SBAITI & COMPANY PLLC
Mazin A. Sbaiti (TX Bar No. 24058096)
Jonathan Bridges (TX Bar No. 24028835)
J.P. Morgan Chase Tower
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367

Counsel for The Charitable DAF Fund, L.P. and CLO Holdco, Ltd.

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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
CHARITABLE DAF FUND, L.P. AND CLO HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendant.	§	
	§	

MOTION TO SUPPLEMENT APPELLATE RECORD

CLO Holdco, Ltd., and the Charitable Donor Advised Fund, Appellants in the above-styled appeal from the United States Bankruptcy Court for the Northern District of Texas, respectfully move to supplement the appellate record.

Currently before the District Court is the appeal of the bankruptcy court's dismissal of the adversary proceeding. One of the bases cited by the bankruptcy court for imposing judicial estoppel is a transcript of a hearing that occurred before the bankruptcy court, on January 14, 2021.[1] In the transcript of that hearing, counsel for the debtor, Mr. Morris, is quoted as stating (in relevant part),

> I would respectfully request that we just enter into a short stipulation on the record reflecting that the Debtor's acquisition of Harbourvest's interests in HCLOF is compliant with all of the applicable agreements between the parties.[2]

Immediately thereafter, prior counsel for CLO Holdco, Ltd., is quoted as responding:

> In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, but the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.[3]

The bankruptcy court's dismissal of the entire adversary on judicial estoppel grounds hones in on the sentence "but the Debtor is compliant with all aspects of the contract" as a judicial admission which has been contradicted by the filing of the underlying suit.

Undersigned counsel requested the original recording of the hearing to verify the transcription. That recording was delivered on May 25, 2022. The recording makes clear that the word "but" at the beginning of "but the Debtor is compliant with all aspects of the contract" was wrongfully transcribed. The recording makes clear that what Mr. Kane said in actuality was:

> In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **that** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient (emphasis added).

[1] *See* APP_000053.

[2] APP_001020.

[3] *Compare* APP_000053 (Order) *with* APP_001020 (Tr. Of Hearing).

It is this correction—seemingly minor, but in the context of the opinion, is of significant consequence—that Appellants ask this for.

Federal Rule of Appellate Procedure 10(e) allows a court to correct a transcription error to ensure that the record accurately reflects what occurred in the lower court:

> **(e) Correction or Modification of the Record.**
>
> (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.
>
> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
>
> (A) on stipulation of the parties;
>
> (B) by the district court before or after the record has been forwarded; or
>
> (C) by the court of appeals.

FED. R. APP. P. 10(e)(1)-(2)(A).

The bankruptcy court issued a corrected transcript on May 26, 2022. *See In re Highland Capital Management, L.P.,* No. 19-bk-34054, Docket No. 3348. Movants respectfully request that this corrected transcript be made part of the appellate record.

Dated: May 26, 2022

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti
Texas Bar No. 24058096
Jonathan Bridges
Texas Bar No. 24028835
JPMorgan Chase Tower
2200 Ross Avenue – Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367

E: mas@sbaitilaw.com
jeb@sbaitilaw.com

Counsel for Plaintiffs

CERTIFICATE OF CONFERENCE

Undersigned counsel attempted to meet and confer with counsel for the debtor via email on May 25, 2022. Counsel for the debtor related that they would confirm whether they opposed or consented. At the time of preparation of this brief, 6:00 pm on May 26, 2022, we have not heard back. Should they respond we will supplement or amend this certificate.

/s/ Mazin A. Sbaiti
Mazin A. Sbaiti

Amended 05/26/2022

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	Thursday, January 14, 2021
	)	9:30 a.m. Docket
Debtor.	)	
	)	- MOTION TO PREPAY LOAN [1590]
	)	- MOTION TO COMPROMISE CONTROVERSY [1625]
	)	- MOTION TO ALLOW CLAIMS OF HARBOURVEST [1207]

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For CLO Holdco, Ltd.:	John J. Kane KANE RUSSELL COLEMAN LOGAN, P.C. 901 Main Street, Suite 5200 Dallas, TX 75202 (214) 777-4261

APPEARANCES, cont'd.:

For James Dondero:	John T. Wilson D. Michael Lynn John Y. Bonds, III Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300
For HarbourVest, et al.:	Erica S. Weisgerber M. Natasha Labovitz Daniel E. Stroik DEBEVOISE & PLIMPTON, LLP 919 Third Avenue New York, NY 10022 (212) 909-6621
For Highland CLO Funding, Ltd.:	Rebecca Matsumura KING & SPALDING, LLP 500 West 2nd Street, Suite 1800 Austin, TX 78701 (512) 457-2024
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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

DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, the Honorable Stacey Jernigan presiding.

THE COURT: Good morning. Please be seated. All right. We're a little late getting started because we had lots of reading material for the Court today. All right. This is Judge Jernigan, and we have a couple of Highland settings. The HarbourVest matters are the primary thing we have set today, and then we also have a Debtor's motion pursuant to protocols for authority for Highland Multi-Strat to prepay a loan.

All right. Well, let's get a few appearances. First, for the Debtor team, who do we have appearing this morning?

MR. POMERANTZ: Good morning, Your Honor. It's Jeff Pomerantz, John Morris, and Greg Demo here on behalf of the Debtor.

THE COURT: Okay. Thank you.

All right. We have objections on HarbourVest. Who do we have appearing for Mr. Dondero this morning?

MR. WILSON: Your Honor, it's John Wilson, and I'm also joined by Michael Lynn, John Bonds, and Bryan Assink.

THE COURT: Okay. I'm sorry. Could -- the court reporter does yeoman's work in this case. Let me just make sure we got all three of those names. Say again, Mr. Wilson.

MR. WILSON: John Bonds and Michael Lynn and Bryan Assink.

THE COURT: Oh, okay. So, see, I thought I heard somebody Wilson in all of that, which was why I was pressing the issue.

All right. Is Mr. Dondero present on the video for today's hearing?

MR. WILSON: I believe he is, Your Honor.

THE COURT: Mr. Dondero, could you confirm that you are out there? (No response.) Okay. My court reporter says he sees the name out there. Is he in your office?

MR. WILSON: Your Honor, he is appearing remotely from my office. I'm not sure exactly where he's appearing from.

THE COURT: Okay. Well, Mr. Dondero, if you're out there and you're speaking up to confirm you're present, we're not hearing you. Maybe your device is on mute. So please unmute yourself.

(No response.)

THE COURT: All right. I'm going to take some other appearances and you -- you need to try to communicate with your client and let him know I need to confirm he's present. Okay?

All right. Meanwhile, let's go to our other Objectors. CLO Holdco. Who do we have appearing today?

MR. KANE: John Kane; Kane Russell Coleman & Logan; on behalf of CLO Holdco.

THE COURT: All right. Thank you, Mr. Kane.

We had an objection from Dugaboy Investment Trust and Get Good Trust. Who do we have appearing?

MR. DRAPER: Douglas Draper, Your Honor, for -- for Draper.

THE COURT: All right. Thank you, Mr. Draper.

All right. I think those were the only written objections we had. Mr. Pomerantz, do you confirm, we don't have any other objectors for the motions set, correct?

MR. POMERANTZ: Your Honor, there was those three.

THE COURT: I'm sorry. I didn't catch your full sentence.

MR. POMERANTZ: That is correct, Your Honor. There were three objections to the motion.

THE COURT: Okay. Mr. Clemente, you're there for the Creditors' Committee?

MR. CLEMENTE: Yes. Good morning, Your Honor. Matt Clemente on behalf of the Official Committee of Unsecured Creditors.

THE COURT: All right. Good morning. Thank you. All right. We have a lot of other folks on the video. I'm not going to go ahead and take a roll call of other lawyers.

MS. WEISGERBER: Your Honor?

THE COURT: Yes?

MS. WEISGERBER: Excuse me, Your Honor. It's Erica Weisgerber from Debevoise on behalf of HarbourVest.

THE COURT: Okay.

MS. WEISGERBER: And I'm joined by Natasha Labovitz and Dan Stroik --

THE COURT: Okay.

MS. WEISGERBER: -- from Debevoise as well.

THE COURT: Thank you. I was neglectful in not getting your appearance, because, of course, you're at the front and center of this motion to compromise, and I did see that you filed a reply brief yesterday afternoon. Okay. Thank you.

All right. Do we have -- do we have Mr. Dondero on the line? I'm going to check again.

(No response.)

THE COURT: Mr. Dondero's counsel, I cannot hear you, so please unmute your device.

MR. WILSON: Your Honor, it appears to me that Mr. Dondero's device was unmuted as soon as you asked if he was available. I sent him a communication a second ago asking if he's having technical difficulties. I have not received a response, so I --

MR. DONDERO: Hello. Can anybody hear me?

THE COURT: Oh.

MR. WILSON: Okay. I hear him.

