does not apply, then Bermuda and the Cayman Islands have the greater interest in applying their laws to transfers made by Bermuda and Cayman entities (i.e. CDO Fund and SOHC) to Cayman entities (i.e. Sentinel, Montage and Mainspring). UBS counters that New York has the greater interest in enforcing its fraudulent conveyance laws, as the claims in this proceeding are concerned with the enforcement of New York judgements.

Here, a conflict exists between New York and Texas with respect to the timeliness of UBS's claims for actual fraudulent conveyances based on the 2017 Transfers. The Texas

Uniform Fraudulent Transfer Act contains a statute of repose. It provides, in pertinent part, that a claim for intentional fraudulent transfer "is extinguished" if it is not brought "within four years after the transfer was made . . . or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant" (*see* Tex Bus & Com Code Ann § 24.010 [a] [1]). This is substantially different to the applicable New York law, which provides that "[a] claim for actual fraud (Debtor and Creditor Law § 276) is timely if brought either within six years of the date that the fraud or conveyance occurs or within two years of the date that the fraud or conveyance is discovered or should have been discovered, whichever is longer" (*Patterson Belknap Webb & Tyler LLP v Marcus & Cinelli LLP*, 227 AD3d 505, 507 [1st Dept 2024] [internal citation omitted]).[4] While statutes of limitation are generally "matters of procedure" that are "governed by the law of the forum," statutes of repose are matters of substantive law and "fall within the course charted by choice of law analysis" (*Tanges v Heidelberg N. Am., Inc.*, 93 NY2d 48, 53, 55-56 [1999] [explaining that a statute of repose is substantive, because, unlike a statute of limitation, which "does not extinguish the underlying right, but merely bars the remedy," a statute a repose "se*rves as an absolute barrier that prevents . . . what might otherwise have been a cause of action from ever arising*" [internal quotation marks and citation omitted]).

A conflict also exists, with respect to these claims, between New York law and the laws of Bermuda and the Cayman Islands. Under New York's Debtor and Creditor Law ("DCL") § 276, which "addresses actual fraud, . . . proof of unfair consideration or insolvency" is not

[4] Notably, there is a dispute as to whether this is the applicable version of New York's law. In 2020, the Uniform Fraudulent Conveyance Act ("UFCA") was repealed and replaced by the Uniform Voidable Transaction Act. As explained below, the UFCA governs many of the issues raised on these motions. Therefore, unless indicated otherwise, all references to "Debtor and Creditor Law" or "DCL" refer to the UFCA.

required (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). Under the laws of Bermuda and the Cayman Islands, for such a transfer to be voidable, it must be made with the intent to defraud and the transaction must be for no consideration or significantly less than the value of the property transferred (*see* NYSCEF Doc No. 260, Lowe affirmation ¶¶ 27, 29, exhibits L [NYSCEF Doc No. 272], Cayman Is. Fraudulent Dispositions Law §§ 2, 4 [1]; M [NYSCEF Doc No. 273] Bermuda Conveyancing Act §§ 36A [1], 36C [1]).

As already explained, where conflicting conduct-regulating laws are at issue, "New York courts usually apply the law of the place where the tort occurred" (*Elson*, 283 AD2d at 115; *see Eccles*, 42 NY3d at 336). "[T]he place of the wrong is . . . where the last event necessary to make the actor liable occurred; that is where the plaintiffs' injuries occurred" (*Deutsche Bank AG*, 2015 NY Slip Op 30163[U] at *20 [internal quotation marks and citation omitted]; *see Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC*, 45 Misc 3d 1204[A], 2014 NY Slip Op 51461[U], *10 [Sup Ct, NY County 2014] [stating that "(i)n fraud claims, the paramount concern of a court is the locus of the fraud (,) which ( ) is where the injury is inflicted, not where the fraudulent act originated" (internal quotation marks and citations omitted)]). "Further, as the purpose of fraudulent conveyance laws is to aid creditors who have been defrauded by the transfer of property, consideration of the residency of the parties, particularly the creditors, is also required to determine their reasonable expectations" (*Wimbledon Fund, SPC (Class TT) v Weston Capital Partners Master Fund II, Ltd.*, 184 AD3d 448, 450 [1st Dept 2020] [internal quotation marks and citations omitted]; *see Taberna Preferred Funding II, Ltd.*, 2014 NY Slip Op 51461[U] at *10-*11 [explaining that "(a)pplying foreign law to foreign (debtors) does not necessarily incentivize lawful conduct by the (debtor) in the jurisdiction where the injury occurred if that (debtor) is managed and operated from a different jurisdiction"]).

Here, New York has a significant interest in applying its laws to the fraudulent conveyance claims (*see* discussion of New York's interest, *supra* at 20-21). "Since fraudulent conveyance law is an essential tool in ensuring that creditors' rights manifest into a real recovery, rather than a worthless, unrecoverable judgment, applying New York law is a sensible way to fulfill the parties' expectations" (*Taberna Preferred Funding II, Ltd.*, 2014 NY Slip Op 51461[U] at * 11). Texas' interest, on the other hand, is limited. While HCM managed the Judgment Debtors from its Texas offices, neither it nor the Judgment debtors are incorporated in Texas and no injury is alleged to have occurred there.[5] "Thus, the only interest that Texas has in this litigation is regulating the conduct of . . . foreign [entities] doing business within Texas when the conduct injures parties outside of Texas. That does not outweigh New York's significant interests in the litigation." (*Highland CDO Opportunity Master Fund, L.P.*, 270 F Supp 3d at 726.)

For previously stated reasons (*see* discussion of New York's interest, *supra* at 19-20), New York also has a greater interest in enforcing its fraudulent conveyance laws in connection with the 2017 Transfers by CDO Fund and SOHC than Bermuda and the Cayman Islands. As already explained, this is particularly so with regard to SOHC, which has no demonstrable ties to the Cayman Islands beyond the fact of its incorporation there (*see id.* at 20).

Accordingly, New York's law applies to the fraudulent conveyance claims.

2. Statute of Limitations

As a preliminary matter, respondents contend that this claim is time barred under the relatively recent changes to Article 10 of New York's Debtor and Creditor Law, formerly known

[5] The petition does not state where HMC is incorporated and the submissions on these motions do not supply that information. However, according to the court in *Highland CDO Opportunity Master Fund, L.P.*, "HCM is incorporated in Delaware, not Texas" (270 F Supp 3d at 726).

as the Uniform Fraudulent Conveyance Act ("UFCA"). The UFCA was repealed and replaced by the Uniform Voidable Transaction Act ("UVTA").

Respondents argue that the fraudulent conveyance claims must be dismissed as untimely under the UVTA, as this proceeding was commenced on February 8, 2023, more than four years after the 2017 Transfers and more than a year after their alleged discovery on February 10, 2021. Respondents insist that, despite the fact that the 2017 Transfers occurred prior to the UVTA's effective date, the UVTA is applicable, because the fraudulent transfer claim accrued upon discovery, on February 10, 2021, after the effective date

The UVTA does not apply to the 2017 Transfers. The historical note found after § 278 of the Debtor-Creditor law states that the new statute "**shall not apply to a transfer made or obligation incurred before [the effective date of the statute], nor shall it apply to a right of action that has accrued before such effective date.**"

Respondents' interpretation is contrary to this plain language. The word "nor" indicates that the UVTA "shall not apply" in either situation presented, whether it be a transfer before the effective date or the accrual of a claim before the effective date. Therefore, because the 2017 Transfers occurred before the effective date, under the plain language of the historical and statutory note, the UVTA does not apply.

Respondents rightly point out that a claim will always accrue after a transfer, as in the case of a fraud not being discovered until a later time (*see Guedj v Dana,* 11 AD3d 368, 368 [1st Dept 2004]) or where a judgment must be entered in order for the claim to accrue (*see Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 493 [1st Dept 2016]). However, this does not render "nor shall it apply to a right of action that has accrued before such effective date" superfluous. Its presence serves to emphasize the absence of its mirror opposite. Had the statute

intended otherwise, it would have provided that, in addition to "appl[ying] to a transfer made or obligation incurred on or after such effective date," it applied to causes of action that accrued on or after such date. As the statute does not so provide, the court shall not read such a provision into the statute (*see Corr*, 42 NY3d at 673). "[A] new statute is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]).

Thus, the UFCA is the operative law in this proceeding and, unless indicated otherwise, all references to the DCL refer to the version effective prior to April 4, 2020 (see *Owens v. Turkiye Halk Bankasi A.S.,* 2021 WL 638975, at *2 n. 2 (SDNY Feb. 16, 2021), *aff'd,* 2023 WL 3184617 [2d Cir. May 2, 2023]; see also *In re Diamond Fin. Co., Inc.*, 658 B.R. 748, 772 n. 18 [Bankr. EDNY 2024]["the amendments do not apply in this adversary proceeding because the transfers occurred before the effective date of the UVTA"]). The court in *Foley v Union de Banques Arabes et Francaises* (683 F Supp 3d 375 [SD NY 2023]), a case upon which respondents rely, adopted a contrary interpretation. However, this case appears to be against the weight of authority. In that case, the court treated a claim's accrual after the effective date as the determinative factor, despite the transfer having occurred before the effective date. This interpretation is clearly wrong as it ignores the language of the historical and statutory note that the new statute "**shall not apply to a transfer made". . . before such effective date**.

3. Sufficiency of the Pleadings

Respondents contend that the petition fails to state a claim for fraudulent conveyance, because the underlying contention, that the Judgement Debtors intended to defraud UBS by buying insurance to cover the Judgment, is implausible. Next, respondents argue that, because the petition does not specify the value of the assets each entity contributed to the 2017 Transfer,

it fails to allege that the value of the insurance the Funds received was significantly less than the value of the assets they transferred. Respondents also contend that the remaining badges of fraud are insufficiently pleaded to support an intentional fraud claim, because: (1) there was no secret and hasty transfer, as the ATE policy was planned and executed over the course of several months; (2) there were no "dummy" entities involved, as all entities were pre-existing rather than created for the purpose of the transaction; and (3) Sentinel, a regulated insurance company, rather than the transferors, owned the assets after the 2017 Transfers. Finally, respondents argue that because UBS cannot demonstrate that the 2017 Transfers to Sentinel are voidable, neither are any of the subsequent transfers from Sentinel to Ellington, Montage and Mainspring.

UBS responds that the petition sufficiently alleges all of the badges of fraud and that respondents' contention that such allegations are "implausible" and attempts at raising issues of fact are inappropriate on a motion to dismiss on the pleadings.

DCL § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." To establish actual intent, a petitioner may "rely on 'badges of fraud' to support [its] case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent" (*Wall St. Assoc.*, 257 AD2d at 529 [internal quotation marks and citations omitted]). These include:

> "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance" (*id.*; *see also Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]).

The allegations of fraudulent intent must be pleaded with particularity pursuant to CPLR 3016 (b) (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]). On a motion to dismiss pursuant to CPLR 3211, the court must accept the petition's factual allegation as true and, "in the absence of proof that an alleged material fact is untrue or beyond significant dispute, must not dismiss the [petition]" (*Wall St. Assoc.*, 257 AD2d at 526-527 [internal citations omitted]).

Here, the petition alleges numerous badges of fraud with sufficient particularity to state a claim for actual fraudulent conveyance under DCL § 276 with respect to the 2017 Transfers. The Petition alleges that the 2017 Transfers to Sentinel were carried out after negative summary judgment outcomes in the Underlying Action, at a time when respondents anticipated a $1.2 billion judgment (*see* NYSCEF Doc No. 186, petition ¶¶ 61-64, exhibit 38 [NYSCEF Doc No. 44], HCM's Settlement Analysis [identifying risks to Dondero and the HCM-related entities associated with the Underlying Action, including a $1.2 billion judgment, and analyzing how transferring assets away from the transferors could obviate these risks]).

The petition also alleges that the ATE Policy was outside the usual course of business for Sentinel. Sentinel had never previously issued an after-the-even policy or a policy as large as the ATE Policy and would not have had the means to pay on the policy without the 2017 Transferred Assets (*id.* ¶¶ 66, 70). Additionally, the petition alleges that outside counsel raised possible issues with "the idea that the premium [would] be satisfied by the transfer of the hedge funds' investment portfolios," as it risked the "'premium' [being] returned or . . . set aside as some unlawful preference" (*id.* ¶ 72, exhibit 42 [NYSCEF Doc No. 48], email from Solomon Harris at BC SEN0000745905). CIMA is also alleged to have raised numerous concerns about the ATE Policy, including that: no one could explain the "basis upon which the [2017 Transferred Assets]

had been valued on or about August 1, 2017 for the purpose of premium settlement"; and Sentinel's actuary "was not involved in the determination of premium pricing . . . to any extent at all" (*id.* ¶ 88, exhibit 67 [NYSCEF Doc No. 73], CIMA's Final Inspection Reports at BC SEN0000078822, BC SEN0000078819).

Further, the petition alleges that Ellington and Dondero were involved with both sides of the transaction (*see id.* ¶ ¶¶ 63-65, 77, 80) and that they retained control of the 2017 Transferred Assets through their control of Sentinel as its ultimate beneficial owners and as the sole members of the Sentinel Advisory Board (*see id.* ¶¶ 13, 14, 63, 71).

Finally, the petition alleges the inadequacy of consideration, as the 2017 Transfers to Sentinel were for more than four times what was required under the contract for the premium and exceeded the coverage of the policy (*see id.* ¶¶ 72, 75).

While respondents scoff at the implausibility of the fraudulent scheme set out in the petition, they do not refute any of its allegations.

Respondents point to internal communications and documents demonstrating that "the ATE policy was designed as a way for the Funds to settle with UBS" and that using all of their assets as a premium payment was intended "to convert illiquid securities into cash" and to "protect against crushing tax liability" (NYSCEF Doc No. 257, Ellington brief at 16, 17; *see* NYSCEF Doc No. 46, HCM's Settlement Analysis at HCMUBS005254, HCMUBS005257-59). However, this does not refute fraudulent intent, but merely creates an issue of fact. Neither does the fact that UBS was ultimately able to recover a substantial portion of the 2017 Transferred Assets through its settlement with Sentinel (*see* NYSCEF Doc No. 257, Ellington brief 17-18; NYSCEF Doc No. 186, petition ¶ 98 n 21, exhibit 25 [NYSCEF Doc No. 31], Partial Satisfaction-Piece for Post-Judgment Interest at 3) demonstrate that the ATE Policy was created

for that purpose. This is especially so in light of the allegations that: Ellington and Dondero never disclosed the existence of the ATE Policy; Ellington told UBS that CDO Fund and SOHC were ghost funds; and it was only after Ellington and Dondero were removed from HCM, that the Independent Board disclosed the existence of the ATE Policy (*see* NYSCEF Doc No. 186, petition ¶¶ 90-92).

Respondents also rely on the fact that Sentinel had approximately $19.2 million in assets and $17.6 million in equity in December 2016 (*see* NYSCEF Doc No. 257, Ellington brief at 17; *see* NYSCEF Doc No. 55, Sentinel's December 2016 Financial Statements at HCMUBS001071). However, this does not establish that Sentinel's subsequent transfers to Ellington, Montage and Mainspring, occurring three to five years later (between 2019 and 2021) did not intrude into 2017 Transferred Assets. Additionally, the fact that the subsequent transfers were made at least two years after the 2017 Transfers, does not "undermine[] the claim of fraudulent intent" (*Carlyle, LLC*, 160 AD3d at 477), particularly as the petition alleges that dissipation of the 2017 Transferred Assets started shortly after issuance of the Phase I Judgment (*see* NYSCEF Doc No. 186, petition ¶¶ 99-101; *contra Carlyle, LLC*, 160 AD3d at 477 [finding the "the timing of the allegedly fraudulent transfers—beginning two years before the judgment debtors incurred the subject debts—undermines the claim of fraudulent intent"]).

Respondents also contend that the allegation that "the Funds transferred assets 'valued at over $105,647,679.00 to satisfy a $25,000,000 premium" is impermissibly vague and disregards the economic substance of the transaction" (NYSCEF Doc No. 257, Ellington brief at 18, quoting petition ¶ 72). They argue that the allegations of the petition refute UBS's claim that the value of the insurance the Funds received was significantly less than the value of the transfers they made, because: (1) each fund received a policy with a $100 million limit of liability; and

(2) a review of the APA's Schedule A, listing the transferred assets, shows that CDO Fund contributed only about half, and SOHC contributed only a handful (*see* NYSCEF Doc No. 104, APA at BC SEN0000089127-28). Therefore, they argue, there is no basis for the allegation that each of the Funds transferred more value than the $100 million in insurance they received. However, as the stated purpose of the 2017 Transfer was to satisfy the premium of $25 million, the transfer of assets valued at more than four times that amount alleges an overpayment. Additionally, the statement that "each Fund received . . . an ATE policy with a $100 million limit of liability" is misleading (NYSCEF Doc No. 257, Ellington brief at 18). The $100 million limit was in the aggregate for all three Insureds, CDO Fund, SOHC and CDO Holding (*see* NYSCEF Doc No. 186, petition ¶ 75, exhibit 51 [NYSCEF Doc No. 57], ATE Policy at UBSPROD1973070). Moreover, respondents gloss over the allegation that HFP, one of the Judgement Debtors, received no consideration whatsoever, as it was not a named insured (*id.* ¶ 76).

Lastly, respondents point to the alternate valuations for the 2017 Transferred Assets, contained in the exhibits annexed to the petition: a valuation of $94 million in April 2017 (*see* NYSCEF Doc No. 46, HCM's Settlement Analysis at HCMUBS005261) and a valuation of $68 million in June 2018 (NYSCEF Doc No. 75, Sentinel Presentation to CIMA at UBSPROD2572277). Thus, they argue, the petition itself refutes any suggestion that the Funds overpaid for the $100 million ATE Policy. Considering the petition's allegation concerning the manner in which HCM employees generate these valuations, i.e. that there was no explanation for "the basis upon which the [2017 Transferred Assets] had been valued" (*id.* ¶ 88, exhibit 67 [NYSCEF Doc No. 73], CIMA's Final Inspection Reports at BC SEN0000078819), and the fact

that neither valuation speaks to the value of the 2017 Transferred Assets at time of transfer, they do not refute the petition's allegation of overpayment.

For the foregoing reasons, the petition sufficiently alleges that the 2017 Transfers were actual fraudulent conveyances under DCL § 276 (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. LP*, 25 AD3d 301, 303 [1st Dept 2006] [holding that "(g)iven the 'badges of fraud,' which include the close relationship among the parties to the transaction, the inadequacy of consideration, (the judgment debtor's) knowledge of (the petitioner's) claims and its inability to pay them, and the timing of the transfer . . . (a) sworn explanation that the transfer was in partial satisfaction of an antecedent rent debt (did) not negate the inference as to intent"]).

Respondents do not challenge the sufficiency of the allegations with respect to the subsequent transfer to Ellington, Mainspring and Montage, other than to challenge the underlying 2017 Transfers. Therefore, to the extent these motions seek to dismiss these turnover claims, the motions are denied.

4. Piercing the Corporate Veils of Mainspring and Montage

Dondero contends that there is no basis to hold him liable as Mainspring's alter ego, because the petition fails to allege the elements of veil-piercing in a nonconclusory way. UBS responds that this ignores the plethora of facts alleged that reveal his personal domination over Mainspring.

Ellington does not challenge the sufficiency of the allegations seeking to hold him liable as Montage's alter ego. Instead, he argues that the claim fails because he had only a 9% voting share in Montage, with the remaining 91% controlled by a trust for the benefit of the Cayman Islands Red Cross (*see* NYSCEF Doc No. 74, Sentinel email to CIMA at DISCSEN0008408,

DISCSEN0008410). UBS responds that, because Ellington guided the decision making of the trustee of the ITA Trust, he was, in fact, controlling Montage's voting shares.[6]

Here, the petition sufficiently alleges that Dondero is Mainspring's alter ego. In addition to alleging that "Dondero is the ultimate beneficial owner of Mainspring" (NYSCEF Doc No. 186, petition ¶ 13), who "owned 99.5% of Mainspring" (*id.* ¶ 113), it alleges that he used Mainspring to enter into fake service agreements in order to pay HCM insiders bonuses that they were otherwise ineligible to receive in HCM's bankruptcy. The petition alleges that Mainspring received no benefit from these agreements and would even pay the obligations of other entities. In this way, the petition alleges, Dondero used Mainspring to reward HCM employees who were loyal to him. (*See id.* ¶¶ 119-128.) Viewed in the light most favorable to petitioner, these allegations permit the inference that Mainspring "is a 'dummy' for its individual stockholder[] who [is] in reality carrying on the business in [his] personal capacit[y] for purely personal rather than corporate ends" (*Port Chester Elec. Constr. Corp.*, 40 NY2d at 657 [internal quotation marks and citation omitted]).

The petition also sufficiently alleges that Dondero used his domination over Mainspring "to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury" (*First Capital Asset Mgt.*, 300 AD2d at 116, citing *Matter of Morris*, 82 NY2d at 141), as it alleges that he used his position as the ultimate beneficial owner of Mainspring, which owned 70% of Sentinel, to compel Sentinel to issue dividends, thereby draining assets that would have

---

[6] UBS made this argument during oral arguments on these motions (*see* July 8, 2024 tr at 83:22-84:8). In its brief in opposition to Ellington's motion, UBS mistakenly assumes that "Ellington does not dispute, and therefore concedes, that UBS sufficiently alleged he is an alter ego of Montag" (NYSCEF Doc No. 333, opposition brief to Ellington's motion at 7).

otherwise been available for collection by UBS (*see* NYSCEF Doc No. 186, petition ¶¶ 113-119).

Accordingly, the petition sufficiently alleges that Dondero was Mainspring's alter ego.

As for Ellington's claim that he did not control the voting shares of Montage, it is contradicted by the very document he cites. In explaining Sentinel's organization chart to CIMA (*see* NYSCEF Doc No. 74, Sentinel email to CIMA at DISCSEN0008410), a Beecher employee states that "ITA acts as trustee of the shares . . . and holds the shares in trust, with the Cayman Islands Red Cross as the beneficiary" (*id.* at DISCSEN0008408). As the petition alleges that Dondero and Ellington were the sole members of the Sentinel Advisory Board of ITA Trust, and that they "guide[d] the decision making of the Trustee of the ITA Trust in its role as an indirect shareholder in Sentinel" (*id.* ¶ 71, exhibit 66 [NYSCEF Doc No. 72] at BC SEN0000076075), this contradicts Ellington's claim that he did not control Montage.

For the foregoing reasons, the motions to dismiss are denied with respect to the second claim to the extent that the claim seeks to hold Dondero liable as the alter ego of Mainspring and to hold Ellington liable as the alter ego of Montage.

C. Converting the Special Proceeding into a Plenary Action

Respondents contend that this proceeding should be converted into a plenary action, because the fact-laden claims at issue are inappropriate for summary disposition. UBS responds that the request should be denied, because there is no basis for it.

Article 52 of the CPLR provides for the enforcement of money judgments and, where the asset sought is not in the possession of the judgment debtor, the article authorizes a turnover proceeding to be brought against the transferee (*see* CPLR 5225 [b]). In fact, "when the 'property' of a judgment debtor is physically held by a third party, the applicable provision is

CPLR 5225 (b), and a special proceeding is required" (*AC Penguin Prestige Corp. v Two Thousand Fifteen Artisanal LLC*, 233 AD3d 576, 577 [1st Dept 2024].) Further, a special proceeding brought pursuant to CPLR 5225 (b) "obviates the necessity for a plenary action" under the DCL (*Siemens & Halske GmbH. v Gres*, 32 AD2d 624, 624 [1st Dept 1969]; *see Matter of WBP Cent. Assoc., LLC v DeCola*, 50 AD3d 693, 694 [2d Dept 2008]) and "may be maintained under an alter ego theory" (*Matter of Rockefeller v Statement Servs., Corp.*, 204 AD3d 922, 924 [2d Dept 2022] [internal citation omitted]).

Based on the foregoing, the request to convert this turnover proceeding into a plenary action is denied. However, petitioner has now charted its course and should not complain later should it need more recourse to discovery than this proceeding will permit.

Accordingly, it is hereby

ORDERED that the motion of respondent Scott Ellington (motion sequence number 011) to dismiss the petition is denied; and it is further

ORDERED that the motion of respondent James Dondero (motion sequence number 013) to dismiss the petition is denied; and it is further

ORDERED that respondents are directed to serve their answers to the petition within 20 days after the electronic filing of this decision and order; and it is further

ORDERED that counsel are directed to appear for a status conference over Microsoft Teams on April 2, 2025 at 11:00 a.m.

25

3/25/2025
DATE

HON. MELISSA A. CRANE
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

650744/2023 UBS SECURITIES LLC ET AL vs. DONDERO, JAMES ET AL
Motion No. 011 013

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

UBS SECURITIES LLC AND UBS AG LONDON BRANCH,

- against -

JAMES DONDERO, SCOTT ELLINGTON, HIGHLAND CDO HOLDING COMPANY, HIGHLAND CDO OPPORTUNITY MASTER FUND, L.P., HIGHLAND FINANCIAL PARTNERS, L.P., HIGHLAND SPECIAL OPPORTUNITIES HOLDING COMPANY, CLO HOLDCO, LTD., MAINSPRING, LTD., and MONTAGE HOLDINGS, LTD.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☐ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ Action Commenced under CPLR 214-g
- ☐ CPLR article 78 Proceeding
- ■ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ■ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	■ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☐ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 03/25/2025	Entered: 03/26/2025
Judge (name in full): Melissa A. Crane	Index No.: 650744/2023
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ■ Yes ☐ No

If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

2024-05185 Appellate Division - First Department

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

James Dondero appeals the Supreme Court's March 25, 2025 Decision and Order denying Dondero's Motion to Dismiss the claims brought against Dondero by UBS Securities LLC and UBS AG London Branch (collectively, "UBS") in the Special Turnover Petition (the "Petition").

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

1. Holding that New York law applies to Petitioners' veil-piercing claims;
2. Holding that the Petition sufficiently alleged that Dondero is the Judgment Debtors' alter ego and that the court has personal jurisdiction over Dondero;
3. Holding that veil-piercing can apply to a limited partnership;
4. Holding that New York law applies to Petitioners' fraudulent conveyance claims;
5. Holding that the Uniform Fraudulent Conveyance Act, not the Uniform Voidable Transaction Act, applies to the 2017 Transfers;
6. Holding that the Petition sufficiently alleged a claim against Dondero for fraudulent conveyance;
7. Holding that the Petition sufficiently alleged that Dondero is the alter ego of Mainspring; and
8. Denying Dondero's request to convert the proceeding into a plenary action.

On appeal, Dondero seeks reversal of the Decision and Order.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	UBS Securities LLC	Petitioner	Respondent
2	UBS AG London Branch	Petitioner	Respondent
3	James Dondero	Respondent	Appellant
4	Scott Ellington	Respondent	None
5	Highland CDO Holding Company	Respondent	None
6	Highland CDO Opportunity Master Fund, L.P.	Respondent	None
7	Highland Financial Partners, L.P.	Respondent	None
8	Highland Special Opportunities Holding Company	Respondent	None
9	CLO Holdco, Ltd.	Respondent	None
10	Mainspring, Ltd.	Respondent	None
11	Montage Holdings, Ltd.	Respondent	None
12			
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Attorney Information			
Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.			
Attorney/Firm Name: Deborah Deitsch-Perez / Stinson LLP			
Address: 2200 Ross Avenue, Suite 2900			
City: Dallas	State: Texas	Zip: 75201	Telephone No: 214-560-2218
E-mail Address: deborah.deitschperez@stinson.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name: Robert J. Lack / Friedman Kaplan Seiler Adelman & Robbins LLP			
Address: 7 Times Square, 28th Floor			
City: New York	State: New York	Zip: 10036	Telephone No: 212-833-1100
E-mail Address: rlack@fklaw.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name: Andrew B. Clubok / Latham & Watkins LLP			
Address: 1271 Avenue of the Americas			
City: New York	State: New York	Zip: 10020	Telephone No: 212-906-1200
E-mail Address: andrew.clubok@lw.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name: Robert S. Landy / Ford O'Brien Landy LLP			
Address: 275 Madison Avenue, 24th Floor			
City: New York	State: New York	Zip: 10016	Telephone No: 212-858-0040
E-mail Address: rlandy@fordobrien.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name: Sawnie A. McEntire / Parsons McEntire McCleary PLLC			
Address: 1700 Pacific Avenue, Suite 4400			
City: Dallas	State: Texas	Zip: 75201	Telephone No: 214-237-4303
E-mail Address: smcentire@pmmlaw.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 201 OF 2025 ( )

BETWEEN:

CHARITABLE DAF HOLDCO, LTD (IN OFFICIAL LIQUIDATION)

Plaintiff

AND

(1) MARK ERIC PATRICK

(2) PAUL MURPHY

(3) CDMCFAD, LLC

(4) DFW CHARITABLE FOUNDATION

(5) CDH GP, LTD. AS GENERAL PARTNER FOR AND ON BEHALF OF CHARITABLE DAF FUND, LP, AND IN ITS CAPACITY AS GENERAL PARTNER

(6) CLO HOLDCO, LTD.

Defendants

WRIT OF SUMMONS

TO: (1) **MARK ERIC PATRICK** of 6716 Glenhurst Drive, Dallas, Texas, 72554, United States of America

THIS WRIT was issued by Maples and Calder (Cayman) LLP, attorneys for the Plaintiff, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: CJM/JRN/TQR/858403.000001/83527361)

EXHIBIT
Q

(2) **PAUL MURPHY** of Windsor Village #24, South Church Street, Grand Cayman, Cayman Islands

(3) **CDMCFAD, LLC** of c/o The Corporation Trust Company, 1209 Orange Street, City of Wilmington, County of New Castle, Delaware, 1980, United States of America

(4) **DFW CHARITABLE FOUNDATION** of c/o The Corporation Trust Company, 1209 Orange Street, City of Wilmington, County of New Castle, Delaware, 1980, United States of America

(5) **CDH GP, LTD. AS GENERAL PARTNER FOR AND ON BEHALF OF CHARITABLE DAF FUND, LP, AND IN ITS CAPACITY AS GENERAL PARTNER** of c/o Campbells Corporate Services Limited, Floor 4, Willow House, Cricket Square, Grand Cayman KY1-9010, Cayman Islands

(6) **CLO HOLDCO, LTD.** of c/o Campbells Corporate Services Limited, Floor 4, Willow House, Cricket Square, Grand Cayman KY1-9010, Cayman Islands

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within 14 days after the service of this Writ on you, counting the day of service, or, if you are served out of the jurisdiction, within such other period of time as the Court may order, you must either satisfy the claim or return to the Registrar of the Financial Services Division, Court Office, PO Box 495, George Town, Grand Cayman, KY1-1106, Cayman Islands, the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 15th day of July 2025

NOTE - This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 201 OF 2025 ( )

BETWEEN:

CHARITABLE DAF HOLDCO, LTD (IN OFFICIAL LIQUIDATION)

Plaintiff

AND

(1) MARK ERIC PATRICK

(2) PAUL MURPHY

(3) CDMCFAD, LLC

(4) DFW CHARITABLE FOUNDATION

(5) CDH GP, LTD. AS GENERAL PARTNER FOR AND ON BEHALF OF CHARITABLE DAF FUND, LP, AND IN ITS CAPACITY AS GENERAL PARTNER

(6) CLO HOLDCO, LTD.

Defendants

STATEMENT OF CLAIM

INTRODUCTION

1 The Plaintiff, Charitable DAF HoldCo, Ltd (in Official Liquidation) (the "**Company**"), is a Cayman Islands exempted company, incorporated on 27 October 2011, having its registered office at HSM Corporate Services Ltd, 68 Fort Street, George Town, PO Box 31726, Grand

FILED by Maples and Calder (Cayman) LLP, attorneys for the Plaintiff, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: CJM/JRN/TQR/858403.000001/83559387)

Cayman KY1-1207. The authorised and issued share capital of the Company is divided into Participating Shares and Management Shares.

2 The Company was placed into court supervised liquidation and Margot MacInnis and Sandipan Bhowmik of Grant Thornton Specialist Services (Cayman) Limited were appointed as joint official liquidators (the "**JOLs**") pursuant to an order of this Honourable Court dated 6 May 2025.

3 The Company was, between November 2011 and 18 December 2024, the sole limited partner of Charitable DAF Fund, LP (the "**Fund**"). At all relevant times, the net asset value of the Fund's assets was c. US$270million.

4 The Fund is a Cayman Islands exempted limited partnership formed to invest and manage assets for the benefit or ultimate benefit of certain registered charitable organisations in the U.S. namely The Dallas Foundation; the Greater Kansas City Community Foundation; the Santa Barbara Foundation and The Community Foundation of North Texas (the "**Charities**"). These charities are the owners or the ultimate beneficial owners of Participating Shares in the Company.

5 In March 2021, Mark Patrick (the "**First Defendant**") was appointed the sole director and registered as the sole Management Shareholder of the Company. In April 2021, Paul Murphy (the "**Second Defendant**") was appointed by the First Defendant as a second director of Holdco.

6 By virtue of a series of transactions or purported transactions between March 2024 and March 2025, unbeknownst to the holders of the Participating Shares (the "**Participating Shareholders**") of the Company, Mr Patrick caused:

6.1 the Company, with the agreement and concurrence of Mr Murphy, to assign its interest in the Fund to the Third Defendant, a Delaware limited liability company, formed in

December 2024 and controlled by Mr Patrick, in exchange for a membership interest in that entity;

6.2 the Company, with the agreement and concurrence of Mr Murphy, to issue and allot further Participating Shares (representing a majority of the issued participating share capital) to the Fourth Defendant, a Delaware company, incorporated in December 2024 and controlled by Mr Patrick;

6.3 the Third Defendant to redeem the Company's membership interest in the Third Defendant for a consideration of c. US$1.6 million, representing approximately 0.59% of the total net asset value of the assets held by the Fund; and

6.4 the Company, with the agreement and concurrence of Mr Murphy, to be placed into voluntary liquidation after having made a final distribution to all Original Participating Shareholders (defined below) in the Company of the proceeds of redemption,

collectively the "**Impugned Transactions**".