THE COURT: Mr. Dondero?

MR. DONDERO: Hello?

THE COURT: Is that you?

MR. DONDERO: Yeah, it is. I've been on. I've heard everything since the beginning. It's just we've had technical difficulties. I couldn't use the Highland offices. We've been trying to set up something else.

THE COURT: All right.

MR. DONDERO: But I'm on now, if -- yes.

THE COURT: All right. Very good. Well, I'm glad we've got you.

All right. Well, Mr. Pomerantz, how did you want to proceed this morning?

MR. POMERANTZ: Your Honor, we could take up the HarbourVest motion first, and I will turn it over to John Morris. He and Greg Demo will be handling that. And then after that we can handle the other motion, which is unopposed.

THE COURT: All right. Mr. Morris?

MR. KANE: Your Honor, this is -- sorry. This is John Kane for CLO Holdco. Just very briefly, if I may. And this will affect, I think, the Debtor's case in chief, so I'll expedite things a little bit, I believe.

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the

HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.

THE COURT: All right. Well, thank you for that, Mr. Kane. I think that -- that eliminates one of the major arguments that we had anticipated this morning. So, thank you for that.

Any other housekeeping matters that maybe someone had that I didn't ask about?

MS. MATSUMURA: Yes, Your Honor. This is Rebecca Matsumura from King & Spalding representing Highland CLO Funding, Ltd. I just wanted to put on the record, we -- our client had requested that some of its organizational documents be filed under seal. But we have given permission for the parties to present the relevant excerpts, to the extent it's still relevant after Mr. Kane's announcement, in court. And we'd just ask that the underlying documents remain sealed, but we're not going to object if they show them on a PowerPoint or anything like that.

So, to the extent that you had that on your radar, I just wanted to clear that up for the proceedings.

THE COURT: All right. Well, I did sign an order

late last night. I don't know if it's popped up on the docket.

MS. MATSUMURA: Yes, Your Honor. That's what this referred to. That was what -- these are the documents that were being sealed. And so I just wanted to note, if you -- you know, if the Debtor puts up an excerpt of those documents and you're like, wait a minute, didn't I seal those, that we were the party that requested them be under seal and we're fine with them being shown in court, as long as the underlying documents aren't publicly accessible.

THE COURT: Okay. Got you. Thank you.

All right. Any other housekeeping matters?

MR. MORRIS: Yes, Your Honor. This is John Morris from Pachulski Stang for the Debtor. Good morning.

THE COURT: Good morning.

MR. MORRIS: The only other matter that I wanted to raise, and I can do it now or I can do it later, or Your Honor may tell me that it's not appropriate to do at this time, is to schedule the Debtor's motion to hold Mr. Dondero in contempt for violation of the TRO.

THE COURT: All right. Well, let's do that at the conclusion today. And please make sure I do it. I think I was going to address this last Friday, and we went very late and it slipped off my radar screen. But I did see from my courtroom deputy that you all were reaching out to her

yesterday to get this set, and then Mr. Dondero's counsel reached out to her and said, We're going to file an objection to a setting next Wednesday, or I think you had asked for a setting next Tuesday or Wednesday.

MR. MORRIS: I did.

THE COURT: And I don't -- I don't know if that response/objection was ever filed last night. I haven't seen it if it was. So, we'll -- please, make sure I don't forget. We'll take that up at the end of today's matters. All right. Well, --

MR. MORRIS: All right. So, --

MS. WEISGERBER: Your Honor, one last housekeeping item from -- I'm joined this morning by Michael Pugatch of HarbourVest, who will present some testimony this morning. I just want to confirm he's on the line and confirm no objections to him sitting in for the rest of the hearing.

THE COURT: All right. Mr. Pugatch, this is Judge Jernigan. Could you respond? Are you there with us?

MR. PUGATCH: Yes. Good morning, Your Honor. Mike Pugatch from HarbourVest here.

THE COURT: All right. Very good. I think we had you testify once before in the Acis matter, if I'm not mistaken. Maybe. Maybe not. Maybe I saw a video deposition. I can't remember.

All right. So, we're going to let Mr. Pugatch sit in on

this. Anyone want to say anything about that? I consider him a party representative, so I don't -- I don't think anyone could invoke the Rule.

All right. Very good. Well, let's go forward if there are no more housekeeping matters.

MR. MORRIS: Okay.

THE COURT: Mr. Morris?

MR. MORRIS: Thank you. Thank you very much, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for the Debtor.

It's a rather straightforward motion today. It's a motion under Rule 9019, pursuant to which the Debtor requests the Court's authority and approval to enter into a settlement agreement with HarbourVest that will resolve a number of claims that HarbourVest has filed against the Debtor.

What I -- the way I propose to proceed this morning, Your Honor, is to give what I hope is an informative but relatively brief opening statement. I'll defer to HarbourVest and its counsel as to whether they want to make a presentation in advance of the offer of evidence. Any objecting party, I suppose, should then be given the opportunity to present their case to the Court. Then the Debtor will call Jim Seery, the Debtor's CEO and CRO. We will offer documents into evidence. I would propose then that the objecting parties take the opportunity to ask Mr. Seery any questions they'd like on the

matter.

After the Debtor rests, I think HarbourVest would like to put Mr. Pugatch on the stand to offer some testimony on their behalf. And I think that that will conclude the case. We can finish up with some closing arguments as to what we believe the evidence showed, but that's the way that I'd like to proceed, if that's okay with the Court.

THE COURT: All right. That sounds fine.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: Okay. So, as I said, Your Honor, this is a -- this should be a very straightforward motion under Rule 9019. The standard is well-known to the Court. There are four elements to a 9019 motion. The Debtor clearly has the burden of proof on each one. And we easily meet that burden, Your Honor.

The standard, just to be clear, the first part is that we have to establish a probability of success, with due consideration for uncertainty of law and fact. The second one is the complexity, likely duration, expense and inconvenience of the litigation. The third part of the test is the paramount interest of creditors. And the fourth part of the test is whether or not the proposed settlement was reached after arm's-length negotiations.

The Debtor believes that it easily meets this standard, and frankly, is a little bit frustrated that it's being forced

to incur the expense by Mr. Dondero in going through this process.

A plain reading, a fair reading of the economics here relative to the claim shows that this is a very reasonable settlement. I don't need to go beyond that, Your Honor. I don't even need to use the word reasonable. It surely meets the lowest standard.

We've prepared a couple of demonstrative exhibits, Your Honor. I'm going to use them with Mr. Seery. But I'd like to just put one up on the screen now, if I may.

Ms. Canty, can you please put up Demonstrative Exhibit #3?

Demonstrative Exhibit #3 is an outline of the economics of the settlement. It includes the various pieces, the components that the parties have agreed to. And it shows, at least from the Debtor's perspective, just what HarbourVest is being given here.

Up on the screen is a demonstrative exhibit. It has citations to the evidence that will be admitted by the Court. The first line shows that HarbourVest will receive a $45 million allowed general unsecured nonpriority claim. And that -- that can be found at Debtor's Exhibit EE, Exhibit 1, at Page 2.

That claim is discounted by the expected recovery that general unsecured creditors are supposed to get. As of November, in the liquidation analysis that was part of the

disclosure statement -- that's the citation in the footnote -- the Debtor believed that unsecured creditors were estimated to recover approximately eighty-seven and a half cents on the dollar. And so we just did the arithmetic there to get to the net economic value of the proposed general unsecured claim.

And from that, we reduced $22-1/2 million because that is the net asset value of HarbourVest's interest in HCLOF, which, pursuant to the settlement agreement, it will transfer back to the Debtor, so that the net economic value is approximately $16.8 million.

You will hear testimony from Mr. Seery that this number is, in fact, overstated, and it's overstated because, since the time the disclosure statement was filed in November, a number of events have occurred that will -- that have caused the estimated recovery percentage to be reduced from approximately 87-1/2 percent to something lower than that. We don't have the exact number, Your Honor, but Mr. Seery will -- and the evidence will show that there's been more expenses, that there's been some resolution of certain claims. There's been some positive issues, too. But that number is probably in the 70s somewhere.

And in any event, I think the point here is, Your Honor, HarbourVest invested $80 million in HCLOF, which was going to participate in the investment in CLOs. They filed a claim for $300 million, through treble damages and other claims. But

the net economic impact of this is going to be somewhere probably in between $12 and $14 million. I'll let Mr. Seery give more precision to that. And it represents less than -- a less than five percent recovery on the total claim.

And we think it's important for the Court to keep that in mind. What are the economics here? Are we overpaying? Is this an unreasonable settlement? And I think the evidence will show that the Debtor is not, but that this settlement that you see before you was the product of arm's length, and I'm going to go in reverse order of the four-part test under 9019.

So, the last part is whether or not the settlement, the proposed settlement was the product of arm's-length negotiation. You'll hear lots of evidence that this settlement that's up on the screen right now very much was the product of arm's-length negotiation.