7 The First and Second Defendants effected the Impugned Transactions in breach of their fiduciary and other duties to the Company in order to bring ownership of the Fund and its assets, with a net value of c. US$270 million (as assessed at 30 September 2024), under Mr Patrick's effective control to the exclusion of the interests of the Charities. The Charities, as the original, and rightful, ultimate beneficiaries of the Fund, have been left with nothing.

8 Further, during the period March 2021 to June 2024, the First and Second Defendants, in breach of fiduciary duty, caused the Company to pay excessive fees and expenses to Mr Patrick.

FILED by Maples and Calder (Cayman) LLP, attorneys for the Plaintiff, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: CJM/JRN/TQR/858403.000001/83559387)

THE PARTIES

The Company

9 The Company is a Cayman Islands exempted company, incorporated on 27 October 2011, having its registered office at HSM Corporate Services Limited, Ltd, 68 Fort Street, George Town, PO Box 31726, Grand Cayman, KY1-1207, Cayman Islands.

10 The directors of the Company are Mr Patrick (appointed on 25 March 2021) and Mr Murphy (appointed by Mr Patrick on 22 April 2021).

11 The Company has been governed by the following memorandum and articles of association from time to time:

11.1 The memorandum and articles of association dated 27 October 2011; and

11.2 The amended and restated memoranda and articles of association dated 19 January 2015; 24 January 2024; and 20 February 2025 respectively.

The Company remains governed by the memorandum and articles of association as amended and restated on 20 February 2025 (the "**Articles**") save that the Company reserves the right to challenge the validity of the Articles.

12 Save as set out above, the Company will rely on the Articles and all previous iterations for their applicable full terms and effect.

13 Pursuant to the Articles and at all relevant times, the authorised share capital of the Company was US$50,000 divided into 100 Management Shares of US$0.01 par value each and 4,999,900 Participating Shares of US$0.01 par value each.

FILED by Maples and Calder (Cayman) LLP, attorneys for the Plaintiff, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: CJM/JRN/TQR/858403.000001/83559387)

14 The Articles (with reference to the defined term of 'Restricted Person') require that the Participating Shareholders must at all times qualify as a tax-exempt organisation pursuant to section 501(c)(3) of the United States Internal Revenue Code of 1986 ("**IRC**").

15 The Participating Shares do not have voting rights but confer the right to participate in the profits or assets of the Company including by way of the receipt of dividends (Article 12).

16 The Management Shares have voting rights but confer no other right to participate in the profits or assets of the Company (Article 11).

17 The Participating Shareholders therefore have the entirety of the economic interest in the Company, whereas the Management Shareholders have the control rights.

18 On 7 November 2011, the Company issued:

18.1 300 Participating Shares to The Highland Capital Management Partners Charitable Trust #2 ("**Trust #2**"); and

18.2 100 Management Shares to Grant Scott.

19 On 30 November 2011, Trust #2 transferred its 300 Participating Shares equally amongst:

19.1 Highland Kansas City Foundation, Inc.;

19.2 Highland Dallas Foundation, Inc.[1]; and

19.3 Highland Santa Barbara Foundation, Inc.,

collectively, the "**Supporting Organisations**".

[1]Since June 2024, Highland Dallas Foundation, Inc. has also done business as 'NexPoint Philanthropies Dallas, Inc.', per an Assumed Name Certificate filed with the Secretary of State of Texas.

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20 On 12 August 2015, the Company issued 5 Participating Shares to the Community Foundation of North Texas, ("**CFNT**", and together with the Supporting Organisations the "**Original Participating Shareholders**") for Highland Capital Management, L.P. Charitable Fund at CFNT.

21 On 25 March 2021, the Management Shares were transferred to Mr Patrick and he continues to hold these shares.

22 The Participating Shares held by the Original Participating Shareholders represented the entire issued Participating Share capital of the Company until 7 February 2025. On that date, Mr Patrick, with the agreement and concurrence of Mr Murphy, caused the Company to issue 318 Participating Shares to the Fourth Defendant, DFW Charitable Foundation ("**DFW**"), significantly diluting the shareholdings of the Original Participating Shareholders and the indirect economic interest of the Charities.

23 Until 18 December 2024, the sole asset of the Company was its limited partnership interest in the Fund (the "**Partnership Interest**").

24 As a result of the Impugned Transactions, the Company now has no material assets.

DFW

25 DFW (the Fourth Defendant) is a non-profit non-stock corporation incorporated in Delaware on 9 December 2024, which is organised under the General Corporation Law of the State of Delaware exclusively for charitable purposes.

26 DFW is the majority Participating Shareholder of the Company by virtue of the purported share issuance on 7 February 2025, and Mr Patrick is its registered director, president and sole member.

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The Fund

27 The Fund is a Cayman Islands exempted limited partnership formed on 28 October 2011 (registration no. 53083), having its registered office at Campbells Corporate Services Ltd, Floor 4, Willow House, Cricket Square, Grand Cayman, KY1-9010, Cayman Islands.

28 The Fund is governed by the Second Amended and Restated Exempted Limited Partnership Agreement dated 11 March 2024 (the "**LPA**"). The initial exempted limited partnership agreement of the Fund was dated 25 October 2011, was amended and restated on 7 November 2011 and further amended on 26 July 2022 (with effect from 24 March 2021). The Company will rely on the LPA for its applicable full terms and effect.

29 Mr Patrick was instrumental in the establishment of the Company, the Fund and the Fund structure.

30 Until 18 December 2024, the Company was the sole limited partner of the Fund.

31 On 18 December 2024, Mr Patrick, with the agreement and concurrence of Mr Murphy, caused the Company to transfer its limited partnership interest to CDMCFAD, LLC ("**CDM**") (the Third Defendant) in exchange for a membership interest in CDM.

32 The original general partner of the Fund was Charitable DAF GP, LLC (the "**Original GP**"), a Delaware limited liability company registered as a foreign company in the Cayman Islands. The Original GP was the general partner from the Fund's formation until 7 March 2024.

33 On 7 March 2024, the Original GP was replaced by CDH GP, Ltd. (the "**New GP**") (the Fifth Defendant).

34 The sole asset of the Fund is its 100% shareholding in CLO HoldCo, Ltd. ("**CLO HoldCo**") (the Sixth Defendant), a Cayman Islands exempted company incorporated with limited liability,

having its registered office address located at Campbells Corporate Services Limited, Floor 4, Willow House, Cricket Square, Grand Cayman KY1-9010, Cayman Islands.

35 The assets of the Fund were valued at c. $270 million in September 2024.

The New GP

36 The New GP (the Fifth Defendant) is a Cayman Islands exempted company incorporated on 27 February 2024, having its registered office located at Campbells Corporate Services Limited, Floor 4, Willow House, Cricket Square, Grand Cayman KY1-9010, Cayman Islands.

37 Mr Patrick is the New GP's sole director and sole shareholder.

38 The New GP is a defendant to these proceedings in two capacities: (i) in its capacity as General Partner; and (ii) for and on behalf of the Fund in order to join the Fund as a defendant to these proceedings.

CDM

39 CDM (the Third Defendant) is a limited liability company incorporated in Delaware on 12 December 2024, having its registered address c/o The Corporation Trust Company, 1209 Orange Street, City of Wilmington, County of New Castle, Delaware, 19801.

40 CDM is governed by the terms of a Limited Liability Company Agreement dated 18 December 2024.

41 Since 18 December 2024, the primary asset of CDM has been the limited partnership interest in the Fund.

42 The sole manager of CDM is Mark Patrick.

43 From 18 December 2024 to 27 March 2025, the sole member of CDM was the Company.

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44 On 27 March 2025, Mr Patrick caused CDM to redeem the Company and admit DFW as the sole participating member.

CLO HoldCo

45 CLO HoldCo (the Sixth Defendant) is a Cayman Islands exempted company incorporated on 13 December 2010, having its registered office address located at Campbells Corporate Services Limited, Floor 4, Willow House, Cricket Square, Grand Cayman KY1-9010, Cayman Islands, and which is the Fund's main subsidiary.

46 The directors of CLO Holdco are Messrs Patrick and Murphy.

47 The sole shareholder of CLO Holdco is the Fund.

The Directors

Mark Patrick

48 Mr Patrick (the First Defendant) is a U.S. resident who is:

48.1 a director, holds the offices of (i) President, (ii) General Counsel, and (iii) Chief Investment Officer and is the current Management Shareholder of the Company;

48.2 the Manager of CDM (the Third Defendant);

48.3 the sole director and the sole member of DFW (the Fourth Defendant);

48.4 the sole director and sole shareholder of the New GP (the Fifth Defendant); and

48.5 a director of CLO HoldCo (the Sixth Defendant).

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49 Mr Patrick was employed as tax counsel by Highland Capital Management, L.P. ("**Highland**") from 2008 to 2021 and as tax counsel by Highgate Consulting Group, Inc. d/b/a Skyview Group from March 2021 to October 2024.

Paul Murphy

50 Mr Murphy (the Second Defendant) is a Cayman Islands resident who is:

50.1 a director of the Company;

50.2 a director of CLO HoldCo (the Fifth Defendant); and

50.3 a director of various other entities in the Charitable DAF structure.[2]

51 Mr Patrick and Mr Murphy are referred to herein as the "**Directors**".

THE CHARITABLE PURPOSE OF THE FUND

52 The Fund was formed on 28 October 2011 at the instigation of Mr James Dondero, a U.S. resident and the founder of Highland to enable certain assets, held through the shares in CLO Holdco, to be donated to a charitable foundation.

53 Upon the formation of the Fund, the Company was admitted as a limited partner and, by way of capital contribution, contributed all of the outstanding equity interests in CLO HoldCo to the Fund.

54 The purpose of the Fund was to make investments for the ultimate benefit of the Original Participating Shareholders and the Charities:

[2]Mr Murphy was appointed to the board of directors of the following entities on 22 April 2021; Liberty CLO Holdco, Ltd., Liberty Sub, Ltd., HCT Holdco 2, Ltd. and MGM Studios Holdco, Ltd. at the same time as Charitable DAF HoldCo, Ltd and CLO HoldCo, Ltd.

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54.1 The recitals to the LPA of the Fund provide that the purpose of the Fund was to "*make certain investments directly or indirectly on behalf of certain entities exempt from taxation under section 501(c)(3) of the U.S. Internal Revenue Code … for the economic benefit of the Limited Partner and its Indirect Charitable Owners*…".

54.2 Clause 1.3 of the LPA provides that "… *the Partnership may make investments in other types of securities, investment vehicles and instruments in the sole discretion of the General Partner for the purpose of benefitting, directly or indirectly, the Indirect Charitable Owners*".

54.3 Clause 1.6(a) of the LPA provides that "*the Partnership's assets and investments shall be for the benefit of the Limited Partners and not for the economic benefit of the General Partner*".

54.4 "Indirect Charitable Owners" is defined in the LPA as "*the indirect equity owners of the Limited Partners which shall at all times be entities or organizations exempt from taxation under Section 501(c)(3) of the Code or entities or organizations whose sole beneficiaries are entities or organizations exempt from taxation under Section 501(c)(3) of the Code.*" i.e., the Company's Participating Shareholders or the Charities.

54.5 Clause 4.2(a) of the LPA provides that "*Distributions shall be made to the Limited Partner at the times, in a manner (including in kind) and in the aggregate amounts determined by the General Partner, after taking into consideration available cash and the needs of the Indirect Charitable Owners of the Limited Partner for funds to cover their administrative and operating expenses*…".

54.6 The LPA does not modify the statutory duty of the General Partner to act in good faith and in the interests of the Fund.

55 The Charities are the following four US charitable or non-profit foundations:

55.1 *The Dallas Foundation*: a charitable entity established in Texas in 1929 which has awarded over $1 billion in grants and manages over $500 million in assets.

55.2 *Greater Kansas City Community Foundation*: a charitable entity established in Missouri in 1978 which has awarded over $7 billion in grants and manages over $6 billion held in charitable funds.

55.3 *Santa Barbara Foundation*: a charity established in 1928 which is the largest community foundation on California's Central Coast and manages assets of over $800 million.

55.4 *North Texas Community Foundation*: which manages assets totalling $513 million and donated $38.9 million to local non-profits in 2023.

56 The Dallas Foundation, Greater Kansas City Community Foundation and Santa Barbara Foundation (the "**Supported Organisations**") hold their interests in the Company through their respective Supporting Organisation namely Highland Dallas Foundation, Inc. as the Supporting Organisation for The Dallas Foundation; Highland Kansas City Foundation, Inc. as the Supporting Organisation for the Greater Kansas City Community Foundation; Highland Santa Barbara Foundation, Inc as the Supporting Organisation for the Santa Barbara Foundation.

57 CFNT holds its Participating Shares in the Company directly.

THE TAX STRUCTURE

58 As a matter of U.S. tax law, in order for the Supported Organisations to benefit from distributions from the Fund in a tax efficient manner, it was necessary for them to hold their interests through an offshore corporate blocker entity, namely the Company:

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58.1 S501(c)(3) of the IRC provides that charitable organisations which meet certain criteria are exempt from state and federal taxes except to the extent that it receives income classified as unrelated business taxable income ("**UBTI**"); and

58.2 the Supported Organisations and their Supporting Organisations meet the criteria of s501(c)(3). They are therefore generally exempt from U.S. state and federal taxes, with a few exceptions, including to the extent that they receive UBTI.

59 As a matter of U.S. tax law, at least a portion of income received directly from the Fund by the Supported Organisations would likely be considered UBTI.

60 In order to insulate the Supported Organisations from UBTI, instead of holding their interest in the Fund directly, they held through an offshore corporate blocker structure, namely the Company.

THE SUPPORTED ORGANISATIONS CONTROL THE SUPPORTING ORGANISATIONS

61 The Supporting Organisations were incorporated in Delaware by Mr Dondero on or about 22 November 2011 for the purpose of making charitable donations to their respective charity from the proceeds of dividends received by the Supporting Organisations from the Company.

62 Supporting organisations under the IRC are tax exempt charitable organisations that provide financial or operational support to one or more public charitable organisations (called “supported organisations”). Because of the link with the supported public charities, supporting organisations are classified as public charities themselves, as opposed to private foundations, despite the fact that a supporting organisation's sources of funding may be limited to a single individual, which would otherwise cause the entity to be classified as a private foundation.

63 Contributions to supporting organisations, as public charities, qualify for the highest tax deductibility thresholds under the IRC (up to 50% of the taxpayer’s adjusted gross income, or

60%, in the case of cash gifts) instead of the substantially lower threshold for contributions to private foundations (30% of adjusted gross income, regardless of the character of the contribution).

64 The Supporting Organisations are "Type I" tax exempt organisations under the IRC which means they must be organised and operated exclusively to support and benefit their relevant charity and controlled by that charity:

64.1 S509(a)(3) of the IRC contains the qualifications for a "supporting organisation". Under that section, a supporting organisation is a tax-exempt entity that must be organised and then operate exclusively for either (i) the benefit of, (ii) to perform the functions of, or (iii) to carry out the purposes of one or more supported organisations. The supported organisations must also be s501(c)(3) entities;

64.2 There are three types of supporting organisations, known as “Type I”, “Type II” and “Type III”. S509(a)(3)(B)(i), (ii) and (iii) sets out the requirements for each “Type”, respectively;

64.3 S509(a)(3)(B)(i) provides that a Type I supporting organisation must be operated, supervised or controlled by the supported organisation; and

64.4 S509(a)(3)(C) provides that the supporting organisation may not be controlled by a disqualified person, other than the foundation managers and the supported organisation.

65 The Supporting Organisations are so controlled by the respective Supported Organisations.

66 The Supporting Organisations are governed by the terms of their respective Certificate of Incorporation and by-laws (the "**Bylaws**").

67 The Certificates of Incorporation provide (amongst other things) that:

67.1 the Supporting Organisation:

(a) is organised and shall be operated exclusively for charitable, educational and scientific purposes;

(b) is organised and operated exclusively to support and benefit the particular charity that controls it; and

(c) is a non-profit non-stock corporation and cannot issue any capital stock;

67.2 no part of the net earnings of the Supporting Organisation shall be distributable to the directors and officers of the Supporting Organisation or other private persons save that the Supporting Organisation can pay reasonable compensation for services rendered; and

67.3 net earnings can be used to make grants, loans and similar payments for charitable, educational and scientific purposes to benefit the relevant Supported Organisation.

68 The Bylaws provide that (amongst other things):

68.1 There are two classes of members of the Supporting Organisations with one member in each such class:

(a) the institutional member (the "**Institutional Member**") which shall be the Supported Organisation; and

(b) the individual member (the "**Individual Member**") which shall be Mr Dondero or an individual designated as the Individual Member in the Bylaws.

68.2 In terms of voting on a matter submitted to a vote of the members (except as otherwise provided in the Bylaws):

(a) the Institutional Member is entitled to two votes; and

(b) the Individual Member is entitled to one vote.