The third part of the test, Your Honor, is whether it meets the paramount interest of creditors. You know, regrettably, Mr. Dondero is the only purported creditor who is objecting here. He may have done so through different vehicles, but every objecting party here is a debtor [sic] owned and controlled by Mr. Dondero. No other creditor -- not the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty -- nobody is objecting to this settlement except for Mr. Dondero. And we believe that that highlights the Debtor's

ability to meet the third prong of the test, and that is these are -- this settlement is in the paramount interest of creditors.

Again, going in reverse, the second part of the test is the complexity, duration, and expense of litigation. There will be no disputed evidence that we meet -- the Debtor easily meets this prong of the test. The evidence is going to show that HarbourVest's claim is based on fraud, fraud in the inducement, fraudulent statements and omissions, the kind of case, Your Honor, that I'm sure you're familiar with that is incredibly fact-intensive, that will be incredibly difficult to navigate through. It will be prolonged, it will be expensive, because you're necessarily relying on he said/she said, basically. And so we're going to have to get testimony from every person that spoke in connection with the events leading up to the transaction. So we think the second prong will be easily met, Your Honor.

And then the last prong -- the first prong, if you will -- is the likelihood of success on the merits. We think that the settlement, the economic recovery that's up on the screen here, which ultimately will be less than five percent of the claimed amount, in and of itself shows that the settlement is consistent with the Debtor's perception of its likely success on the merits. I'm certain that HarbourVest disagrees, but that's okay, we're here today and that's the Debtor's view,

and the Court is here to assess the Debtor's business judgment and whether the Debtor has properly analyzed the issues and gone through the process. And the evidence will show conclusively that it will. That it has.

Mr. Seery will testify at some length as to the risks that he saw. I think that you'll hear counsel for Mr. Dondero ask both Mr. Seery and Mr. Pugatch a number of questions designed to elicit testimony about this defense or that defense. And it's a little -- it's a little ironic, Your Honor, because, really, every defense that they're going to try to suggest to the Court was a valid defense is a defense that the Debtor considered. In fact, it's, you know, it's a little spooky, how they've -- how they've been able to identify kind of the arguments that the Debtor had already considered in the prosecution of their objections here.

But be that as it may, the evidence will conclusively show that the Debtor acted consistent with its fiduciary duties, acted in the best interests of the Debtor's estate, acted completely appropriately here in getting yet another very solid achievement for the Debtor, leaving very few claims that are disputed at this point, all but one of which I believe are in the hands of Mr. Dondero.

So, that's what we think that the evidence will show.

I do want to express my appreciation to Mr. Kane for reflecting on the arguments that we made with respect to the

ability of the Debtor to engage in the transfer or the acquisition of the asset from HarbourVest. I would -- I would respectfully request that we just enter into a short stipulation on the record reflecting that the Debtor's acquisition of HarbourVest's interests in HCLOF is compliant with all of the applicable agreements between the parties.

And with that, Your Honor, I look forward to putting Mr. Seery on the stand and presenting the Debtor's case.

THE COURT: All right. Other opening statements?

OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

MR. KANE: Yes, Your Honor. Sorry. John Kane on behalf of CLO Holdco.

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client that the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

THE COURT: All right. Well, I'm content with that.

Other opening statements?

OPENING STATEMENT ON BEHALF OF HARBOURVEST

MS. WEISGERBER: Your Honor, Erica Weisgerber on behalf of HarbourVest.

HarbourVest joins in Mr. Morris's comments in support of the settlement, and we believe that the question of whether the settlement between HarbourVest and the Debtor satisfies the Rule 9019 standard is not even a close one.

Some Objectors have made arguments about the merits of HarbourVest's claims, which is why we're here. As Your Honor will hear this morning, HarbourVest has meaningful and meritorious claims against Highland, but made the business decision to avoid the time, expense, and inherent risk of litigation in the interest of preserving value, both for itself and for the estate.

Today, Michael Pugatch, a managing director of HarbourVest, will testify before the Court. He'll explain that HarbourVest claims against Highland arise out of certain misrepresentations and omissions by Highland to HarbourVest in connection with HarbourVest's purchase of an interest in HCLOF, one of Highland's managed funds. Those misrepresentations and omissions, as Your Honor will hear, relate to Highland's litigation with its former employee, Joshua Terry, and transfers that were conducted in 2017 to strip Acis of value and prevent Mr. Terry from collecting on an $8 million judgment.

Mr. Pugatch will further explain that HarbourVest would not have invested in HCLOF had it known the underlying facts about those Acis transfers.

Mr. Pugatch will also testify that not only did HarbourVest not know about those transfers, it learned about those transfers when it was accused of orchestrating the transfers itself in the Acis bankruptcy. Your Honor will hear

that the Acis trustee sought extensive discovery from HarbourVest after numerous accusations that HarbourVest was behind the transfers.

Mr. Pugatch will also testify that Highland charged legal fees for itself and its affiliates to HCLOF, essentially forcing HCLOF to fund the litigation involving the Acis bankruptcy and Mr. Terry.

In total, HarbourVest's claims for damages are over a hundred million dollars in investment-related losses, lost profits, legal fees inappropriately charged to HCLOF, its own legal fees. And that's before interest or trebling damages.

But HarbourVest stands ready to litigate its claims, but following hard-fought and extensive negotiations with the Debtors, the parties reached the settlement that's now before the Court. Mr. Pugatch's testimony regarding the strong factual bases for HarbourVest's claims against Highland and its recoverable damages will further underscore the risks that the Debtors faced if they chose to litigate these claims, and why this settlement is fair, equitable, and in the best interest of the estate.

THE COURT: All right. Thank you, Counsel.

Other opening statements?

OPENING STATEMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

MR. DRAPER: Your Honor, this is Douglas Draper on behalf of one of the Objectors. I'd like to just make a few

comments with respect to what I've heard and what the Court is going to hear.

The first issue I'd like to address is the comment by counsel for the Debtor that no other party has objected. The 9019 motion is one of the issues that this Court has to rule on, whether or not there was an objection or not. So the fact that this may be -- bankruptcy is not a popularity contest and not an issue of who votes for what and doesn't vote. This, along with the 1129(a) tests, are clearly within your province, and you need to listen carefully because you'll have to make your own independent analysis whether my objection is correct or incorrect.

Two other points I'd like to make that I think are very salient. Number one is, if you look at the Debtor's disclosure statement, it basically took the position that the HarbourVest claim is of little or no value. And lo and behold, thirty days later, there's a settlement that brings about a significant recovery to HarbourVest. The timing is interesting, and I think the Court needs to pay careful attention to what transpired between the two dates.

And then the last point I'd like to make is, as you listen to the evidence, and what I learned abundantly clear from hearing the depositions, is that the claim of HarbourVest, if there is a claim at all, is probably one hundred percent -- should be subordinated in that it appears to arise out of the

purchase or sale of a security. And, again, I would ask the Court to listen carefully to this because that's what it appears to be and that's what the evidence is going to show to the Court.

THE COURT: All right. Mr. Draper, let me clarify something I'm not sure if I heard you say or not. Were you saying that the Court still needs to drill down on the issue of whether the Debtor can acquire HarbourVest's interest in HCLOF?

MR. DRAPER: No.

THE COURT: Okay. I was confused whether you were saying I needed to take an independent look at that, now that the objection has been withdrawn of Holdco. You are not pressing that issue?

MR. DRAPER: No, I am not. Basically, I think it's the fairness of the settlement. I think the transferability of the interest is separate and apart from the fairness of the settlement itself. I think the fairness -- the transferability was a contractual issue between two parties that the Court does not have to drill down on.

THE COURT: All right. I have another question for you. I want to clarify your client's standing. Tell me -- I'm looking through a chart I printed out a while back. I guess Dugaboy Investment Trust filed a couple of proofs of claim; is that right?

MR. DRAPER: Yes.

THE COURT: Okay. What --

MR. DRAPER: And objections are pending.

THE COURT: Pardon?

MR. DRAPER: Objections to those claims are pending before the Court, Your Honor, --

THE COURT: Okay.

MR. DRAPER: -- and have not been litigated.

THE COURT: And what about Get Good Trust?

MR. DRAPER: Get Good Trust has a proof of claim also that objections are pending to. Pending.

THE COURT: Okay. I don't want to get too sidetracked here, but I know standing was -- was mentioned as a legal argument today. What is the basis for those proofs of claim?

MR. DRAPER: The first one is, with respect to the proof of claim for Dugaboy, there is an investment that Dugaboy made that was then funneled, we believe, up to the Debtor. And the -- the loan that exists, we believe is a Debtor loan, as opposed to a loan to the entity that we made the loans to.

And, again, it's a matter that the Court is going to hear. The claim may or may not be allowed. It has not been disallowed yet.

The second part to the Dugaboy ownership is we own an

interest in the Debtor. And so we are, in fact, a party in interest.

THE COURT: Okay.

MR. DRAPER: It may be a small interest, but it is an interest.

THE COURT: It has a limited partnership interest in the Debtor?

MR. DRAPER: Yes.

THE COURT: Is that correct?

MR. DRAPER: Yes.

THE COURT: Okay. Well, I'll move forward. Thank you.

Does that cover -- any other opening statements? I think that covered everyone who was -- who filed some sort of pleading today. No.

MR. WILSON: Your Honor, John Wilson on behalf of --

THE COURT: I'm sorry. I'm sorry.

MR. WILSON: -- Mr. Dondero.

THE COURT: I missed Mr. Dondero's counsel. I knew we had visited at some point this morning. I just got confused there. Go ahead, Mr. Wilson.

MR. WILSON: No problem, Your Honor. I was just going to say that we will reserve our comments until after the conclusion of the testimony.

THE COURT: All right. Very well.

Mr. Morris, you may call your first witness.

MR. MORRIS: Thank you, Your Honor. Before I do, just two very, very quick points.

THE COURT: Okay.

MR. MORRIS: To be clear, Dugaboy's interest in the Debtor is 0.1866 percent. Less than two-tenths of one percent.

Secondly, the argument that Mr. Draper just made with respect to subordination is one that appears in nobody's papers. And, in fact, not only doesn't it appear in anybody's papers, but Mr. Dondero, I believe, specifically took issue with the fact that a portion of the consideration that HarbourVest would receive would be on a subordinated basis, and he would -- and I think he took the position there is no basis to give them a subordinated claim.

So, I just wanted to point those items out to the Court, not that I think either one makes a large difference today, but I do want to deal with the facts.

THE COURT: Thank you.

MR. MORRIS: The Debtor would call -- you're welcome, Your Honor. The Debtor calls Mr. James Seery.

THE COURT: All right. Mr. Seery, welcome back to virtual court. If you could say, "Testing, one, two" so I can see you and swear you in.

MR. SEERY: Testing, one, two.

THE COURT: All right. I heard you but I'm not yet seeing your video. Is your video turned on?

MR. SEERY: Video is on. Yes, Your Honor.

THE COURT: Okay. I see you now. Please raise your right hand.

JAMES SEERY, DEBTOR'S WITNESS, SWORN

THE COURT: Thank you. Mr. Morris?

MR. MORRIS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good morning, Mr. Seery. Can you hear me?

A I can. Thank you, Mr. Morris.

Q Okay. Let's just cut to the chase here. Are you familiar with HarbourVest's claims filed against the Debtor?

A I am, yes.

Q And did you personally review them?

A I did, yes.

Q Do you recall that over the summer the Debtor objected to HarbourVest's claim?

A Yes, we did.

Q Why -- can you explain to the judge why Harbour -- why the Debtor objected to HarbourVest's claim last summer?

A Sure. The HarbourVest claims, I believe there are about six of them, initially were filed, and they were -- they were relatively vague in terms of what the specifics of the claims

were.

So, we saw the claims but didn't, frankly, pay a lot of attention to the underlying transaction that was referred to in the proofs of claim and the losses that HarbourVest had claimed to suffer -- to suffer with respect to their purchase of securities related to HCLOF and the damages caused by the Acis case. So we filed a pretty pro forma objection. I believe it was a simply stated objection that we didn't have any record that there was anything in the Debtor's books and records that they had a valid claim for any amount against the Debtor.

Q Are you aware that HarbourVest subsequently filed a response to the Debtor's objection to their claims?

A Yes. Yes, I am aware.

Q And did you familiarize yourself with that particular response?

A I did indeed. It was a pretty extensive response, really developing the full panoply of their claims, which included claims for expenses relating to the Acis case, which HarbourVest viewed as being improperly charged to HCLOF by its manager, which is effectively Highland. Those expenses, HarbourVest took the view, were excessive, had nothing to do with the investment, and were simply a pursuit of a personal vendetta against Mr. Terry and his interests by Mr. Dondero, and using HCLOF's money to actually pursue those interests.

In addition, and this was the first time we saw that, HarbourVest brought forth its claims that it was entitled to effectively rescind the transaction. And I say rescind the transaction: In security parlance, they claim that they were induced by fraud, I think as most are -- to enter into the transaction.

As most are aware, the liability limitations in the OMs and the exculpation in the documents are pretty broad, and HarbourVest's position was that they weren't going to be subject to those limitations because the actual transaction that they entered into was a fraud on them, designed by Mr. Dondero, Mr. Ellington, and the Highland team.

Q All right. Let's talk about your understanding, the Debtor's understanding of the factual background to HarbourVest's claim. What is your understanding of the investment that HarbourVest made?

A Well, HarbourVest made an investment in the Highland CLO business. The Highland CLO business was -- was Acis. And effectively, the business had been separated, but in name only. Acis was just a shell, with a few partners -- obviously, Mr. Terry as well -- but it was all Highland personnel doing all the work.

And what they were trying to do with Acis was, in essence, resuscitate a business that had been in a bit of a decline from its pre-crisis heyday.

They were looking to take additional outside capital. They would -- they would pay down or take money out of the transaction, Highland would, or ultimately Mr. Dondero, and they would -- they would seek to invest in Acis CLOs, Highland's 1.0 CLOs. And then with respect to the Acis CLOs, and potentially new CLOs, but with the Acis CLOs, they'd seek to reset those and capture what they thought would be an opportunity in the market to -- to really use the assets that were there, not have to gather assets in the warehouse but be able to use those assets to reset them to market prices for the liabilities and then make money on the equity.

Q Do you have an understanding --

A Then --

Q I'm sorry. Go ahead.

A Why don't I continue? So, the transaction, they found HarbourVest as a potential investor, and the basis of the transaction was that they would make an investment into Acis.

Shortly before the transaction, and while they were doing diligence, Mr. Terry received his arbitration award. I believe that was in October of 2017. The transaction with HarbourVest closed in mid- to late November of 2017. But Mr. Terry was not an integral part. Indeed, he wasn't going to be a key man. He had been long gone from Highland by that time.

What the -- I think you asked me originally what the basis of their claim was. The transaction went forward, and the

basis of their claim is that they really were never -- nothing was disclosed to them about the nature of the dispute with Mr. Terry other than in the highest-level terms; the animosity with respect to which that dispute was held by Highland and potentially Mr. Terry; and really, how those costs would be borne and risks be borne by the investment that they were making.

That was, in essence, the transaction and the high-level view of their claim.

Q Okay. Just a few very specific facts. Do you have an understanding as to how much HarbourVest invested and what they got in exchange for that investment?

A Yeah. HarbourVest invested in a couple tranches, and I forget the exact dates, but approximately $75 million originally, and then they added another five. Some distributions were made in the first half of 2018, putting their net investment in the mid-seventies on the investment, which now is worth about 22-1/2 million bucks.

Q And what percentage interest in HCLOF did HarbourVest acquire, to the best of your knowledge?

A They have 49.98 percent of HCLOF. HCLOF, just to refresh -- the Court is, I think, well aware of this, but to refresh, is a Guernsey entity. Not -- not atypical for structures of this type to use offshore jurisdictions and sell the securities under -- at least to U.S. -- can't sell them to

U.S. investors unless they qualify, and these are sold under Reg S to -- to investors that otherwise qualify. And HarbourVest was investing in that transaction through the Guernsey structure.

Q And do you have an understanding as to who owned the 50-plus percent of HCLOF that HarbourVest was not going to acquire?

A Yeah. There's -- you can tell by the name. HCLOF is Highland CLO Funding. This is a Highland vehicle. So Highland owned and controlled the vehicle. The DAF, which is -- which is Dondero-controlled trusts, have the -- 49 percent. Highland has, I believe, around .63-65 percent directly. And then Highland employees at the time who were involved in the business owned another small percentage.

So the majority was going to be controlled by Highland through its control of DAF and its control of the employees that worked for it. HarbourVest would be a minority investor.

Q Okay. And I believe you testified that the investment was made in mid-November; is that right?

A That's correct. I think it was the 15th, may have been the 17th of November.

Q And do you recall when in October the Terry arbitration award was rendered?

A It was about a month before. I think it was right around the 20th, the 17th to the 20th. I may be slightly wrong on

each of those dates.

Q Okay. What is your understanding as to what happened after the issuance of the award that is the basis or at least one of the bases for HarbourVest's claim?

A I don't think there's -- I don't think there's any dispute. And there certainly are judicial findings. Dondero and Highland went about stripping Acis of all of its assets. So, remember that Acis is not a separate standalone company, in any event. It's controlled and dominated completely by Highland at the time. But it did have contracts. And those contracts had value.