68.3 Institutional membership is not transferable or assignable.

68.4 Individual membership is transferable or assignable only upon approval of the Institutional Member.

68.5 Both the Institutional Member and the Individual Member must be present in person or by represented proxy to constitute a quorum at all meetings of members.

68.6 There shall be three directors of the board of the Supporting Organisation. Two directors shall be elected annually by the Institutional Member and one director shall be elected annually by the Individual Member.

69 The relationship between the Supporting Organisations and their respective Supported Organisation are governed by separate operating/legal relationship agreements (collectively "**Operating Agreements**"). These agreements provide, among other things, that:

69.1 the Supported Organisation will provide certain services to the Supporting Organisation;

69.2 the Supported Organisation will appoint two of the three directors of the Supporting Organisation as required by Bylaws; and

69.3 in consideration for the services provided by the Supported Organisation to the Supporting Organisation, the Supporting Organisation shall pay a fee to the Supported Organisation.

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16

70 Mr Dondero sits on the board of each of the Supporting Organisations with two other directors from each of the Supported Organisations respectively.

71 The relationships, rights and obligations created by and between the Supported Organisations and the Supporting Organisations pursuant to the agreements entered into between them were at all material times in summary that:

71.1 the Supported Organisations control the Supporting Organisations through their majority voting interest and their ability to elect a majority of the directors of the Supporting Organisations;

71.2 the Supporting Organisations support the Supported Organisations by way of making grants to them from time to time from their assets, including any dividends received from the Company;

71.3 the Supporting Organisations have no ability to pay dividends to any private person or make payments to their directors (save reasonable reimbursement for reasonable out-of-pocket expenses) and can only make grants to the relevant Charity in furtherance of their charitable purposes; and

71.4 while Mr Dondero sits on the board of the Supporting Organisations, he does not control them, as a supermajority of the votes are always held by the respective Charity.

72 The Company will rely on the Certificates of Incorporation, Bylaws, Operating Agreements and terms of the IRC for their applicable full terms and effect.

THE CONTROL POSITION OF MR PATRICK OVER THE COMPANY AND THE FUND

73 The terms of the LPA grant sole control over the management and distribution of the Fund's assets to the General Partner. The terms of the Articles grant sole control over the management and distribution of the Company's assets to the Management Shareholder.

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The LPA

73.1 Clause 1.12

(i) The term "**General Partner**" shall refer to Charitable DAF GP, LLC, and each other person subsequently admitted as a general partner pursuant to the terms of this Agreement. The General Partner shall give each Limited Partner notice of any change in control of the General Partner. The General Partner shall give each Limited Partner notice of the admission of any additional general partner to the Partnership.

73.2 Clause 1.6

(i) Subject to the terms and conditions of this Agreement, the General Partner shall have full, exclusive and complete discretion in the management and control of the business and affairs of the Partnership, shall make all decisions regarding the business of the Partnership, and shall have all of the rights, powers and obligations of a general partner of a limited partnership under the laws of the Cayman Islands. Except as otherwise expressly provided in this Agreement, the General Partner is hereby granted the right, power and authority to do on behalf of the Partnership all things which, in the General Partner's sole discretion, are necessary or appropriate to manage the Partnership's affairs and fulfill the purposes of the Partnership; provided, however the Partnership's assets and investments shall be for the benefit of the Limited Partners and not for the economic benefit of the General Partner.

(ii) Except as otherwise provided herein, the Limited Partners, in their capacity as Limited Partners, shall not participate in the management of or have any control over the Partnership's business nor shall the Limited Partners have the power to represent, act for, sign for or bind the General Partner or the Partnership. The Limited Partners

hereby consent to the exercise by the General Partner of the Powers conferred on it by this Agreement.

The Articles

73.3 Article 11

The Management Shares shall be issued at par value and shall carry the right to receive notice of and to attend, to speak at and to vote at any general meeting of the Company. In the event of a winding up or dissolution of the Company, whether voluntary or involuntary or for the purposes of a reorganization or otherwise or upon any distribution of capital, the entitlement of the holders of Management Shares shall be determined in accordance with these Articles. Management Shares confer no other right to participate in the profits or assets of the Company.

73.4 Article 12

Participating Shares shall confer upon a Shareholder no right to receive notice of, to attend, to speak at nor to vote at general meetings of the Company but shall confer upon the Shareholders rights in a winding-up or repayment of capital and the right to participate in the profits or assets of the Company in accordance with these Articles.

73.5 Article 13

…the rights attached to any such Class may… only be materially adversely varied or abrogated with the consent in writing of the holders of not less than two-thirds of the issued Participating Shares of the relevant Class or with the sanction of a resolution passed at a separate meeting of the holders of the Participating Shares of such Class by a majority of two-thirds of the votes case at such a meeting.

73.6 Article 84 (d)

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19

The office of Director shall be vacated if the Director…is removed from office by Ordinary Resolution.

The definition of Ordinary Resolution is a vote of the Management Shares.

73.7 Article 99

Subject to any rights and restrictions for the time being attached to any Shares, or as otherwise provided for in the Act and these Articles, the Directors may from time to time declare dividends (including interim dividends) and other distributions on Shares in issue and authorise payment of the same out of the funds of the Company lawfully available therefor.

73.8 Article 104

Subject to any rights and restrictions for the time being attached to any Participating Shares, all dividends shall be declared and paid in such amounts as may be declared by the Director's in their sole and absolute discretion without a requirement to pay such dividends on a pro-rata basis as to the paid-up or par value of the Shares.

74 The Management Shares in the Company and the General Partner in the Fund have at all material times been held and/or controlled by a single individual who, as a result, has sole control of the Fund structure (the "**Control Position**"):

74.1 In or around November 2011:

(a) Grant Scott was appointed as the sole director and allotted the 100 Management Shares of the Company; and

(b) Grant Scott became the holder of the membership interest in the Original GP and was appointed the Manager thereof,

thereby assuming the Control Position from that date.

74.2 In or around 24 March 2021, Mr Scott:

(a) assigned 100% of the membership interest in the Original GP to Mr Patrick pursuant to an Assignment and Assumption of Membership Interests Agreement, which membership interest gave Mr Patrick the sole right to manage the Original GP;

(b) transferred to Mr Patrick the 100 Management Shares in the Company; and

(c) resigned as a director of the Company and resolved to appoint Mr Patrick as the sole director in his place.

74.3 On 25 March 2021, Mr Patrick was entered into the Company's Register of Members as the holder of the Management Shares.

74.4 Mr Patrick therefore assumed the Control Position from that date.

74.5 On 22 April 2021, Mr Patrick resolved to appoint Mr Murphy as a second director of the Company.

74.6 On 7 March 2024, by way of a Deed of Assignment and Assumption, Mr Patrick, as managing member of the Original GP, caused the Original GP to transfer its general partnership interest in the Fund to the New GP.

74.7 Mr Patrick is the sole shareholder and director of the New GP.

74.8 Mr Patrick therefore remains in the Control Position and was in such position at all relevant times since 25 March 2021.

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21

75 Further, the sole asset of the Fund is its shares in CLO Holdco (the Sixth Defendant). Mr Patrick and Mr Murphy are the directors of CLO Holdco and were appointed on 2 April 2021 and 22 April 2021 respectively.

76 The Control Position was not and is not a term of art but was nevertheless a legal and factual position:

76.1 where a single individual was the sole Management, and therefore voting, Shareholder of the Company;

76.2 where the same individual was a director of the Company;

76.3 where the same individual was the sole shareholder or controller of the General Partner;

76.4 where the same individual was a director of the General Partner;

76.5 where the same individual was in complete and effective control of at least the Company, of the General Partner, of the Fund and of CLO Holdco;

76.6 where the same individual was in effective sole control of all assets of the Fund;

76.7 where the same individual had no economic, residual, beneficial or winding up interest in assets of the Company;

76.8 where the same individual had no economic, residual, beneficial or winding up interest in assets of the General Partner;

76.9 where the same individual had no economic, residual, beneficial or winding up interest in assets of the Fund;

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76.10 where the same individual was, irrespective of his or her formal positions, functions or duties, including as a director, acting as a trustee, fiduciary or in a trustee-like or fiduciary-like position with respect to the assets held by the Fund;

76.11 where the same individual was at all times acting solely for the benefit or the ultimate benefit of the Original Participating Shareholders and/or through them the Supported Organisations and/or through them the Charities; and

76.12 in the alternative to the plea directly above, where the duties otherwise owed by the same individual as a matter of law, including as a director, were affected and/or altered by the existence of the structure as pleaded above, including the facts and matters relating to the Control Position and including the fact that the structure as pleaded above was designed and intended to be solely for the benefit or the ultimate benefit of the Original Participating Shareholders, and/or through them the Charities.

EVENTS RESULTING IN THE COMPANY HAVING NO MATERIAL ASSETS AND THE DILUTION OF THE SUPPORTING ORGANISATIONS' INTERESTS

Plan to defeat the interests of the Original Participating Shareholders

77 On 9 November 2023, Shields Legal Group ("**Shields Legal**") (the U.S. attorneys for the Company) sent to Campbells LLP ("**Campbells**") (then Cayman Islands attorneys for the Company) a work plan (the "**Work Plan**") relevant to the Company, the Fund and CLO HoldCo.

78 It can be inferred, and is averred, that the purpose of the Work Plan and the subsequent advice and steps taken as detailed below was to seek to entrench Mr Patrick's Control Position and defeat the interests of the Original Participating Shareholders.

79 The Work Plan stated that (amongst other things):

79.1 the advice required related to "…*potential disputes and corporate reviews and best practices for each, including proactive corporate actions, solidifying defenses, etc*...";
and

79.2 "…*we may need to rely on opinions and memoranda in potential future disputes*..."

80 The Work Plan set out the issues on which the Directors sought advice, including among other things the following questions:

80.1 'Can the controlling person dilute shares, e.g., the Participation Shares?'

80.2 'Can the controlling person redeem shares, e.g., the Participation Shares?'

80.3 'Is there any Cayman law requirement that the Company distribute money upwards to the next level of entities (Highland Dallas Foundation, Inc. and others)?'

80.4 'Could the Company liquidate, distribute all its assets elsewhere, or otherwise make the Participation Shares worthless?'

80.5 'What can be done at this point to make [the share transfers in the Company from Mr Scott to Mr Patrick] bullet proof?'

81 The Directors were advised that any steps taken in relation to the proposed issuance of new Participating Shares and withholding dividends must be in compliance with their fiduciary duties and taken in the best interest of the Company:

81.1 On 8 January 2024, Walkers (Cayman) LLP ("**Walkers**") (also then Cayman Islands counsel for the Company) provided advice on issues set out in the Work Plan to the effect that (amongst other things)*:*

(a) the Directors have power under the Articles to issue new Participating Shares that dilute the current Participating Shareholders, but must consider their fiduciary duties (including the duty to act in the best interests of the Company) when issuing such shares;

(b) the Participating Shares are non-redeemable;

(c) while payment of a dividend or other distribution is at the discretion of the Directors, if the Company were to have distributable reserves available, there may be a question of whether the Directors would be acting in its best interests to not pay some dividend or distribution; and

(d) the Directors have fiduciary duties to the Company which are paramount when considering (i) making a distribution and (ii) the distributable reserves available from which to make payments; they must have regard to what is in the Company's best interests, its future cash requirements, and its present and future solvency.

82 In February 2024, without telling the Supporting Organisations or the Charities, Mr Patrick sought to form a new entity to replace the Original GP. On 5 February 2024, Walkers emailed Mr Patrick to ask whether that entity should be a Cayman LLC or an exempted company, to which he responded later that day: "*Doesn't matter to me. Whatever from a strategic point of view - hard to find or track, or trace. Or find owners etc. Generic name. Strong litigation protection*."

83 On 27 February 2024, without telling the Supporting Organisations or the Charities, the New GP (the Fifth Defendant) was incorporated in the Cayman Islands.

84 On 7 March 2024, Mr Patrick, in his capacity as Managing Member of the Original GP, and without telling the Supporting Organisations or the Charities, executed a written consent for the

transfer of the GP Interest to the New GP, thereby replacing the Fund's General Partner. The Supporting Organisations subsequently discovered this change only by chance in February 2025.

85 In or around August 2024, the Supporting Organisations were provided with a financial analysis (prepared by NexPoint Advisors LP) of the Fund's annual expenses which showed or appeared to show increases in expenditure, particularly as follows (and without prejudice to any further relevant facts and matters relating to Directors' fees or expenses):

85.1 directors' fees increased from around US$40,000 in 2022 to almost US$600,000 in 2023 – and increased further to around US$2.25 million in the first half of 2024; and

85.2 expenses overall for the first half of 2024 were around US$18.3 million – almost the same amount spent over the entire course of 2023 (i.e. US$18.6 million).

86 On 13 September 2024, without telling the Supporting Organisations or the Charities, the Directors resolved (amongst other things) with respect to Mr Patrick's compensation:

86.1 to increase Mr Patrick's salary to US$850,000 per annum;

86.2 include a long-term incentive ("**LTI**") tied to the Fund's returns, being 7.5% of annualised net fund returns in excess of 10% (capped at 25% annualised return); and

86.3 the Company should assess legal expenses attributable to investment which impacted the LTI compensation and then determine whether the LTI compensation should be increased.

87 On 1 October 2024, without telling the Supporting Organisations or the Charities:

87.1 the Directors resolved (amongst other things) that Mr Patrick would receive:

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(a) an LTI payment of US$975,000; and

(b) an 'annual discretionary bonus' for 2023 at an amount of 2.5 times his base salary.

87.2 Previously, in or around October 2021, Mr Patrick had signed an 'employment agreement' for his position at the Company, for the period commencing 24 March 2021, which provides that Mr Patrick:

(a) shall receive a base salary of US$850,000;

(b) shall receive an LTI payment for the period 24 March 2021 to 24 March 2024 in the amount of US$4,759,000; and

(c) is eligible for both annual and discretionary bonuses as determined at the 'sole and absolute discretion of the Directors'.

88 Comparatively, Mr Scott's salary during his tenure in the Control Position was approximately US$60,000 per annum. Notwithstanding the above, the Supporting Organisations were not informed of these increases to the Directors' fees, remuneration and/or benefits.

89 In late October 2024, as a result of concerns arising from this additional expenditure, the Supporting Organisations requested that Mr Patrick provide relevant financial information for the Company and the Fund. Mr Patrick did not do so.

90 On 11 November 2024, Holland and Knight ("**H&K**"), U.S. attorneys for the Supporting Organisations, issued a letter to Mr Murphy advising that the Supporting Organisations no longer had confidence in the governance of the Company and/or the Fund and considered that a reorganisation of the governance structures was required to protect the charitable efforts of the Supporting Organisations (the "**No Confidence Letter**").

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91 On 26 November 2024, Mr Patrick sought advice from Walkers as to whether the Company could issue further Participating Shares to a new non-profit organisation to dilute the Supporting Organisations so as to weaken any winding-up petition brought by the Supporting Organisations on just and equitable grounds. Mr Murphy wrote that:

> "*Issuance of new participation shares, where the existing foundations represent a smaller % of the issued and outstanding shares, would weaken any petition based on just and equitable grounds but we must be careful they don't point to this as ground to wind up i.e. the existing foundations say we're artificially trying to weaken their position by diluting them therefore the company should be wound up or an order made for change of management /revocation of the share issuances. It's a very difficult situation to get right without gifting them a potential ground…*"

92 On 27 November 2024, Walkers responded to the Directors confirming that, if other shareholders were to oppose an equitable winding up, such opposition will be taken into consideration and would likely help.

93 On 9 December 2024, DFW was incorporated as a non-profit non-stock company in Delaware, by or with the assistance of Mr Douglas Mancino, partner of U.S. firm, Seyfarth Shaw LLP ("**Seyfarth**"), who, worked alongside Mr Patrick in the establishment of the Company and the Fund structure. The sole member of DFW was and is Mr Patrick.

94 On 7 February 2025, 318 Participating Shares were issued to DFW.

95 On 20 February 2025, Mr Patrick as the Management Shareholder of the Company resolved to adopt the Amended and Restated Memorandum and Articles of Association dated 20 February 2025 which, among other things:

95.1 Amended the Memorandum at paragraph 3 to give the Company charitable objects;

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95.2 Amended article 70 to introduce the concept of a Management Director (being a director holding the Management Share) and to weight the voting such that on all matters the Management Director had 10 votes and any other directors had 1 vote;

95.3 Deleted the previous articles 70 and 71 giving the right to appoint alternate directors and proxies. By email dated 27 February 2025, Walkers confirmed that the purpose of this deletion was to "*avoid the risk of 'outsiders' being brought into the fold*".

96 The Company reserves its position in respect of the validity of these amendments.

The purported restructuring: Mr Patrick causes the assignment of the Partnership Interest to CDM

97 On 12 December 2024, CDM was incorporated as a limited liability company in Delaware.

98 On 18 December 2024, without telling the Supporting Organisations or the Charities, the Directors of the Company resolved (the "**Transfer Resolutions**") to approve the transfer of the entirety of the Company's limited partnership interest in the Fund to CDM, in consideration for the contribution by the sole member of CDM of 100% of the membership interest in CDM. The Transfer Resolutions provide (amongst other things) that, based apparently on U.S. tax advice, the transfer of the limited partnership interest to CDM:

98.1 *"…would help insulate the DAF from exposure to [Dondero] and his entities who may be at risk of causing the [IRS] to revoke the tax-exempt status of one or more of the Participating Shareholders/supporting organizations which could imperil the assets of the Company*";

98.2 "*The IRS would look favorably upon any and all attempts for DAF to maintain its influence from what seems to be persistent attempts by Dondero and the entities controlled by him to use DAF for his private benefit and private inurement*";

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98.3 As a Delaware limited liability company (CDM): "…*as permitted under the LLC Act, the terms of the LLC Agreement eliminate the fiduciary duties of the manager of the Transferee*".

99 On 18 December 2024, without telling the Supporting Organisations or the Charities, the Company, CDM and the New GP entered into a Deed of Assignment and Assumption (the "**Deed**") which was executed by Mr Patrick on behalf of each of (i) the Company in his capacity as Director; (ii) CDM in his capacity as Manager; and (iii) the New GP in his capacity as Director. Pursuant to the terms of the Deed:

99.1 The Company assigned its entire limited partnership interest in the Fund to CDM (the "**CDM Assignment**").

99.2 The New GP provided its written consent to the CDM Assignment and the admission of CDM as the new limited partner, in accordance with clause 1.11(a) of the LPA.

99.3 CDM agreed to exercise its reasonable best endeavours to ensure that 100% of the membership interest in CDM held by Mr Patrick would be transferred to the Company (the "**CDM Membership Interest**").

100 On 18 December 2024, the Company (as member) and Mr Patrick (as manager) entered into a Delaware law governed Limited Liability Company Agreement in respect of CDM (the "**LLC Agreement**").

101 The LLC Agreement, materially provides (amongst other things) that:

"Fair Market Value shall have the meaning set forth in Section 6.9(b).

…

The initial Manager shall be Mark Patrick.

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30

…

6.5 No Duties to the Company. To the fullest extent permitted by law, including Section 18-1101(c) of the Act, and notwithstanding any other provision of this Agreement or in any agreement contemplated herein or applicable provisions of law or equity or otherwise, the parties hereto hereby agree that the Manager shall owe no fiduciary duty to any Member or the Company; provided, however, that the foregoing shall not eliminate the duty to comply with the implied contractual covenant of good faith and fair dealing.

…

6.9 Valuation of Company Assets.

(a) General. The Manager shall make a good faith determination of the value of the Company's assets in connection with any distribution pursuant to Section 8.1(b), as required under Section 4.3(c), upon the dissolution of the Company, and whenever otherwise required by this Agreement or determined by the Manager.

(b) Binding Effect. The value of any Company asset or Interest determined pursuant to this Section 6.9 shall be binding upon the Company and the Members and shall establish the "Fair Market Value" of such asset or Interest for all purposes under this Agreement.

…

7.3 Redemption. The Manager, in its sole discretion, may cause any Member's Interest to be redeemed by the Company for any reason. Any Interest of a Member to be redeemed by the Company shall be redeemed for the Fair Market Value of such Interest, as determined by the Manager in its sole discretion. Such payment to the

Member shall either be made in cash or pursuant to a promissory note. Such promissory note shall: (i) provide for interest at the lowest rate necessary to avoid the imputation of additional interest under the Code; and (ii) have a stated principal amount of the Fair Market Value of such Member's Interest being redeemed, as determined by *the Manager in its sole discretion."*

102 The Company will rely on the terms of the LLC Agreement for their applicable full terms and effect.

103 The effect of these transactions was that:

103.1 CDM was inserted into the corporate structure below and as a subsidiary of the Company and would hold the entirety of the limited partnership interest in the Fund previously held by the Company; and

103.2 The Company would hold the entire membership interest in CDM, with the result that the Company's sole asset, having previously been its limited partnership interest in the Fund, was exchanged for the CDM Membership Interest

(the "**Restructuring**")

104 The Restructuring was at an undervalue and not in the interests of the Company (in that the CDM Membership Interest was less valuable than the limited partnership interest that the Company assigned to CDM) because (amongst other things)*:*

104.1 The General Partner owed fiduciary duties to the Company in the Fund, but the Manager (Mr Patrick) did not owe any fiduciary duties to CDM; and

104.2 The CDM Membership Interests were susceptible to being redeemed by Mr Patrick (as Manager) in his sole discretion and for any reason, for "fair market value" as defined by Article 6.9, i.e. a "good faith determination of the value".

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105 On 3 April 2025, the Company obtained retrospective advice from Leading Counsel on the steps taken by the Company in December 2024 to effect the Restructuring and whether the transfer is "*open to challenge by the Participating Shareholders*", which advice:

105.1 refers to the justifications for the decisions taken as set out in the Restructuring Resolutions, and considers that, if called upon to justify the purpose of those decisions, the Directors would need to explain:

(a) how the penalisation or loss of tax-exempt status any of the current Participating Shareholders could have "*imperil[ed]"* the *"assets"* of the Company;

(b) the detrimental issues the Company was facing that the Directors believed would be mitigated by the interposition of CDM into the Fund structure; and

(c) how and/or why the Restructuring would (i) benefit the Company and (ii) reduce the influence of Mr Dondero; and

105.2 considers that a shareholder reviewing the reasons listed in the Restructuring Resolutions "*might suggest that the contents of the resolution are self-serving and do not tell the full story, but rather seek to obscure the true motivations of the board*".

Persistent and continual lack of information for the Supporting Organisations

106 On 23 January 2025, having received no response from Mr Murphy to the No-Confidence Letter, Julie Diaz, the CEO of The Dallas Foundation, sent Mr Patrick an email advising that the Supporting Organisations needed to better understand the Company's/Fund's asset position, and requesting certain information be provided by 10 February 2025.

107 Having received no response, on 28 January 2025, Ms Diaz sent a further email to the Directors expressing serious concern (i) that the Supporting Organisations' requests for information

continued to be disregarded, and (ii) about the ongoing lack of transparency on the part of the Directors.

108 On 30 January 2025, Mr Murphy replied to Ms Diaz stating that the Directors:

108.1 had not received the 23 January email – but understood the next step was for the Directors to "*present directly*" to the Supporting Organisations to address the No-Confidence Letter; and

108.2 are cooperating with the Supporting Organisations to provide additional information – but "*have no legal obligation to do so*" and such cooperation "*should not be construed as an implicit acknowledgement of any duty to continue providing information to you*".

109 On 31 January 2025, Mr Michael Stockham of H&K responded to Mr Murphy noting that he and Mr Patrick were fiduciaries, managing US$270 million in assets for the benefit of charities that support the most vulnerable (i.e. the Charities) and: *"[w]hatever your side's obvious antagonism to Mr Dondero, the fact remains that the underlying assets are ultimately for these charitable missions.*"

110 On 4 February 2025, Mr Murphy responded that while open to resolving the concerns, they (i.e. the Directors) were struggling to understand the Supporting Organisations' change in position.

111 On 7 February 2025, H&K responded that the Directors were fiduciaries in control of US$270 million for the benefit of charities: "*these monies are for improving the quality of life of children, building pathways for everyone to have a fair opportunity to succeed and … fostering a love for education. They are not meant to pay you and Mr. Patrick millions in director fees*".

112 On 14 February 2025, H&K received a letter from Mr Mancino which rejected the accuracy of the reported increases in expenditure. On 27 February 2025, H&K responded that his clients

were frustrated by the lack of transparency and refusal to answer simple queries about the financial position. In response, Seyfarth sought available dates for Mr Murphy to make the promised presentation to the Supporting Organisations. H&K responded the next day with three potential dates/times for the proposed call between 26 March and 3 April 2025. Mr Mancino did not respond.

113 On 20 March 2025, Mr Mancino sent a letter purportedly on behalf of the Company to the IRS about alleged undue influence and control exercised over the Supporting Organisations by Mr Dondero. The letter makes serious and unsubstantiated allegations about the Supporting Organisations, absent evidential support, including that they each (i.e. all of them): "*operates for Mr Dondero's private benefit when he uses his influence or control over them to cause them to use or attempt to use their influence as Participating Shareholders of DAF Holdco to wrest control of DAF Holdco and its assets…*".

114 On 3 April 2025, Mr Mancino sent an email to H&K stating that he had just learned there was a call scheduled for the following day and seeking to reschedule. H&K responded that no such call had been arranged and queried the apparent source of confusion.

115 Mr Mancino, and Mr Patrick and Mr Murphy (each in part through Mr Mancino as an instructed attorney) acted in bad faith by maintaining a pretence of actual or potential cooperation with the Supporting Organisations when this was not the case, and by sending or causing to be sent the email of 20 March 2025 in secret:

115.1 four (4) months after the Directors and/or the Company transferred away the Company's interest in the Fund without telling the Supporting Organisations or the Charities;

115.2 two (2) months after the Directors and/or the Company diluted the existing Participating Shareholders without telling the Supporting Organisations or the Charities (see below);

115.3 one (1) week after the Directors and/or the Company redeemed the Company's interest in CDM without telling the Supporting Organisations or the Charities (see below);

115.4 one (1) day after the Directors placed the Company in voluntary liquidation, without telling the Supporting Organisations or the Charities.

Purported Share Issuance and allotment to DFW

116 In November 2024, without telling the Supporting Organisations or the Charities, the Directors began seeking advice from Walkers on whether the Company could issue new Participating Shares that would have the effect of diluting the existing Participating Shareholders - "*in light of a possible just and equitable winding up petition*" being filed by one of the Supporting Organisations.

117 On 7 February 2025, Walkers advised that, while there must be a corporate benefit to the exercise of the power, the Articles grant the Directors power to issue new shares that dilute the Participating Shareholders, and recommended the shares be issued sooner than later, and before any winding up petition was presented, since any alteration to the Company's membership made after the presentation of the petition would be void.

118 On 7 February 2025, without telling the Supporting Organisations or the Charities, the Directors resolved to issue 318 Participating Shares to DFW (the "**Share Issue Resolutions**"), resulting in DFW owning 51.04% of the Participating Shareholding and the dilution of the Supporting Organisations from an aggregate shareholding of 100% to 48.96% (the "**Share Issuance**"). The Share Issue Resolutions provided that:

118.1 Participating Shareholders had requested information and made false and misleading claims about the Company and its finances which the Directors believe were directed by Mr Dondero.

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118.2 Based apparently on U.S. tax advice:

(a) There was a heightened risk the IRS could revoke the tax-exempt status of the Participating Shareholders which could imperil the status and assets of the Company.

(b) Increasing the number of Participating Shareholders would mitigate the undue influence and private inurement of Mr Dondero.

(c) The IRS would look favourably upon attempts by the Fund to maintain its independence from his (i.e. Mr Dondero's) attempts to use the Fund for his private benefit.

118.3 The Directors believed the Share Issuance to DFW would protect the Company and the Participating Shareholders and resolved that the Share Issuance to DFW be approved.

119 On 5 March 2025, Leading Counsel (Mr Tony Beswetherick KC) issued draft retrospective (but final) advice to the Company on the Share Issuance in which he opined (amongst other things) as follows:

119.1 where Articles confer a power on directors to issues shares, that power is a fiduciary one and must only be exercised for proper purposes; an issue of shares "…*deliberately aimed at altering the balance of power between*" is problematic; the power should not be exercised with a view to altering an existing balance of power, irrespective of whether the directors consider that doing so is in the interests of the company;

119.2 the effect of the Share Issuance was that, if there were to be a company meeting or proposal to approve a modification that affects the Participating Shareholders' rights,

the ability of the prior Participating Shareholders to vote down such a change was negatively affected (DFW now having over 50% of the total Participating Shares);

119.3 it is not immediately clear from the Share Issue Resolutions whether the justifications stated were actually relevant to the Directors' decision. If they were relevant, it is not explained why the issue of shares to DFW would prevent false claims being made by Mr Dondero; it may be that those matters are part of the context, rather than part of the reason for the decision; and

119.4 the Participating Shareholders might suggest the Share Issue Resolutions are self-serving and do not tell the full story, but rather seek to obscure the true motivations of the board.

Plan to redeem the Original Participating Shareholders

120 In January and February 2025, the Directors, in connection with a plan to try to redeem the Participating Shareholders and/or the CDM Membership Interest held by the Company, and without telling the Supporting Organisations or the Charities, sought to obtain an analysis of the fair market value of the Participation Shares, and the discount that should be applied to such valuation, given the limited rights conferred upon Participating Share under the Articles.

Historic ValueScope Valuations

121 At the request of the Company, ValueScope, Inc. ("**ValueScope**") conducted a series of valuation analyses of 100 Participation Shares on a net asset value ("**NAV**") basis between December 2020 and September 2024 to determine their fair market value ("**FMV**"). These valuations were apparently prepared for internal reporting purposes and apparently applied consistent methodologies throughout the period. The results of these valuations are summarised below:

Valuation date	NAV	NAV Per Share	Combined Discounts	FMV Per Share	FMV (100 shares)
31 December 2020	$176.96M	$580,193	17.0%	$481,468	$48,146,754
31 December 2021	$243.19M	$797,343	11.6%	$705,210	$70,521,019
31 December 2022	$276.24M	$905,711	15.4%	$766,549	$76,654,941
31 December 2023	$277.57M	$910,076	14.0%	$782,847	$78,284,712
30 September 2024	$269.05M	$882,140	13.9%	$759,614	$75,961,370

122 The final NAV-based valuation prepared by ValueScope prior to the Restructuring was dated 7 January 2025, and gave a valuation of 100 Participating Shares as at 30 September 2024 (the "**September 2024 Valuation**").

PwC and FTI

123 On 14 January 2025, Walkers inquired with PwC about a valuation of "*the shares of Charitable DAF Holdco*". In that email, Walkers, presumably on instructions from the Directors, listed the Supporting Organisations as "*potential adverse parties*".

124 On 7 February 2025, Walkers informed PwC that CDM had been inserted into the structure and requested that a second valuation be prepared of all the CDM Membership Interest, which valuation Walkers said was also to rely on the NAV as previously advised (rather than leaving

PwC to determine their own valuation methodology). PwC responded that their initial view is "*there is no meaningful difference*" between the two valuations requested - "*i.e. the economic interest in the underlying NAV still fully accrues to the participating shareholders*" - but that voting power/control remains with Mr Patrick (or with entities he controls). PwC asked for further information about what Mr Patrick was trying to achieve by the Restructuring to help them understand the valuation implications.

125 On 10 February 2025, PwC suggested a call with Walkers to discuss the second valuation, which call took place on 11 February 2025, and was also attended by Mr Patrick's '*onshore and Delaware counsel*'. Following that call, PwC declined to take on the instructions:

> *"... our view is that the new Delaware entity (CDMCFAD) effectively has full economic interest and control over the Fund, so we don't really see a basis for applying any discounts to the underlying Fund NAV for that entity. As it relates to the participating shareholders' interest in Charitable DAF Holdco, Ltd., we don't think we can reliably estimate the value/discount given the current fact pattern. While we could make hypothetical assumptions about how the articles may be interpreted, and/or how future cash flows may or may not be distributed, the impact on value is so substantial that we don't think it would be a meaningful exercise (i.e. we'd end up with the discount being 100% in one scenario, but 0% in another). On that basis, I don't think there is a fee / scope that can work for us currently."*

The FTI Memo

126 On 13 February 2025, without telling the Supporting Organisations or the Charities, the Company engaged FTI Consulting in London ("**FTI**") to advise on (i) the discount applicable (if any) to a valuation considering how the rights attached to Participation Shares differed from those typically associated with ordinary shares, and (ii) the impact of the existence of an additional share class (being the Management Shares held by Mr Patrick). FTI's engagement

letter also stated that "*The Memo will also include a valuation of the ordinary shares of CDMCFAD, LLC, the immediate subsidiary of Charitable DAF HoldCo*".

127 On 2 March 2025, FTI provided a draft memorandum to Walkers/the Company.

128 On 27 March 2025, FTI issued its final memorandum (the "**FTI Memo**"), which stated (amongst other things) that the rights of Participating Shares were extremely limited, and the potential distribution of cash was highly dependent on a member's alignment with the Fund's mission. The FTI Memo concluded that a "limited discount" for lack of control and marketability should be applied where a member is aligned with the Fund's mission (said to be close to the range concluded by ValueScope in its 7 January ValueScope Report, i.e. a discount of 13.9%), and a "high discount" of 95% where a member is not.

Legal advice sought

129 On 25 February 2025, without telling the Supporting Organisations or the Charities, the Directors sought advice from Walkers and Shields Legal on any powers under the Articles to enable the removal of the Supporting Organisations, including by (i) redemption of the Participating Shares (Art 14 and 28), (ii) a forced transfer of Participating Shares held by a Restricted Person (Art 21) (iii) or an alternative course whereby DFW repurchased the shares, which could then be cancelled, and new shares issued which are redeemable by the Company. Walkers advised that both redemption and forced transfers were not permitted but agreed with the alternative course involving DFW.