So the first idea was to strip out the management contract and put it into a separate vehicle, which we called HCF Advisor, which Highland still owns. The second piece was to strip out some valuable assets, the risk retention piece, which was a loan that in essence was equity that Highland had put into Acis but structured as a loan, as many of the transactions we'll see down the road are, in order to deal with some -- avoid taxes in any way possible. And that structure, that value moved value out of Acis for the express purpose of trying to run, in essence, the Highland business back in Highland.

Remember, as I said, Acis is just a Highland business moved to a separate shell. When Mr. Terry got his arbitration award against Acis and was seeking to enforce it, it was

pretty straightforward, let's take all the assets -- Dondero scheme -- let's take all the assets and move them back into Highland so Terry can't get anything.

Q And how does that scheme relate to the HarbourVest claim, to the best of your knowledge?

A Well, HarbourVest -- HarbourVest's position is that they invested in Acis and -- and whether Acis was called Acis or called Highland, it doesn't really matter; there were valuable assets in the -- in the entity that they were going to be investing in through the equity in these CLOs and some of the debt securities in those CLOs.

And then the stripping out and the fraudulent conveyances out of Acis caused them damages because that's what left the damage to Mr. Terry.

The quick math on Acis, by the way, is Acis has probably lost, total damages, 175 million bucks. And that's pretty easy. DAF lost 50. HarbourVest lost 50. Fifteen million of fees charged to HCLOF. Another five million of fees, at least, incurred by Mr. Terry. Ten million that went to Mr. Terry, 15 to Highland fees, another five, plus Mr. Terry's settlement in this case, over eight million bucks.

So HarbourVest's position, which, on a factual basis, you know, is problematic for the estate, is, wait a second, we invested in this vehicle with Highland. That was supposed to invest in Highland CLOs. They were called Acis, but they were

Highland CLOs. And then you went about causing tremendous damage to that vehicle that we ultimately were investing in, and then charge us for the pleasure.

Q You used the phrase earlier "OM," I believe.

A Offering memorandum.

Q Offering memorandum? Can you just explain to the Court your understanding of what an offering memorandum is?

A Typically, under U.S. law, and foreign jurisdictions have similar laws, you have to have a document that explains the securities that you're selling. And it goes into extreme detail about the securities and the risks related to those securities.

And the idea is not to have a document that tells you whether it's a good investment or a bad investment, but it's a document that discloses to the potential investor all of the risks with respect to that security or related to the investment over the duration of the security. It doesn't predict the future, but it's supposed to make sure that it gives you a very clean view of the past and a very clean view of what the facts from the past are and how they would implicate the future of the investment.

Q And in the course of its diligence, did the Debtor have an opportunity to review the offering memorandum in the context of the claims that were being asserted by HarbourVest?

A Oh, absolutely. It was originally effectively -- it's an

HCLOF offering memorandum. But as I said, HCLOF was managed and controlled by Highland, and Highland originally prepared it. And then, of course, in connection with -- with this dispute and these claims, we reviewed it, both myself and my legal team.

Q All right.

MR. MORRIS: Your Honor, the offering memorandum is on the Debtor's exhibit list, and I think this is an appropriate time to move into evidence Debtor's Exhibits A through EE, all of which appear at Docket No. 1732.

THE COURT: 1732?

MR. MORRIS: It's the Debtor's Second Amended Witness and Exhibit List.

THE COURT: All right. Any objection to admission of A through EE?

MR. DRAPER: Douglas Draper. No objection, Your Honor.

THE COURT: All right. Mr. --

MR. MORRIS: May I proceed?

THE COURT: Yeah. Mr. Wilson, did you want to confirm no objection?

(Echoing.)

THE COURT: All right. Hearing no objection, Debtor's A through EE are admitted.

(Debtor's Exhibits A through EE are received into

evidence.)

THE COURT: Go ahead, Mr. Morris.

MR. MORRIS: Thank you, Your Honor. The offering memorandum itself is one of the documents that we filed under seal, and we did so at the request of counsel to HCLOF. But HCLOF has consented to our sharing up on the screen certain very limited provisions of the document, without waiving the request that the agreement otherwise be maintained under seal.

THE COURT: All right.

MR. MORRIS: So may I proceed on that basis, Your Honor?

THE COURT: You may. Uh-huh.

MR. MORRIS: Okay. Ms. Canty, can you please put up on the screen Demonstrative Exhibit #1? Okay. Can we just -- is there a way to just expand that just a bit, Ms. Canty? Thank you very much. And if we could just scroll it up? Thank you very much. Perfect.

Okay. So, Your Honor, this, as the footnote says, is an excerpt from the offering memorandum that can be found at Debtor's Exhibit AA. Double A. And this particular portion of the offering memorandum is at Page 35.

THE COURT: Okay.

BY MR. MORRIS:

Q Mr. Seery, have you seen this portion of the offering memorandum before?

A Yes, I have. But before I continue, I just -- I should have checked. Are you able to hear me clearly? Am I speaking too quickly or am I cutting out? I just want to make sure. I'm using a different set of audio today.

THE COURT: All right.

MR. MORRIS: That's fine.

THE COURT: I hear you very well.

MR. MORRIS: Yeah.

THE COURT: So I think we're good right now. Thank you.

THE WITNESS: Yeah. Thank you, Your Honor. I was just checking.

THE COURT: Okay.

THE WITNESS: In response to your question, Mr. Morris, yes, I have seen this before.

BY MR. MORRIS:

Q Okay. And can you -- did you form a view in doing the due diligence as to the adequacy of this disclosure?

A Yes, I did.

Q Can you share your -- or share with Judge Jernigan the Debtor's view as to the adequacy of this disclosure concerning the litigation between Highland and Acis?

A With respect to the litigation between Highland and Acis, or, really, between Acis, Highland, and Highland's principals and Acis's principal, totally inadequate. The disclosure here

is very high-level. And if there were no other litigation going on, it might serve to suffice. It basically says, In our business, because we invest in distressed loans, there's a lot of litigation around distressed investments, and that's what we have. And then it says, We've talked with the investor about other things and we're -- we think that's enough.

Q Is there anything in this portion or anywhere in the offering memorandum that you're aware of that disclosed to HarbourVest that in the weeks leading up to the investment Highland was engaged in the fraudulent transfer of assets away from Acis?

A No. And I apologize, because I think it's -- I've conflated two provisions. This one only deals with the very high-level nature of the business. It doesn't give any indication that there's any material litigation going on elsewhere with respect to Acis.

I believe there's another provision that says, We -- we have talked to -- oh, here -- I'm sorry. It is here. Shareholders have had an opportunity to discuss with Highland to their satisfaction all litigation matters against Highland and its affiliates unrelated to its distressed business.

That, in my opinion, is wholly inadequate.

Q Okay.

MR. MORRIS: And let's put up -- actually, let's just

move on.

BY MR. MORRIS:

Q Let's go to the settlement itself.

MR. MORRIS: Can we put back up Demonstrative Exhibit #3?

BY MR. MORRIS:

Q Mr. Seery, can you see that?

A Yes, I can.

Q Does this generally describe the net economic recovery of the HarbourVest settlement based on estimated recoveries for general unsecured creditors as of November 2020?

A As of November 2020, it does. And you alluded to this in your opening, but to be clear, the numbers have shifted. Costs have increased. The -- so the -- effectively, the numerator, in terms of distributable value that we estimate, is lower. And settlements, the denominator, have also increased. So the claims against the estate that have been recognized have increased. And that, that probably takes it down closer, in our view, to about seventy cents distribution, a number closer to nine to ten million, maybe a little bit less.

However, there's also some additional value that we -- we believe we will recover directly. There are north of $150 million of intercompany notes owed by Dondero entities to Highland. A number of those notes are demand notes, and we've

already made demand. We'll be initiating actions next week. So those are -- those value, we believe, we'll recover directly from Mr. Dondero and from related entities.

To the extent those related entities don't have value, we feel very strongly about our ability to pierce the veil and reach in to Mr. Dondero. And then his assets, either his personal assets or the assets that he claims are in trusts.

In addition, there are a significant amount of notes that were extended in two -- I believe around 2017, for no consideration. Those notes were demand notes, I believe, and then extended it 30 years. So they have 2047 maturities. Those were probably going to have to be subject to fraudulent conveyance type actions or -- or some sort of sale at a very discounted value because third parties wouldn't want long-dated notes with Mr. Dondero as the counterparty for very much money.

Those -- they defaulted on some of those parties, so we effectively turned them into demand notes. We've accelerated, and we'll be bringing actions against those entities next week as well.

So I think (garbled) have come up, so I apologize. One way of saying I think the sixteen and a half is a bit high right now, based upon what we know, but the value is going to be higher than our estimate a couple of weeks ago because we do believe we'll be able to recover on the notes.

One additional caveat, just to be fully transparent here. This summary with the 16.8 doesn't include the subordinated piece of this -- of this claim and our resolution. That -- recovery of that piece will be dependent upon the success of litigations.