130 On 5 March 2025, as stated above, Leading Counsel provided retrospective advice to the Company regarding the Share Issuance, which also considered whether the Directors had power under the Articles to redeem the Participating Shares. Leading Counsel opined that they did not, on the basis that the Participating Shares were not issued as redeemable shares, and could not be redeemed unless there were a prior variation of the rights ascribed to them. That said, any proposal to vary the rights attached to the shares to make them redeemable would

support an argument "*that the [DFW Share Issue] was itself procured with a view, ultimately, to disenfranchising the pre-existing Participating Shareholders*".

131 On 17 March 2025, Mr Patrick wrote to Walkers in the following terms:

> *"Agree we need to finalise the [FTI valuation] reports …We should request any limits on use removed.*
>
> *We are seeking U.S. tax counsel to send emails to Paul and I that the non profits are Restricted Persons and/or best interests of the Company to have non dondero holders of its interests. After that, an alternative approach is to give them what they want – liquidate Holdco Ltd after its only investment is redeemed by the US. LLC pursuant to U.S. counsel advice above, that it's in the best interests of the Company to redeem all non-profits affiliated with Dondero. US LLC has same valuation conducted on its shares as the participation shares. so we would redeem the LLC interest, then distribute the proceeds out of Holdco Ltd., and file articles of Dissolution for Charitable daf Holdco Ltd before a wind up petition is filled. That would put us on the "high ground" to fight (rather the way this is currently heading in a defensive posture). they would have to scrap their wond up petition and fight for reinstatement, gripe about the valuations, and file fiduciary breach actions …*
>
> *We will stage this in light of the Doug letter, new advice of two separate U.S Tax counsel, and seeing how successful (or not) our outreach to the Texas attorney general office is.*
>
> *Note US LLC would make DFW its sole owner."*

132 The email of 19 March 2025 makes plain that the Directors, or at least Mr Patrick, intended to liquidate the Company without notice to the Supporting Organisations and to otherwise obstruct

the Supporting Organisations' ability to exercise any right to petition to wind up the Company on just and equitable grounds.

133 On 20 March 2025, Walkers provided comments on the FTI draft valuation, and FTI responded. These comments include, amongst other things*:*

> "Walkers: *It is stated at [3.2(2)] that "there is no overriding duty of DAF's Directors to act in the shareholders' interest. The Directors will act according to the best interest of the company, that is, to achieve the charitable causes that are aligned with DAF's mission". However, as a matter of Cayman law, directors owe duties to the company, and must act in its best interests [which are] generally regarded as the interests of the members as a whole, and in certain circumstances the objects of the company may be taken into account when determining what is in its best interests.*
>
> FTI: *Can you explain how it was in the interests of the company to materially dilute the existing shareholders*?
>
> …
>
> Walkers: *It is stated at [3.10] that "the Participating Shareholders do not have any rights to cause a liquidation/winding up of the company". However, the Participating Shareholders do have the right to seek a winding up of the company, as conferred upon them by the Companies Act (rather than the Articles).*
>
> FTI: *Why won't they just do this immediately and seek distributions? Isn't the ability to trigger a liquidation contradictory with point 1 which states* "*Shareholders do not have any right to exert influence on whether/how the funds of DAF are used or distributed*".
>
> …

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Walkers: *As per our comments, please could you delete references to our advice so as to avoid any potential arguments about waiver of privilege.*

FTI: *Your advice is important in us arriving at our conclusions. I understand from our legal team that we either (i) keep the reference to your advice or (ii) address the memo to you. Are you expecting there to be litigation in relation to the proposed transaction?*

…

Walkers: *Our client now seeks a valuation report which may, in connection with a proposed redemption of the membership interests in CDM, be disclosed to third parties and relied on to establish fair market value of both the membership interests in CDM, and in turn HoldCo.*

FTI: *This is a material change in the purpose and access rights of the report. Please provide more detail of the transaction. Is it the case that Mark will make CDM redeem the shares owned in by DAF? And who would you like to share the report with? And on what basis (e.g. non-reliance)? We also note our memo is not a valuation – it is a quantification of discounts given the rights of the participating shares. To do a valuation, we would need to do a more detailed exercise, including valuing the underlying assets."*

134 On 21 to 24 March 2025, FTI and Walkers had an exchange (amongst other things) as follows*:*

"FTI: *If the firm was wound down, would it result in distributions to the existing participating shareholders? Or would Mark still be able to shareholder structure to ensure the existing participating shareholders got nothing? Given they haven't received dividends since 2019, why haven't the participating shareholders triggered a wind down? If they can trigger a wind down and then in short order receive $300m of distributions, it does change things re discount.*

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Walkers: *if HoldCo was wound up, the Participating Shareholders would receive distributions which would be made pari passu, and Mark (if he was the liquidator) would not be able to ensure the existing Participating Shareholders get nothing. Whilst the Participating Shareholders have the right to seek to wind up under the Companies Act, they need a proper basis to do so… We can only assume [they] have not commenced proceedings seeking to wind the company up because they do not have a proper basis on which to do so …*

…

FTI: *Would an absence of distributions be sufficient grounds to make an application to wind the company up? If the participating shareholders did make the application, would Mark be able to issue a vast number of shares to another party before the distributions were made thereby ensuring the existing shareholders received very little?*

Walkers: *A Participating Shareholder may consider an absence of distributions sufficient grounds for a winding up order on the just and equitable basis… But it is difficult for us to say whether that petition would be successful. If (a) a Participating Shareholder presented a petition; (b) new shares were purportedly issued; and (c) the Court then made a winding up order, the issue of the new shares would be void and not impact the amounts the Participating Shareholders would receive.*"

135 On 26 and 27 March 2025, FTI and Walkers had an exchange (amongst other things) as follows*:*

"Walkers: *We have discussed with our client and onshore counsel and set out some amendments in the attached. In addition, we note (1) we have not received any material addressing reliance on the memo by CDM; and (2) the "Limitations and restrictions" section still provides that the memo "should not be used to support a transaction". For*

the memo to be useful in the circumstances, CDM [and HoldCo] need to be able to rely on it or a separate memo would need to be addressed to CDM on which it may rely. Further, both entities need to be able to rely on the memo(s) to support the proposed transaction.

FTI: *What is the intention of adding that directors should act in the interests of future members? I am struggling to understand how a director could act in a manner which is beneficial for future shareholders which is not also helpful for existing shareholders.*

The limitations in our note will remain. To do a valuation to support a transaction, we will need to do significantly more detailed work. This is an unusual/complicated situation. We are open to doing a fairness opinion on the transaction. But this will require approval from our risk committee and more information on the transaction and situation. We are happy for CDM to have our memo on a non-reliance basis. But this memo should not be used to support a transaction."

March 2025 ValueScope Valuation

136 Following the Restructuring, ValueScope was requested by Shields Legal, without telling the Supporting Organisations or the Charities, to prepare two valuation analyses:

136.1 100% Membership Interest in CDM; and

136.2 Certain Participating Shares of the Company as at 25 March 2025 (the "**March 2025 Valuation**").

137 The March 2025 Valuation had the same instructions, definition of value and scope of work as the September 2024 Valuation. Like the September 2024 Valuation, the March 2025 Valuation also referenced a 30 September 2024 balance sheet (and did not refer to any later analysis of

assets and liabilities). As shown below, the September 2024 Valuation and March 2025 Valuation produced very different results.

138 A comparative summary of the September 2024 and March 2025 Valuations is set out below:

Valuation Date	DLOC*	DLOM**	Valuation Basis	FMV (100 Shares)
30 September 2024	8.1%	6.3%	NAV	$75,961,370
25 March 2025	99.2%	20.00%	DCF***	$536,784
Difference	**+91.1%**	**+13.7%**		**-$75,424,586**

*DLOC – Discounted for Lack of Control

**DLOM – Discounted for Lack of Marketability

***DCF – Discounted Cash Flow

139 The March 2025 Valuation stated: "*for the valuation of non-controlling assets in holding companies such as DAF, the asset-based approach is most commonly used [as Valuescope had always done previously]. When applied to such companies, the approach consists of measuring the underlying net asset value of an entity (the fair market value of the entity's assets less the fair market value of its liabilities). The NAV is then discounted as appropriate to determine the fair market value of the fractional interest in the entity. However, in the case of the participation shares under consideration, the asset-based approach is not applicable. These shares do not confer control and only have a claim in respect of the underlying assets in a winding up.*"

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140 ValueScope does not appear to have considered whether winding up was a possibility, and therefore, whether value could have been realised that way and by reference to NAV.

141 For reasons which are unclear to the Company, the March 2025 Valuation expressly rejected the asset-based (NAV) approach on the basis that the economic benefits of the Participating Shares in the Company were contingent on discretionary distributions by its manager. The report states.

> *'Unlike equity interests that derive value from an allocable portion of the entity's net assets, the economic benefits of these shares are contingent upon discretionary distributions by the director. As such, their value is not directly tied to the entity's NAV, and an alternative valuation approach is required to appropriately reflect their characteristics and economic reality*'.

142 Accordingly, the methodology applied in the March 2025 Valuation was markedly different from the methodology applied in the September 2024 Valuation. Instead of relying on discounted net assets, the March 2025 Valuation:

142.1 applied a discounted cash flow ("**DCF**") methodology to estimate the present value of expected future distributions, rather than an asset-based approach, as had been applied in at least the past five annual valuations by ValueScope;

142.2 determined the FMV of 100 Participating Shares to be US$536,784;

142.3 applied a discount of 99.2% for DLOC; and

142.4 applied a discount of 20.00% for DLOM.

143 The DCF model is based on the present value of future distributions to the Company. ValueScope's report shows that these were estimated based on historic distributions themselves controlled by Mr Patrick.

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144 Based on the valuations above, between 30 September 2024 and 25 March 2025, the FMV of 100 Participating Shares in the Company apparently declined from US$75,961,370 to US$536,784, representing a reduction in value of 99.29% in less than a six month period, in which the Restructuring occurred, attributable to a change in valuation basis (amongst other things) from NAV to DCF.

145 Furthermore, ValueScope does not appear to have sense-tested their valuation. Although they identified “total equity” of c. US$270 million and concluded that all of the Participation Shares had a value of only c. US$1.6 million, they did not address themselves to who benefitted from the residual value of c. US$268 million.

Admission and Redemption

146 On 27 March 2025, Mr Patrick, as manager of CDM, executed a written consent (the "**Manager Consent**") to (a) cause CDM to admit DFW as an additional member of CDM pursuant to the terms of an Admission and Amendment No.1 Agreement (the "**Admission Agreement**") and (b) redeem the CDM Membership Interest held by the Company pursuant to the terms of a Redemption and Amendment No. 2 Agreement (the "**Redemption Agreement**" and together with the Admission Agreement, the "**Restructure Agreements**"):

146.1 The recitals to the Manager Consent stated that the redemption of the Company's membership interest was justified by reason of alleged attempts by the Supporting Organisations to exert control, and the potential loss of their (i.e. the Supporting Organisations’) non-profit and tax-exempt status:

> *“… the Manager has formed the view that the Current Member, by virtue of being a member of the Company and having as Participating Shareholders the Highland Foundations, poses a material risk to the Company, its assets, and the Mission Statement of DAF due to, among other things, (i) officers and directors of the Highland Foundations seeking to assert dominion and control*

over the assets of DAF (through the Current Member), despite no legal ability to do so under the Current Member's organizational documents and despite the potential illegality (as demonstrated by tax counsel to DAF—see Exhibits C and D) of doing so, (ii) the potential loss of the non-profit status of the Highland Foundations due to their actions, among others, described in clause (i), and (iii) the potential loss of the tax-exempt status which the Highland Foundations currently enjoy and which is central to the mission of DAF, as a result of the factors including those described in clauses (i) and (ii)"

146.2 The Manager Consent further stated:

"*WHEREAS, in connection with the Restructure Agreements and the transactions contemplated thereby, the Manager (on behalf of the Company) obtained a valuation report of the membership interests of the Company from ValueScope and FTI Consulting, copies of which are attached hereto as Exhibit E, which valuation reports have informed the Manager the fair market value of the membership interests*"

146.3 Exhibits C and D to the Manager Consent are documents purportedly containing information regarding various alleged U.S. tax issues relating to the Company.

146.4 Exhibit C is the letter from Mr Mancino to the IRS dated 20 March 2025, in which Mr Mancino (amongst other things) stated:

(a) there has been "deterioration" of the Company's relationship with Highland Dallas Foundation, Inc. ("**HDF**") due to the undue influence and control exercised over HDF by Mr Dondero.

(b) the information in the letter will demonstrate clearly that Mr Dondero's influence and control is an inappropriate donor relationship with representatives of the HDF who serve on the Board of Directors of and as officers of HDF.

(c) such undue influence and control potentially jeopardises the tax-exempt status of HDF as an organisation described in s.501(c)(3) and, at a minimum, causes it to fail to remain a supporting organisation described in s. 509(a)(3).

146.5 Exhibit D is an advice produced by Carrington Coleman (U.S. law firm) dated 25 March 2025 (the "**Carrington Advice**") which amongst other things:

(a) asserts that Mr Dondero has been attempting "*through his control of the Highland SOs, to exert dominion and control over the cash and property he previously donated to DAF and for which he claimed charitable deductions, all for his personal benefit.*"

(b) suggests that Mr Dondero was using the Company as his personal "*piggy bank*", and that it may be perceived by the IRS that the Fund has been or is his financial alter ego.

(c) concludes that "*the IRS will look favourably upon any and all attempts for DAF to maintain its independence from what seems to be persistent attempts by Dondero, and the entities controlled by him to use DAF for his private benefit and inurement.*"

146.6 Exhibit E contained two valuation reports:

(a) The first was a ValueScope valuation.

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51

(b) The second is the FTI Memo referred to above, in which FTI expressly stated that the analysis in the FTI Memo should not be used in support of a transaction, but which Mr Patrick, in any event:

(i) expressly relied upon in the Manager Consent to determine the fair market value of the CDM Membership Interest and the basis for the redemption of the Company's interests; and

(ii) permitted Carrington Coleman to refer to and rely on in the FTI Memo (indeed, having provided the 27 March 2025 copy which was a draft copy only).

146.7 On 27 March 2025, without telling the Supporting Organisations or the Charities, Mr Patrick executed the:

(a) Admission Agreement between CDM and DFW under which DFW was admitted as a member of CDM, in consideration for a capital contribution of US$1,637,192; and

(b) Redemption Agreement under which CDM redeemed the Company's membership interest in CDM for the same sum of US$1,637,192 (the "**Redemption Sum**").

147 On 27 March 2025, without telling the Supporting Organisations or the Charities, the Company entered into a letter agreement with CDM (the "**Letter Agreement**"), pursuant to which the Company assigned to CDM various contracts and agreements to which the Company was a party, listed in Schedule A to the Letter Agreement and CDM agreed to assume the liabilities and obligations in respect of those contracts.

148 On 2 April 2025, the Directors of the Company, by way of written resolution:

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148.1 Noted the redemption of the Company's membership interest in CDM for the Redemption Sum (the "**Redemption**").

148.2 Resolved to pay a dividend to the Original Participating Shareholders of US$1,612,192.01 in the amount of (i) US$528,587.54 with respect to each of HDF, Highland Kansas City Foundation, Inc. and Highland Santa Barbara Foundation, Inc.; and (ii) US$26,429.39 with respect to CFNT.

149 The substantive financial effect of the Redemption, under which DFW did or was committed to make a capital contribution equivalent to the Redemption Sum to CDM, and the CDM Membership Interest held by the Company were redeemed for the Redemption Sum, was that the Company's membership interest in CDM was purchased by or otherwise transferred to DFW for the Redemption Sum.

150 The substantive effect of the overall transaction or series of transactions pleaded above, including the Impugned Transactions already pleaded, was that:

150.1 The Company realised its interest in the Fund, which had a NAV of c. US$270 million, for c. US$1.6 million.

150.2 The Company made a distribution to the Original Participating Shareholders (c. US$1.6 million).

150.3 The Supporting Organisations and the Charities were actually or effectively divested of their indirect interest in the Fund, and the assets underlying the Fund; and

150.4 The Original Participating Shareholders were diluted from 100% of the economic interests in the Company to less than 50%.

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53

Voluntary Liquidation and Supervision Order

151 On 2 April 2025, the Directors resolved, without telling the Supporting Organisations or the Charities, to place the Company into voluntary liquidation and appoint Mitchell Mansfield and William Clarke (the JVLs) of Kroll (Cayman) Ltd as voluntary liquidators.

152 However, unaware of the voluntary liquidation, on 10 April 2025, the Supporting Organisations presented a petition seeking the winding up of the Company on a just and equitable basis, under section 92(e) of the Companies Act (2025 Revision) (the "**J&E Petition**").

153 On 25 April 2025, Walkers and Shields Legal held a call to discuss the J&E Petition. Following that call, Mr Patrick wrote in an email that the "*message ideas*" "*for Monday*" were to "*poison the well*", by which he meant to create a negative impression of Mr Dondero in the eyes of the Court.

154 On 6 May 2025, Justice Jalil Asif KC made a supervision order, under which voluntary liquidation of the Company was to be continued under the supervision of the Court pursuant to s.131 of the Companies Act (As Revised), and the JOLs were appointed.

OBLIGATIONS OWED BY THE DIRECTORS

155 At all material times, the Directors, as directors, owed the following duties individually to the Company:

155.1 A fiduciary duty to act *bona fide* in what he considers to be the best interests of the Company (the "**Best Interests Duty**").

155.2 A fiduciary duty to exercise his powers for a proper purpose, and for the purposes for which they were conferred (the "**Proper Purpose Rule**").

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155.3 A fiduciary duty not to place himself in a position where his personal interest actually or potentially conflicted with his duty of loyalty to the Company (the "**First No-Conflicts Duty**").

155.4 A fiduciary duty not to place himself in a position where his duty to another actually or potentially conflicted with his duty of loyalty to the Company (the "**Second No-Conflicts Duty**").

155.5 A fiduciary duty to not make an unauthorised profit from or by reason of his fiduciary position (the "**No Profit Duty**").

155.6 A fiduciary duty not to accrue or take a benefit or commercial opportunity from the Company without the full and informed consent of the Company (the "**No Self-Dealing Rule**").

155.7 A duty to exercise reasonable skill, care, and diligence in the performance of his role and function as director (the "**Reasonable Care Duty**").

156 With respect at least to Mr Patrick, his duties above and the standard to which he was obliged to comply with such duties are affected by being in the Control Position and the trustee or trustee-like position he occupied. Paragraph 76 above is also relied upon.

157 The Company reserves its position as to whether Mr Patrick, by reason of being in the Control Position and the trustee or trustee-like position he occupied, was an express or other trustee of the assets of the Fund for the Original Participating Shareholders and, through or in addition to them, the Charities.

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ATTRIBUTION OF KNOWLEDGE AND INTENTION

158 As a matter of Cayman Islands law, Mr Patrick's intention and knowledge of facts and matters for all such purposes relevant to this claim is to be attributed to each of DFW, CDM, and the New GP on the basis of at least the following facts:

158.1 As regards DFW, Mr Patrick is listed under DFW's certificate of incorporation, dated 9 December 2024, as "the member of the corporation", and the Admission Agreement showed he served as its "President". Mr Patrick is also the registered director of DFW. Mr Patrick the agent of DFW, in which capacity Mr Patrick executed the Admission Agreement.

158.2 As regards CDM, Mr Patrick is described under the LLC Agreement as the "Manager" of CDM, in which role Mr Patrick was CDM's agent, and in which capacity he (i) executed the Deed of Assignment and Assumption on behalf of CDM, and (ii) executed a written 'Manager Consent' (the "**Manager Consent**") approving the Redemption and Admission Agreements; and executed the Redemption and Admission Agreements.

158.3 As regards the New GP, Mr Patrick was and remains its director, and therefore its agent (in which capacity, Mr Patrick executed the Deed of Assignment and Assumption on the New GP's behalf). Further, Mr Patrick is the sole shareholder of the New GP.

159 Further, if applicable, as a matter of the laws of the State of Delaware, Mr Patrick's knowledge and intention is to be attributed to DFW, CDM, and the New GP on a like basis.

CLAIMS AGAINST THE DEFENDANTS

<u>Breaches of fiduciary and other duty</u>

160 The First and Second Defendants, and each of them, in their capacity as a Director of the Company, acted in breach of their fiduciary and other duties to the Company as follows.

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Restructuring, including the CDM Assignment

161 The Directors (and each of them), in procuring, directing or effecting the Restructuring as set out above, acted in breach of their duties to the Company, including the Best Interests Duty, the Proper Purpose Rule and the Reasonable Care Duty. Additionally, Mr Patrick, in procuring, directing or effecting the Restructuring as set out above, acted in breach of his duties to the Company, including the No Self-Dealing Rule, No Profit Duty, and No-Conflicts Duty (First and Second No-Conflicts Duties).

PARTICULARS

161.1 The Plaintiff relies on paragraphs 77 to 105 above.

161.2 With the assistance of Mr Mancino, Mr Patrick took steps to form CDM and appoint himself as Manager of CDM.

161.3 Mr Patrick designed and/or negotiated and/or directed and/or effected the Restructuring in his capacity as Director of the Company, Director of the New GP, and Manager of CDM, being each of the parties to the Deed, and signed the Deed on behalf of each party.

161.4 The Directors (and each of them) approved the transfer of the Company's entire limited partnership interest in the Fund (having net assets worth c. US$270 million) to CDM, a Delaware entity whose LLC Agreement excluded any fiduciary obligations owed by its Manager (i.e. Mr Patrick) to CDM itself or to its members; in exchange for membership interest in CDM, which interest was capable of being extinguished, by redemption, and for a "fair value", determined at the discretion of the Manager (i.e. Mr Patrick).

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161.5 The Restructuring was of no benefit to the Company and not in its best interests, and Mr Patrick was subject to conflicts of interest (First and Second No-Conflicts Duties) and committed acts of self-dealing.

161.6 The Directors (and each of them) acted when each of them:

(a) knew or ought to have known that the Company was proposing to exchange the Partnership Interest for a membership interest in CDM that was subject to redemption entirely at Mr Patrick's discretion, and for a "*fair value*" determined, in good faith, in his discretion.

(b) knew or ought to have known that the Company was therefore proposing to trade its Partnership Interest, which was not in practical terms defeasible, for an interest that could be extinguished: (i) at a time over which it had no control, (ii) for a price over which it had very limited control and (iii) for a potential valuation basis which excluded a net asset valuation of the assets held in the Fund.

(c) knew or ought to have known that the CDM Membership Interest was to be in a Delaware-incorporated company whose LLC Agreement excluded any fiduciary obligations owed by its Manager either to CDM itself or to its members and was therefore less valuable than the Partnership Interest.

(d) knew or ought to have known that the CDM Assignment was therefore a transaction at an undervalue.

161.7 It can be inferred, and is averred, that Mr Patrick was drawing fees or remuneration or emoluments or benefits from CDM without the full authorisation or full and informed consent of the Company.

161.8 Further, and in any event, the Directors (and each of them) acted when each of them:

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(a) knew or ought to have known that the CDM Assignment was the first step in a series of connected future transactions, including those pursuant to the CDM Assignment, the Share Issuance, the Admission Agreement, the Redemption Agreement and the Redemption, under which the Directors were able to and ultimately did procure the redemption of the Company's CDM Membership Interest, thus extinguishing the Company's interest in the Fund, for an undervalue.

(b) knew or ought to have known that:

(i) the full terms and effect of the CDM Assignment was not a proper or proportionate response to any genuinely perceived risk about U.S. tax concerns.

(ii) the full terms and effect the CDM Assignment was not a proper or proportionate response to any genuinely perceived risk to the Company, which was not itself a Donor Advised Fund and/or did not enjoy or require tax-exempt status under s.501(c)(3) of the U.S. Internal Revenue Code.

(iii) other approaches to address concerns with respect to the tax-exempt status of the HDF short of undertaking the Restructuring (and entering into the CDM Assignment) included notifying the HDF of the conflict and/or concerns and requesting it to remedy it or them.

(iv) even if the facts and matters alleged in relation to the HDF were correct, there was more than a possibility, after an extended passage of time and at least two levels of appeal, that a U.S. tax audit would result in an adverse determination with respect to the tax-exempt status of the HDF.

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59

(v) the tax-exempt status of the HDF was of no concern or no reasonable concern to the Company.

(c) knew or ought to have known that they were keeping the Restructuring, the CDM Assignment, CDM itself and all the surrounding circumstances secret from the Participating Shareholders.

162 By reason of the foregoing breaches of duty or any of them:

162.1 The CDM Assignment is void, alternatively voidable and hereby avoided.

162.2 CDM holds the Partnership Interest on trust or constructive trust for the Company.

162.3 CDM is required to re-transfer the Partnership Interest to the Company and account for any profits on the basis of such trust or constructive trust and/or on a restitutionary and/or on a proprietary basis.

Share Issuance

163 The Directors (and each of them), in procuring, directing or effecting the Share Issuance as set out above, acted in breach of their duties to the Company, including the Best Interests Duty, the Proper Purpose Rule and the Reasonable Care Duty. Additionally, Mr Patrick, in procuring, directing or effecting the Share Issuance as set out above, acted in breach of his duties to the Company, including the No Self-Dealing Rule, No Profit Duty, and No-Conflicts Duty (First and Second No-Conflicts Duties).

PARTICULARS

163.1 The Plaintiff relies on paragraphs 77 to 84, 91 to 96 and 106 to 119 above.

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60

163.2 The Directors (and each of them) designed and/or engineered the Share Issuance, having sought legal advice in relation to the powers conferred on them as Directors of the Company, for the improper purpose of:

(a) diluting without any proper reason or corporate purpose the existing Participating Shareholders and/or depriving the ability of the Supporting Organisations to continue to comprise a majority of the Participating Shareholders.

(b) inserting DFW as a new Participating Shareholder, an entity under the sole control of Mr Patrick, to obstruct and/or prejudice and/or adversely affect the exercise of a Participating Shareholders' right to petition for the just and equitable winding-up of the Company.

163.3 The Directors (and each of them) acted when each of them:

(a) knew or ought to have known the issue and allotment of shares at par to DFW was of no benefit to the Company.

(b) knew or ought to have known that the exercise of the power to issue shares and allot them to DFW was for the improper purpose of diluting the interest of the Original Participating Shareholders.

(c) knew or ought to have known that the Share Issue Resolution and/or the Share Issuance or otherwise the issue and/or allotment of shares to DFW was a response to the prospect that the Supporting Organisations might present a petition for the winding-up of the Company on a just and equitable basis, as indeed they did on 10 April 2025 in ignorance of the Share Issue Resolution and/or the Share Issuance or otherwise the issue and/or allotment of shares to DFW.

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61

(d) knew or ought to have known that the sole or primary purpose of the Share Issue Resolution and/or the Share Issuance or otherwise the issue and/or allotment of shares to DFW was to insert a new majority Participating Shareholder (under their or at least Mr Patrick's control) into the Company's share capital structure to (if they or at least Mr Patrick deemed fit) to oppose the actions of the Supporting Organisations and/or the Original Participating Shareholders, both in relation to any potential contributories' winding-up petition and otherwise, and/or to obstruct and/or prejudice and/or adversely affect the exercise at any time of any rights of the Supporting Organisations as Participating Shareholders.

163.4 Mr Patrick designed and/or directed and/or effected the Share Issuance in his capacity as Director of the Company, even though he was 'President' of DFW and the sole member and the sole director of DFW.

163.5 It can be inferred, and is averred, that Mr Patrick was drawing fees or remuneration or emoluments or benefits from DFW (if not also from CDM) without the full authorisation or full and informed consent of the Company.

164 By reason of the foregoing breaches of duty or any of them:

164.1 the Share Issue Resolution and/or the Share Issuance or otherwise the issue and/or allotment of shares to DFW is void, alternatively voidable and hereby avoided.

164.2 DFW holds its shares on trust or constructive trust for the Company.

164.3 DFW is required to concur in the rescission of the allotment and to re-transfer its shares to the Company on the basis of such trust or constructive trust and/or on a restitutionary and/or on a proprietary basis.

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62

164.4 The Company's register of shareholders shall be rectified accordingly.

Admission and Redemption

165 The Directors (and each of them), in procuring or entering into the Admission Agreement and the Redemption Agreement, and/or in procuring, directing or effecting the Redemption acted in breach of their duties to the Company, including the Best Interests Duty, the Proper Purpose Rule and the Reasonable Care Duty. Additionally, Mr Patrick, in procuring or entering into the Admission Agreement and the Redemption Agreement, or in procuring, directing or effecting the Redemption as set out above, acted in breach of his duties to the Company, including the No Self-Dealing Rule, No Profit Duty, and No-Conflicts Duty (First and Second No-Conflicts Duties).

PARTICULARS

165.1 The Plaintiff relies on paragraphs 120 to 150 above.

165.2 The Directors (and each of them) acted when each of them:

(a) knew or ought to have known that:

(i) proceeding on the basis of the Seyfarth/Mancino letter to the IRS dated 20 March 2025 was flawed or unreasonable.

(ii) proceeding was not a proper or proportionate response to any genuinely perceived risk about U.S. tax concerns.

(iii) the tax-exempt status of the HDF was of no concern or no reasonable concern to the Company.

(iv) proceeding on the basis of the March 2025 Valuation and the FTI Report was flawed in that: (i) the 99.2% discount in value proposed by the

ValueScope Report was a manifestly excessive discount, and resulted in the Company parting with its indirect ownership of 99% of the economic interest in the Fund (which had net assets worth c. US$270 million) for a mere US$1,637,192; and (ii) as pleaded above, the FTI Report expressly stated that *"this memo should not be used to support a transaction."*

(v) the Admission Agreement and the Redemption Agreement were steps in a series of connected transactions, including those pursuant to the CDM Assignment, the Share Issuance, under which the Directors were able to and ultimately did procure the extinguishment of the Company's interest in the Fund, through the redemption of the Company's membership interest in CDM, for an undervalue.

(b) knew or ought to have known that the sole or primary purpose of the Admission Agreement, the Redemption Agreement and the Redemption was to ensure that the Company was fully and finally deprived of an asset (its interest in the Fund) at an undervalue; and to enable a third party, DFW, controlled by Mr Patrick, to procure ownership of an interest in the Fund in complete replacement of the Company.

165.3 Mr Patrick designed and/or negotiated and/or directed and/or effected the Admission Agreement, the Redemption Agreement and the Redemption as Director of the Company, even though he was Manager of CDM and 'President' of DFW, sole member of CDM and sole member and sole director of DFW.

166 By reason of the foregoing breaches of duty or any of them:

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64

166.1 DFW holds the CDM Membership Interest on trust or constructive trust for the Company.

166.2 DFW is required to concur in the transfer of the CDM Membership Interest to the Company or as the Company directs on the basis of such trust or constructive trust and/or on a restitutionary and/or on a proprietary basis.

Further claims against Mr Murphy

167 In respect of any breach of duty as set out above for which Mr Patrick alone is liable:

167.1 At all material times, Mr Murphy worked in close concert with Mr Patrick, including at his direction.

167.2 Mr Murphy knew or ought to have known all the facts and matters pleaded above as known or ought to have been known by Mr Patrick.

167.3 Mr Murphy knew or ought to have known of all the facts and matters pertaining to such breach or breaches by Mr Patrick.

167.4 Mr Murphy took no steps to stop Mr Patrick or to prevent or report the breach or breaches of duty by Mr Patrick.

167.5 Mr Murphy accepted and acquiesced in all steps and actions suggested, promoted or effected by Mr Patrick.

167.6 Mr Murphy accepted and acquiesced in the breach or breaches of duty by Mr Patrick.

167.7 As a consequence, Mr Murphy has acted in breach of his duties to the Company, including the Best Interests Duty and the Reasonable Care Duty.

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Directors' Fees, Remuneration and Expenses

168 The Company is still unclear as to what precise fees or remuneration or emoluments or benefits were afforded to the Directors and from what source, and as to the proper expenses of the Company, in the period after March 2021 and thus reserves its position.

169 As is pleaded above in paragraphs 85 to 89, the Directors approved large increases for Mr Patrick's remuneration, benefits or emoluments: by around 1 October 2024, Mr Patrick's remuneration comprised a base salary of US$850,000, a bonus of 2.5 times that base salary, an LTI incentive payment of US$975,000; for the period March 2021 to March 2024, Mr Patrick was entitled to an aggregate LTI payment of US$4,759,000; and eligibility for discretionary and annual bonuses in addition, to be determined at the sole and absolute discretion of the Directors. By contrast, Mr Scott's annual salary and entire benefits during his tenure in the Control Position was US$60,000.

170 Insofar as the Directors (or each of them) approved of or procured any payment or benefit to or for Mr Patrick or Mr Murphy more than the sum of US$60,000 per annum each in respect of fees or remuneration or emoluments or benefits, such sum was excessive and conferred in breach of duty to the Company, including the Best Interests Duty, the Proper Purpose Rule, the first No-Conflicts Duty, the No Self-Dealing Rule and the Reasonable Care Duty.

171 Further, as is pleaded above, the Directors (or each of them) approved or caused the payment of considerable sums by way of expenses, amounting for example to US$18.3 million for the first half of 2024, and US$18.6 million spent over 2023. Such expenses may include the expenses incurred in effecting the transactions which are the subject matter of these proceedings. The reasonableness or *bona fides* of these expenses is not accepted by the Company.

172 The Company claims:

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172.1 Full information, documents and discovery as to the fees or remuneration or emoluments or benefits or expenses paid or claimed by Mr Patrick and Mr Murphy and each of them since March 2021.

172.2 Full information, documents and discovery as to expenses incurred by the Company or the Fund or any of the Fund's subsidiaries or investments since March 2021.

172.3 Repayment to the Company of all fees or remuneration or emoluments or benefits paid or claimed by Mr Patrick or Mr Murphy and each of them in excess of US$60,000 per annum; together with all improperly paid expenses caused or procured by Mr Patrick or Mr Murphy (or damages or equitable compensation in relation thereto).

Unlawful Means Conspiracy

173 The facts and matters pleaded above amount to an unlawful means conspiracy as follows:

173.1 It is unclear when the conspiracy began but it appears to have started by around the start of 2024.

173.2 The original conspirators were Mr Patrick and Mr Murphy. The Company is unaware of the circumstances in which Mr Patrick and Mr Murphy agreed or combined and is unable to plead further pending further information or discovery.