In order for the subordinated piece to get paid, all general unsecured claims in Class -- Classes 7 and 8 will have to be paid in full. And then -- and then the subordinated class in Class 9, which we believe UBS will have a piece of, and HarbourVest will have a piece of by this settlement, those will be able to recover, and those will be based upon other claims of action against -- primarily against related parties.

Q And then that last point, is that what's reflected in Footnote 3 on this page?

A That's correct, yes.

Q Okay. And just for the record, there's a reduction in value of $22-1/2 million. Do you see that?

A Yes.

Q And can you just explain to the Court what that is and how that value was arrived at?

A Yes. I may be getting slightly ahead of you, Mr. Morris. But to give the Court a reflection of the transaction -- and we can go into the details in a moment -- ultimately, the transaction we structured we think is very fair both economically to the Debtor, but there -- there is some

complexity to it to satisfy some of HarbourVest's concerns that they be able to effectively rescind the transaction, at least from an optical perspective. Value was important, but optics were as well. The twenty-two and a half is the current -- actually, the November value of HCL -- the HarbourVest interests in HCLOF. And that's based upon Highland's evaluation of those interests.

So we do believe that that is a fair value as of that date. It has not gone done. It hasn't gone up explosively, either, but it hasn't gone down. We think that's good, real value. That value is in the Acis CLOs, the equity in those CLOs, which is 2 through 6, that we -- we will be working with the HCLOF folks to get Mr. Terry to monetize those assets and those longer-dated CLOs.

In addition, I think it's 85 percent of the equity in Acis 7 -- Acis 7 is managed by Highland -- that is also beyond its reinvestment period. And in talking to the directors -- and they're new directors, and I'll get to that in a minute, for HCLOF -- they'll seek to push Highland, which is the reorganized Highland, to monetize that asset, with due regard to fair value.

In addition, Harbour -- HCLOF owned a significant amount of the preferred or equity pieces, if you will, in the Highland CLO, 1.0 CLOs. As we've talked about, those are not really CLOs. Those are effectively closed-end funds with

illiquid assets, primarily illiquid assets in them. We've had some dispute in front of the Court about selling the liquid assets in them, which we can go into it another time. Those are being liquidated in the market at fair value.

But HCLOF also is a significant holder of those preferred shares, and those directors would -- have indicated to me that they would like to see those interests also monetized.

Q All right. Let's shift gears for a moment to talk about the diligence that the Debtor did before entering into this agreement. Can you just describe for the Court generally the diligence that was undertaken at your direction?

A Well, when we first received the reply to our objection, we dug into that reply and the specifics in it very aggressively. So we reviewed all of the underlying documents related to the original transaction. We discussed with counsel the legal basis for the HarbourVest claims. We interviewed our own HCMLP employees who were involved in the transaction and tested their recollection, specifically around who dealt with HarbourVest, who had the discussions with HarbourVest, what was disclosed to HarbourVest with respect to the Terry dispute and the Acis litigation.

We also had done, as I think the Court is well aware from prior 9019 testimony, extensive work around the transfers and the issues related to Acis. So we were familiar with their impact on HCLOF.

We also did extensive work valuing the remaining HCLOF interests to get a good feel of not only how much HarbourVest originally invested, but how much they actually lost in this transaction. And as I said, their original investment was around, in total, in two tranches, about $80 million, of which they got about $5 million back, and they've lost $22 million. So it -- I mean, remaining with $22 million. So they've lost, you know, in excess of $50 million.

Q Do you recall whether the Debtor reviewed and analyzed all of the documents that were cited in HarbourVest's response to the Debtor's objection to the HarbourVest proofs of claim?

A Yeah. I think -- I forget, to be honest, which -- exactly what documents were in there. But we went through their objection with a fine-toothed comb, not only with respect to the issues related to the Acis case, but also their references to Guernsey law, other U.S. law, any of the documents between the parties. And obviously, as I mentioned before, the offering memorandum.

MR. MORRIS: Your Honor, I would just note for the record that Debtor's Exhibits I through X are all of the documents that are cited in HarbourVest's response to the Debtor's objection to the HarbourVest proofs of claim, and those are the documents that Mr. Seery just referred to.

THE COURT: All right.

MR. MORRIS: Just, they're in evidence now, and I

just wanted the Court to understand why they're in evidence.

THE COURT: Okay. Thank you.

MR. MORRIS: You're welcome.

BY MR. MORRIS:

Q Let's talk about the Debtor and whether or not it had or has any viable defenses. Did the Debtor form any views as to whether or not it had any defenses to the HarbourVest claims?

A Yes, we did.

Q Can you describe for the Court the defenses that were reviewed and analyzed by the Debtor?

A Yeah. I think we -- we had very significant defenses. So, first and foremost, with respect to the original proof of claim, as I mentioned earlier, it alluded to the expenses and the overcharge. And I think with respect to the 15 million of fees that were charged to HCLOF by Highland, we didn't have a lot of defenses to that claim.

It's pretty clear, by any fair view of the Acis case, that HCLOF, as the investor in the Acis CLOs and the Highland CLOs, had no real responsibility for fighting with Acis and Josh Terry and shouldn't have been charged those fees. I don't -- I don't think there's a legitimate investor that would actually think that that was an appropriate amount to be charged to a fund.

However, the claim was not as broad -- the proof of claim was not as fulsome in terms of discussing and only vaguely

referred to other damages. So we did -- we did, as a threshold matter, think about whether we could argue that it was time-barred because they had not met their obligations to fully disclose under the proof of claim.

Secondly, we considered the defenses to the overall claim of fraudulent inducement. Our perspective was that if we could stop the claim of fraudulent inducement, the damages would likely be limited to the 15 and maybe some -- some other damages. With respect to the 15, again, the problem that we had when we got past -- past motions for summary judgment is the factual predicate for our defense was going to be that we divulged these things to HarbourVest and that they did not reasonably -- it was -- reasonably rely on some failure to divulge because they're a sophisticated investor.

The problem with that defense is that our witnesses, which really would have primarily been Mr. Dondero and Mr. Ellington, and one other employee who runs the CLO business, Mr. Covitz, would not be pretty good. They've been -- two of them have been in front of this Court and they're not viewed favorably and their testimony would be challenged and potentially suspect.

So that gave us a real focus on trying to make sure that we could, if we had to litigate, that we would litigate around the fraudulent inducement.

As I said, reasonable reliance, what was disclosed, lack

of digging into the public record, because you don't have to go far on Google to find "fraud" within two words of "Highland," and the tremendous, you know, litigious nature of Highland. You know, even at that point, when this investment was made, aside from Mr. Terry's arbitration, which by that point, at least by the time (inaudible) was public, there was, you know, significant public disclosure around the Credit Strat and the litigation, the Crusader litigation, the UBS litigation, the, gosh knows, the Daugherty litigation.

So our defense was going to be that you should have figured this out, you're a sophisticated investor, and you should have been able to figure out that there was significant risk that, with respect to Mr. Terry, that Mr. Dondero would not stop litigating and that those costs would put significant risk on the investment.

The problem with that, as I mentioned earlier, is that the OM is wholly deficient. If you have a typical risk factor in the offering memorandum, you would have disclosed that there was a litigation with Mr. Terry, a former partner in the business, and that the Debtor had no intention of settling it. There was no intention of settling. That litigation would go on. It could go on for years and it could result in bankruptcy or attachments and other risks to the business, and that the investor should be fully aware that the Offeror does not intend to be involved in any -- or the manager, in any

settlement with Mr. Terry, and the fact it undermined the investment. That wasn't there.

But that was our preliminary focus, to try to stop fraud in the inducement. And then we -- we had specific facts related to that. You know, once they knew about the bankruptcy in HarbourVest of -- I'm sorry, of Acis, HarbourVest made a second funding, which was there was a -- it was an initial $75 million draw, and then a second, I believe, about a $5 million draw, which was in -- I believe in February. And they made it without -- without objection, and that was after the commencement of the bankruptcy.

In addition, they were -- they were active in the bankruptcy, so the -- some of the things that happened in the bankruptcy, there were many opportunities to settle that case, from our examination, all of which were turned down to -- by Mr. Dondero. But you don't see HarbourVest pounding the table to settle, either, either with respect to the Oaktree transaction or any other transaction.

Now, HarbourVest's defense to that is, well, we were taking advice and all of our information from Highland, and we were getting that information directly from senior folks at Highland why -- what the value was and why we shouldn't do those things. We thought that that would mitigate some of the arguments that -- some of the damages that we might have, I'm sorry, if we -- if we lost.

But the focus at that point, you know, our legal strategy, was can we stop HarbourVest at the very forefront to say, You've got to come into the factual realm and get out of the fraud in the inducement realm. And then the defenses and the exculpations and the liability limitations in the documents would also come into play.

So that -- those are some of the defenses that we focused on and our analytical thinking around them.

Q So, if the Debtor had viable defenses, why is it settling?

A Well, this is a significant claim. And we -- we looked at it with respect to both the impact on the case, but, really, the merits of the claim.

As I said, there's really little dispute that the legal fees should not have been charged to HarbourVest. We think based upon the testimony in Acis, the suspect credibility of those who would have been our witnesses, and the experience in Acis that the Court has had in terms of the completely hell-bent on litigation, it would be hard for anyone to justifiably defend those fees being charged. So, as an initial matter, we had exposure there.

In addition, if HarbourVest got by our defense of -- was able, for example, to claim fraud in the inducement, then we were open to significant damages.

We really didn't put much value, frankly, on the RICO part of it. We think that that's waved around often to show treble

damages. Although in this case certainly somebody could lay out the predicate acts and put forth a RICO-type argument, we just didn't think that that had real merit in this commercial dispute, even with a fraud claim.

But even without the trebling of the damages, there's no dispute that HarbourVest lost more than $50 million in this investment. You know, we -- we thought about that risk as well.

In addition, because the case would really be fact-based, even if we had a high degree of confidence based upon our discussions with our employees and the factual testimony, it was going to be expensive to litigate this case, and time-consuming.

And so we looked at the economic value, the potential risks, and the actual value that we were giving up, and found this to be an extremely, extremely reasonable settlement.

Importantly, and I think what drove it, you -- one of -- one of the things that drove it is another one of our defenses on why, notwithstanding their -- what they held out as meritorious claims, I don't think HarbourVest really wanted to publicly litigate this claim. And we were aggressive in our discussions with HarbourVest of how we would litigate it, which would be quite publicly.

Now, that may or may not be fair, but that does put risk on the counterparty. And so I think that helped drive the

settlement.

In addition, the structure of the settlement we think is extremely favorable to the Debtor and to the estate because, rather than taking the full claim and putting it into a senior unsecured position, we have bifurcated it. We did think about whether this was a claim that could be subordinated under 510. There won't be any arguments, I would be surprised if there's arguments today that we didn't actually give to the Highland employees who have given them to Mr. Dondero's respective counsel.

We did structure it in a way that we thought gave HarbourVest the opportunity to effectively claim a rescission, even though that's not really what it is, and then be able to claim that their recovery is based on the bankruptcy, which it is, but not really dilute all the other stakeholders in the case.

(Pause.)

THE COURT: Mr. Morris? Anything else?

MR. MORRIS: I can hear you, Your Honor.

THE COURT: Okay.

MR. MORRIS: I can hear you.

THE COURT: Okay. Now can you --

MR. MORRIS: I got cut off from Mr. Seery for a moment.

THE COURT: Okay.

BY MR. MORRIS:

Q Okay. I appreciate that. Are you done giving the Debtor's basis for entering into this settlement, Mr. Seery, if you can hear me?

A I think so, but I think as the Court has probably seen, I can go on.

Q Yes.

A So I will try to be -- I'll try to be more concise. But this was a -- this was a difficult settlement. We felt good about our defenses. Felt that we could -- we could try them. But it would be extremely expensive, time-consuming, and there would be a lot of risk. And settling at a level which we believe is actually below the damages that were clearly caused only by the fees was a -- was a -- is a -- is a very reasonable settlement.

Q Okay. Let's just talk about the process by which we got to the settlement. Do you recall generally when the settlement negotiations have -- were commenced?

A I believe it was -- was late summer, early -- early fall.

Q Okay. Before I move on, I just want to go back to the Acis matter that you were talking about, one last issue. Do you know how, if at all, the injunction that was entered in the Acis bankruptcy impacted or related to the HarbourVest claims?

A Yeah. I -- yes, I do. And I believe it -- it did. I

think there's an argument, and we analyzed it thoroughly, that the injunction effectively caused a lot of the damages. Because if you look at the values of the equity that HarbourVest had, the -- and HCLOF had in the CLOs, it went down dramatically after the Trustee in the Acis case took over and then subsequently, when the case was reorganized and Mr. Terry took over, you know, with Brigade as the sub-advisor.

Now, that would -- you know, we would -- we could certainly attempt to throw, in our defense, the causation at Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's retort is that none of this would have occurred but for the burn-it-down litigation that Mr. Dondero engaged in with Highland.

In addition, in Mr. Terry's defense, you know, he did try multiple times with HCLOF, tried to petition, if you will, the HCLOF entity to -- and directors, former directors, to reset the CLOs to make them more economically viable, based upon the current level of asset returns versus the debt costs in the CLOs. And that was rejected by the HCLOF and the Debtor as the controlling party of HCLOF. So, we thought about those risks.

You know, similarly, the economic values in Acis 7 went down pretty significantly from that date as well. So I think there's -- there are some defenses, but that's really Mr. Terry's issue, not our issue. So we thought about those

issues, we analyzed them, and we certainly did all the work around month-to-month reductions in NAVs and how different events in the Acis case might have -- might have caused those and was that some sort of break from the original transgression that HarbourVest claims, which was the fraudulent inducement.

Q Do you recall that in November HarbourVest's motion under 3018 was scheduled to be heard?

A Yes.

Q And can you just tell the Court your understanding of what the 3018 motion was about?

A Well, the 3018 motion was going to be on voting. And we took the view that it really was not -- it shouldn't have been that big an issue and HarbourVest should have been content with just taking their actual losses of roughly a $50-$60 million claim for voting purposes and then we would move on.

HarbourVest was very insistent that they have a $300 million claim, because they took the position -- and with extensive documentation; not only the pleadings they filed, but also detailed decks that were prepared by their counsel, which they had presented to us on the merits of their claim -- that they were going to litigate for -- the 3018 and for the full $300 million value.

And that became the genesis, if you will, of the negotiations to settle.

So, we started talking about the 3018. It was very contentious. My apologies to Ms. Weisgerber and her counsel, her partners, because it was a significant and contentious negotiating call. But the reasons for that I think were that -- their insistence on litigating the 3018 and our view that this was just, you know, another -- another of a series of delays and costs in this case that we really were hoping to avoid.

That led to Mr. Pugatch and I stepping away from counsel, no offense to counsel, you know, ours and his, to begin negotiations around the potential for a settlement. First, it started with a 3018, and then, you know, argued that we would, if we got past the 3018, we were going to litigate this, because we effectively had -- thought we could get everyone else done at -- in and around that time. And I think we were also probably a little bit optimistic about UBS at that time and the mediation, which subsequently we have settled. But that was the genesis of those settlements.

Q And how did the structure, how did the Debtor and HarbourVest derive at the structure whereby there is a general unsecured claim, there is a subordinated piece, and there's the takeback of the HCLOF interest?

A Well, as I outlined, we -- we aggressively set forth our various defenses. Their position was that they -- they should never have been in this transaction before. And they --

HarbourVest is, in essence, a fund of funds, and they have investors, and it certainly wouldn't be their, I'm sure, the best-performing asset in their portfolio, to have made this investment and lost $50 million over this period of time. So they felt strongly that they should never have been in this investment, and but for the failure to disclose and the improper disclosures, they would not have been in this investment.

So, optically, getting out of it was important to them, and that led to our idea and construction of a subordinated claim and the transfer of the HCLOF interests to the estate.

Importantly, the HCLOF interests, as I mentioned, are -- the investments are in the Acis CLOs controlled by Acis and Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and the Acis 7.

So we were keenly focused on, if we were going to get that interest, would we then have the majority control in HCLOF, which we will, and would we be able to drive the recoveries, as opposed to what Highland typically does in these investments is use other people's money, drive down the value, and then try to buy back the interest on the cheap.

Q Just in terms of timing, because I think there was a suggestion in one of the openings that there was something untoward about the timing here: At the time the liquidation analysis was prepared on November 24th, had the Debtor reached

any agreement in principle with HarbourVest?

A If we had, it would have been reflected, so I don't -- I don't think we were agreed by then. I don't recall the specific dates, but if we had, it would have -- it would have been reflected.

Q If I can refresh your recollection that the motion was filed on December 24th, does that help form your understanding or refresh your recollection that there was no agreement in principle on November 24th?

A Yeah. Well, I'm quite sure there was no agreement in principle or we would have reflected it minimally by a footnote. There's -- there's no chance. It's a material reduction in the claims pool that we were previously telling people that, at least for purposes of distribution, like UBS and a couple others we said we thought we would get to zero on. So we didn't calculate in that amount. So I'm quite sure we didn't have a deal when we filed the disclosure statement.

In terms of the timing, anyone who's done this business for any degree of time knows that the crucible of bankruptcy brings people to the settlement when they see something happening in the case, and not before. I think HarbourVest looked at our -- this is my supposition -- HarbourVest looked at our plan, our ability to get this done, our settlement with Redeemer, our settlement with Mr. Terry and Acis, and saw that this plan was coming together, and if they didn't think about

the settlement, they were going to think about not only the risks that we laid forth for them with respect our defenses, but also the opportunity to litigate with the Claimant Trustee over a long period of time, which couldn't have been particularly appetizing.