173.3 As they were incorporated and participated in the facts and matters pleaded above, the New GP, CDM and DFW joined the conspiracy but remain liable in damages for all losses, including prior to joining the conspiracy.

173.4 The conspiracy was a conspiracy to injure the Company.

173.5 The overt acts of the conspiracy were all the facts and matters pleaded above, including as breaches by Mr Patrick or Mr Murphy.

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67

173.6 The unlawful means of the conspiracy were all the facts and matters pleaded above as breaches of duty by Mr Patrick or Mr Murphy.

173.7 Each of the conspirators intended to injure the Company. This averment is an inference from all the facts and matters pleaded above.

173.8 As a consequence, the Company has suffered loss and damage, as a result of the Restructuring, the CDM Assignment, and the Admission and Redemption, and the combined effect thereof, as set out above.

Proprietary claim and/or unconscionable receipt

174 The facts and matters pleaded above give rise to claims by the Company for unconscionable receipt as follows:

174.1 CDM received the Company's Partnership Interest in the Fund under the CDM Assignment.

174.2 The knowledge of CDM was and is that of Mr Patrick.

174.3 The breaches of duty in relation to the CDM Assignment above are relied upon.

174.4 CDM knew that the CDM Assignment was at an undervalue and that causing or procuring the Company to enter into the CDM Assignment was a breach of fiduciary duty by Mr Patrick and/or Mr Murphy.

174.5 By reason of the foregoing, it is unconscionable for CDM to retain the Partnership Interest in the Fund and CDM is liable to account to the Company in equity, by restoring Partnership Interest in the Fund to the Company and/or accounting for any profits or otherwise accounting to the Company in equity.

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Unjust Enrichment

175 In receiving the Company's Partnership Interest in the Fund, CDM was unjustly enriched at the Company's expense and is liable to the Company in restitution:

175.1 The Partnership Interest was transferred on the basis that there was a valid assignment agreement effecting that transfer.

175.2 That basis has totally failed, the CDM Assignment being either void, or avoided hereby.

Alter Ego and Lifting the Corporate Veil

176 In order to obtain the return to it of the Partnership Interest in the Fund, together with an Account of Profits, the Company does not need as a matter of law to make any allegation of "alter ego" or to lift the corporate veil in relation to CDM or DFW.

177 If, contrary to the paragraph above, the Company does so need, it makes the following allegations for the purposes of all relevant claims or causes of action set out above.

177.1 CDM is the "alter ego" of Mr Patrick.

177.2 DFW is the "alter ego" of Mr Patrick.

177.3 In relation to the receipt of any property by CDM directly or indirectly from the Company or the accrual of any profits or benefits by reason of such receipt, the corporate veil should be lifted, with the consequence that such receipt and such profits or benefits should be treated as those of Mr Patrick personally.

177.4 In relation to the receipt of any property by DFW directly or indirectly from the Company or the accrual of any profits or benefits by reason of such receipt, the corporate veil should be lifted, with the consequence that such receipt and such profits or benefits should be treated as those of Mr Patrick personally.

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PARTICULARS

(a) In relation to CDM:

(i) Mr Patrick was and is the Manager. There are no other officers or managers.

(ii) Mr Patrick was and is the managing member.

(iii) CDM was incorporated at Mr Patrick's instigation in order to enter into the CDM Assignment or a transaction of like nature.

(iv) CDM's sole or primary purpose was to play a part in a scheme whereby Mr Patrick would obtain control of the Company's Partnership Interest in the Fund free of the Company, the Company's obligations towards the Supporting Organisations and (if the scheme succeeded) free of Mr Patrick's duties to the Company.

(v) CDM exists and operates in order to conceal the identity of the true or real actor, namely Mr Patrick.

(b) In relation to DFW:

(i) Mr Patrick was and is the 'President'. There are no other officers or managers.

(ii) Mr Patrick was and is the sole member.

(iii) Mr Patrick was and is the sole registered director.

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70

(iv) DFW was incorporated at Mr Patrick's instigation in order to enter into a transaction whereby it would in effect take over the Company's interest in CDM pursuant to the CDM Assignment.

(v) DFW's sole or primary purpose was (i) to play a part in a scheme whereby Mr Patrick would obtain control of the Company's Partnership Interest in the Fund free of the Company, the Company's obligations towards the Supporting Organisations and (if the scheme succeeded) free of Mr Patrick's duties to the Company, (ii) to be the ultimate vehicle by which Mr Patrick would so control of the Company's Partnership Interest in the Fund and (iii) to be a newly-inserted majority Participating Shareholder (under at least Mr Patrick's control) in the Company's share capital structure to oppose the actions of the Supporting Organisations, both in relation to any potential contributories' winding-up petition and otherwise, and/or to obstruct and/or prejudice and/or adversely affect the exercise at any time of any rights of the Supporting Organisations as Participating Shareholders.

(vi) DFW exists and operates in order to conceal the identity of the true or real actor, namely Mr Patrick.

Loss and Damage

178 As a consequence of the above, the Company has suffered loss and damage, including but not limited to:

178.1 Its Partnership Interest in the Fund.

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71

178.2 The costs and expenses incurred in relation to the CDM Assignment, the Share Issuance, the Letter Agreement and the Redemption (including all legal or other advice taken in relation thereto).

178.3 Excessive Directors' fees or remuneration or emoluments or benefits.

178.4 Improper expenses (if any).

178.5 The lost opportunity cost of the Fund and its subsidiaries deploying such funds (as set out in (1), (2) and (3) above) elsewhere, and the consequent fall in value of the Company's interest in the Fund.

178.6 The legal and liquidation costs of investigating the conspiracy, and the costs of these proceedings.

RESERVATION OF POSITION

179 The Company and the JOLs (who direct the Company in bringing these proceedings) fully reserve their position to apply to amend this claim in any way or to bring fresh or further proceedings against any of the Defendants (whether in the Cayman Islands or elsewhere) in the name of the Company or in the name of the JOLs.

OTHER

180 CLO Holdco is joined as a party to these proceedings in order that, as the main subsidiary of the Fund, it may abide by any Order that the Court may make.

INTEREST

181 The Company claims interest pursuant to section 34 of the *Judicature Act (2021 Revision)* and the *Judgment Debts (Rates of Interest) Rules (2021 Revision)*, alternatively pursuant to the

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Court's equitable jurisdiction, compounded in equity at quarterly rests, alternately at common law, for such period and at such rate as the Court thinks just.

PRAYER FOR RELIEF

In the premises, the Company claims:

(1) Damages or equitable compensation.

(2) Orders for restitution or disgorgement.

(3) Orders for the restoration of property to the Company.

(4) Interlocutory or final injunctions as may be necessary or appropriate.

(5) Orders for the appointment of a Receiver or Receivers, as may be necessary or appropriate.

(6) Orders for the provision of documents or information at an early interlocutory stage.

(7) Orders for the cancellation of the Share Issuance, as appropriate.

(8) Rectification of the register of the Company, as appropriate.

(9) Orders pursuant to s.99 of the Companies Act (as revised), as appropriate.

(10) An Account of the fees or remuneration or emoluments or benefits or expenses paid or claimed by Mr Patrick and Mr Murphy and each of them since March 2021.

(11) An Account of all expenses incurred by the Company or the Fund or any of the Fund's subsidiaries or investments since March 2021.

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73

(12) All other Accounts, including an Account of Profits, or Inquiries as may be necessary or appropriate; and further Orders to give effect to the outcome of such Accounts or Inquiries, including Orders for payment of sums to the Company.

(13) All such declarations as may be necessary or appropriate, including to give effect to the continuing interest of the Company in the Fund on the basis of a proprietary interest, trust, constructive trust or otherwise.

(14) All such other relief relating to the Impugned Transactions as may be necessary or appropriate.

(15) Interest as above.

(16) Further or other relief.

(17) Costs.

DATED this 15th day of July 2025

Maples and Calder (Cayman) LLP

Maples and Calder (Cayman) LLP

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74

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE

OF WRIT OF SUMMONS

182 The accompanying form of Acknowledgment of Service should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person.

After completion it must be delivered or sent by post to the Law Courts, PO Box 495G, George Town, Grand Cayman, KY1-1106, Cayman Islands.

183 A Defendant who states in the Defendant's Acknowledgment of Service that the Defendant intends to contest the proceedings must also serve a Defence on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

If the Defendant fails to serve his Defence within the appropriate time, the Plaintiffs may enter judgment against the Defendant without further notice.

184 A Stay of Execution against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings

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states, in answer to Question 3 in the Acknowledgment of Service, that the Defendant intends to apply for a stay, execution will be stayed for 14 days after that Defendant's Acknowledgment, but the Defendant must, within that time, issue a Summons for a stay of execution, supported by an affidavit of the Defendant's means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

See overleaf for Notes for Guidance

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2

Notes for Guidance

1 Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.

2 For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to the Defendant.

3 Where the Defendant is sued in a name different from the Defendant's own, the form must be completed by the Defendant with the addition in paragraph 1 of the words "sued as (the name stated on the Writ of Summons)".

4 Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after that Partner's name.

5 Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN THAT PERSON'S OWN, the form must be completed by the Defendant with the addition in paragraph 1 of the description "trading as (.....)" after that Defendant's name.

6 Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.

7 Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian *ad litem*.

8 A Defendant acting in person may obtain help in completing the form at the Courts Office.

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 2025 ( )

BETWEEN:

CHARITABLE DAF HOLDCO, LTD (IN OFFICIAL LIQUIDATION)

Plaintiff

AND

(1) MARK ERIC PATRICK

(2) PAUL MURPHY

(3) CDMCFAD, LLC

(4) DFW CHARITABLE FOUNDATION

(5) CDH GP, LTD. AS GENERAL PARTNER FOR AND ON BEHALF OF CHARITABLE DAF FUND, LP, AND IN ITS CAPACITY AS GENERAL PARTNER

(6) CLO HOLDCO, LTD.

Defendants

ACKNOWLEDGMENT OF SERVICE

OF WRIT OF SUMMONS

If you intend to instruct an Attorney to act for you, give that Attorney this form IMMEDIATELY.

Important. Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1. State the full name of the Defendant by whom or on whose behalf the service of the Writ is being acknowledged.

2. State whether the Defendant intends to contest the proceedings (tick appropriate box)

□ yes	□ no

3. If the claim against the Defendant is for a debt or liquidated demand, AND the Defendant does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (tick box)

□yes □ no

Service of the Writ is acknowledged accordingly

(Signed).....

Attorney for

Notes on address for service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, the Defendant must give the Defendant's post office box number and the physical address of the Defendant's residence or, if the Defendant does not reside in the Cayman Islands, the Defendant must give an address in Grand Cayman where communications for the Defendant should be sent. In the case of a limited company, "residence" means its registered or principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of that Plaintiff's name, address and reference, if any, in the box below.

Maples and Calder (Cayman) LLP
PO Box 309 Ugland House
Grand Cayman KY1-1104

Cayman Islands: CJM/JRN/LRA/TQR/858403-01

Indorsement by defendant's Attorney (or by defendant if suing in person) of that defendant's name, address and reference, if any, in the box below.

Wyoming Secretary of State
Herschler Bldg East, Ste.100 & 101
Cheyenne, WY 82002-0020
Ph. 307-777-7311

For Office Use Only

WY Secretary of State
FILED: Aug 1 2023 2:44PM
Original ID: 2023-001308207

Limited Liability Company
Articles of Organization

I. The name of the limited liability company is:
Atreyu Logistics LLC

II. The name and physical address of the registered agent of the limited liability company is:
SMK Business Solutions LLC
1603 Capitol Ave Ste 413
Cheyenne, WY 82001

III. The mailing address of the limited liability company is:
15950 N. Dallas Parkway
#600
Dallas, tx 75248

IV. The principal office address of the limited liability company is:
15950 N. Dallas Parkway
#600
Dallas, Tx 75248

V. The organizer of the limited liability company is:
Brian Boyd
750 Old Hickory Blvd, 2-150, Brentwood, TN 37027

Signature: *Brian Boyd* Date: **08/01/2023**

Print Name: **Brian Boyd**

Title: **Attorney**

Email: **Brian@BoydWills.com**

Daytime Phone #: **(615) 861-1936**

EXHIBIT
R

Wyoming Secretary of State

Wyoming Secretary of State
Herschler Bldg East, Ste.100 & 101
Cheyenne, WY 82002-0020
Ph. 307-777-7311

☑ I am the person whose signature appears on the filing; that I am authorized to file these documents on behalf of the business entity to which they pertain; and that the information I am submitting is true and correct to the best of my knowledge.

☑ I am filing in accordance with the provisions of the Wyoming Limited Liability Company Act, (W.S. 17-29-101 through 17-29-1105) and Registered Offices and Agents Act (W.S. 17-28-101 through 17-28-111).

☑ I understand that the information submitted electronically by me will be used to generate Articles of Organization that will be filed with the Wyoming Secretary of State.

☑ I intend and agree that the electronic submission of the information set forth herein constitutes my signature for this filing.

☑ I have conducted the appropriate name searches to ensure compliance with W.S. 17-16-401.

☑ I consent on behalf of the business entity to accept electronic service of process at the email address provided with Article IV, Principal Office Address, under the circumstances specified in W.S. 17-28-104(e).

Notice Regarding False Filings: Filing a false document could result in criminal penalty and prosecution pursuant to W.S. 6-5-308.

W.S. 6-5-308. Penalty for filing false document.

(a) A person commits a felony punishable by imprisonment for not more than two (2) years, a fine of not more than two thousand dollars ($2,000.00), or both, if he files with the secretary of state and willfully or knowingly:

(i) Falsifies, conceals or covers up by any trick, scheme or device a material fact;

(ii) Makes any materially false, fictitious or fraudulent statement or representation; or

(iii) Makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry.

☑ I acknowledge having read W.S. 6-5-308.

Filer is: ☑ An Individual ☐ An Organization

Filer Information:

By submitting this form I agree and accept this electronic filing as legal submission of my Articles of Organization.

Signature:	*Brian Boyd* Date: **08/01/2023**
Print Name:	**Brian Boyd**
Title:	**Attorney**
Email:	**Brian@BoydWills.com**
Daytime Phone #:	**(615) 861-1936**

Secretary of State

Wyoming Secretary of State
Herschler Bldg East, Ste.100 & 101
Cheyenne, WY 82002-0020
Ph. 307-777-7311

Consent to Appointment by Registered Agent

SMK Business Solutions LLC, whose registered office is located at **1603 Capitol Ave Ste 413, Cheyenne, WY 82001**, voluntarily consented to serve as the registered agent for **Atreyu Logistics LLC** and has certified they are in compliance with the requirements of W.S. 17-28-101 through W.S. 17-28-111.

I have obtained a signed and dated statement by the registered agent in which they voluntarily consent to appointment for this entity.

Signature:	*Brian Boyd*	Date:	**08/01/2023**
Print Name:	**Brian Boyd**		
Title:	**Attorney**		
Email:	**Brian@BoydWills.com**		
Daytime Phone #:	**(615) 861-1936**		

STATE OF WYOMING
Office of the Secretary of State

I, CHUCK GRAY, Secretary of State of the State of Wyoming, do hereby certify that the filing requirements for the issuance of this certificate have been fulfilled.

CERTIFICATE OF ORGANIZATION

Atreyu Logistics LLC

I have affixed hereto the Great Seal of the State of Wyoming and duly executed this official certificate at Cheyenne, Wyoming on this **1st** day of **August**, **2023** at **2:44 PM.**

Remainder intentionally left blank.

Filed Date: 08/01/2023

Secretary of State

Filed Online By:

Brian Boyd

on 08/01/2023

Ogier

Baker & McKenzie LLP
452 Fifth Avenue
New York, NY 10018
United States

D: +1 345 815 1857
E: christopher.levers@ogier.com

Ref: CVS/NKQ/513915.00001

Attention: Debra A Dandeneau

14 October 2025

Dear Colleagues

Funding of Liquidation of Charitable DAF Holdco, Ltd (In Official Liquidation) (the Company) – FSD 201 Of 2025 (RPJ)

We act for Crossvine Litigation Funding, LLC.

We confirm that, pursuant to the terms of an Order of the Grand Court of the Cayman Islands dated 15 July 2025 (the **Order**), the joint official liquidators of the Company were authorised to enter into a funding agreement with Crossvine Litigation Funding, LLC dated 11 July 2025.

As a result of the Order, Crossvine Litigation Funding, LLC's funding of the Company's liquidation has received sanction of the Grand Court of the Cayman Islands.

Please note that, in accordance with a further direction of the Grand Court of the Cayman Islands, the Order has been sealed pursuant to Order 24, rule 6 of the Companies Winding Up Rules and must be kept confidential. As a result, a copy of the Order is not enclosed herewith.

Yours faithfully

Ogier (Cayman) LLP

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89 Nexus Way
Camana Bay
Grand Cayman, KY1-9009
Cayman Islands

T +1 345 949 9876
F +1 345 949 9877
ogier.com

EXHIBIT S

LRA/858403/000002/83891446