Q Can you describe for the Court the role played by the independent board of Strand, the general partner of the Debtor, in analyzing and participating in the approval process?

A Yes. I think, as the Court is aware and I've testified before, Mr. Russell Nelms and Mr. John Dubel are fellow independent directors with me, appointed pursuant to the Court order. They are kept abreast of every detail, and -- along the way, not just in a summary form at the end. We have reviewed and analyzed collectively each of the issues. Mr. Dubel has extensive experience in these types of litigation matters. Obviously, Mr. Nelms, from his -- both his practice and his time on the bench, has a keen insight into how to resolve and what the risks and benefits are from settling litigation. So I consult them every step of the way.

Q And as part of this process, did the Debtor reach out to the directors of HCLOF?

A Yes, we did. So, we reached out and we've had several conversations on video chats with the directors. The directors of HCLOF are two new gentlemen, Mr. Richard Boleat

and Mr. Dicky Burwood. They are extremely professional. They are exceptionally well-informed. They are truly careful, and I would say very experienced professional not only directors, but experienced in -- in these matters, both in respect of structured finance as well as these types of vehicles and litigation.

They were appointed by the old directors, Scott and Bestwick, and they have been in control. They have outside counsel, which is King & Spalding in the U.S. They have Guernsey counsel. They have accountants and professional advisors, and are being, in my opinion, exceptionally careful. I've got -- very quickly developed a lot of respect for them, and we consulted with them on this settlement and how it would work.

They've been very clear that they represent HCLOF and they work for the benefit of the equity, whomever owns it, and taking a view that they would like to see these assets monetized swiftly, with due regard to value, for the benefit of the equity.

Q And is it your understanding that the directors of HCLOF approved of this transaction?

A They -- I don't know that their approval was required. It's really -- there are a number of hoops to jump through under the documentation, including opinion of outside counsel that we received from WilmerHale in terms of the effectiveness

of the transfer under the documents. We had a negotiation with -- with those directors, and making sure that we did everything correct -- correctly, excuse me -- with respect to the requirements for the transfer under the documents. And they've indicated their support and acknowledgement that we're doing it correctly.

I don't know if it's fair to say they approved it. I'd just have to go check the documents. But they certainly support it. And I think they generally support our position with respect to how to move forward with the assets.

Q I appreciate that. I guess I meant approval with a small a and not a capital A.

You mentioned WilmerHale. Who do they represent in all of this?

A WilmerHale is the Debtor's outside corporate counsel, in particular with respect to the fund issues that we don't handle in-house. We have significant support for fund issues from the expertise of Mr. Surgent, who's been the CCO, and he is also a lawyer, with respect to, you know, some of the difficult fund issues that Highland has. But when we use outside counsel, we use WilmerHale for that, and they've been -- they've been exceptional.

Q Okay. Just the last two points that were made in Mr. Dondero's objection, I believe. Did the Debtor overpay in this settlement in order to gain the support of HarbourVest in

connection with its -- with the Debtor's attempt to get its plan confirmed?

A Not in any way. My -- I believe the settlement is extremely reasonable. As I testified, it's -- it's less than the -- the actual value going out, depending on unless there's successful litigation, and there well could be, is less than on a pro forma basis the fees that were taken and charged to HCLOF. We didn't do this for votes. We will have Class 2, Class 7, Class 8, and Class 9. So I don't think that's a -- there's no vote purchasing, I think you called it. No, not at all.

Q Yeah. Well, on that topic, I think the phrase that was used was gerrymandering. Are you aware of the argument that's been made that the subordinated claim was dropped in there in order to gerrymander a positive vote for the impaired class of Class 9, I believe?

A In a word, I would say that's preposterous. The -- as I said, we have a number of classes that will vote for the plan. The plan is -- the plan is a monetization plan. And if -- if the creditors determine that they don't want to pursue this plan, we'll go forward with another -- we'll try to get another plan. We tried to have a grand bargain plan. We tried to have a pot plan, as I've testified previously. I'm quite certain that I've done more work on that than anyone else, including Mr. Dondero and anybody who works for him.

And he hasn't been willing to do that.

This is a -- this is a plan that's come together. We think it's going to be in the best interests of the estate. That'll be confirmation next week. Or two weeks, I guess. But I don't see how this is any way related -- this settlement is not any way related to the voting on that -- on that -- on that plan.

Q Just to put the finest point on it, is the Debtor relying on Class 9 to be the impaired consenting class?

A No. I think -- I think what I've -- as I said, I believe we already have the votes in Class -- I think it's 2 or 3, 7, 8, and -- and 9 will vote in favor as well. So that won't be an issue.

MR. MORRIS: Your Honor, I have no further questions of Mr. Seery.

THE COURT: All right. Pass the witness. I'll ask HarbourVest counsel first: Do you have any questions of Mr. Seery?

MS. WEISGERBER: No, Your Honor.

THE COURT: All right. Thank you.

What about cross-examination? Mr. Dondero's counsel?

CROSS-EXAMINATION

BY MR. WILSON:

Q Mr. Seery, how are you doing today?

A I'm well, thank you.

Q I'm John Wilson, and I represent Jim Dondero. I have a few questions for you today.

Now, the HarbourVest proof of claims were filed on April 8th, 2020; is that your recollection?

A I believe that's correct. I don't recall the specific date.

Q Okay. And do you know when you first became aware of the HarbourVest claims?

A I believe it was early in the summer when we filed the omnibus objection. It may have been in late spring, shortly after that. I don't recall the specific date of the filing.

Q And before the time of the filing of the omnibus objection, did Highland educate itself regarding the HarbourVest proof of claims?

A I'm sorry, could you say that again? I didn't quite understand it.

Q Before the omnibus objection was filed, did HarbourVest -- I'm sorry, did Highland educate itself on the HarbourVest proof of claims?

A Not especially, no.

Q Okay. And -- but at some point, Highland did investigate those proofs of claim, correct?

A That's correct.

Q And when would you -- when do you recall that that investigation began?

A I don't recall the date, but the triggering event was HarbourVest's response to our omnibus objection.
Q Okay. And that would have been filed September 11th of 2020?
A I'll take your representation. I don't -- I don't recall the specific date.
Q Okay. And so when you began to investigate the HarbourVest claims, what was your initial reaction?
A My initial reaction was that the -- the larger claims that they were asserting -- the fraud in the inducement, the RICO -- that those claims were, in my view, attorney-made and that when we dug in and did the work, we saw that HarbourVest clearly lost north of $50 million on the investment. We had just started to uncover the fee issue and saw the risk we had there.

But I thought the bulk of those claims were attorney-made. Clever, but attorney-made, as opposed to what I would think are more legitimate. And so we started to develop our defenses around that.
Q And was your initial reaction that the HarbourVest claims were largely worthless?
A I think with respect to the claim around the fees, I believed there was significant risk. With respect to the other claims, I thought our defenses would make them worthless, yes.

Q And did you ever represent to any party that the HarbourVest claim was worth, at most, $5 million?
A I think I represented often, including to HarbourVest, that it was worth nothing. I don't recall if I specifically said $5 million. $5 million would have been a nominal amount to -- which is litigation costs. So it may -- it may have been in my models that I put in that as a settlement amount, but I -- I thought that there were valid and good defenses to those larger claims.
Q And you recognize that HarbourVest was a large, sophisticated investor, correct?
A Yes. I think they manage north of -- right around a hundred billion dollars.
Q And you recognize that HarbourVest routinely structured complex customized investments, correct?
A I believe that -- I don't know the intricate part of their businesses, but as a fund of funds who does creative investments, I think that they do do quite a bit of that. This, I believe, was their first investment in the CLO space.
Q And it was not -- or I should say, you did not believe that HarbourVest was simply a passive investor in HCLOF, correct?
A I don't think that that's true, no.
Q You don't -- you don't believe that you denied their claim to be a passive investor?

A Oh, I think -- I'm sure that in defense of their claims I would argue that they were -- they were more than a passive investor. But it was pretty clear when you look at the structure of what they invested that there was an intent that they be passive on their part. They didn't take a majority interest.

In fact, Highland made it clear in the structure of the deal that they couldn't -- it would be hard for them to get a majority interest because Highland entities would control that and Dondero-controlled entities or individuals would control the majority.

I think that they -- they had hoped to be a passive investor.

Q But was it not your position that HarbourVest was actually an active, involved investor?

A I think our defense was going to be that they knew exactly what was going on, that they participated, that they were active, and that, indeed, that they were in and around some of the subsequent issues in the Acis case.

Q And you understood that HarbourVest played a material role in the various outcomes in the Acis bankruptcy case, correct?

A I don't believe that to be correct, no.

Q Have you ever made that representation to anyone before?

A Not -- not that I recall.

Q Well, do you recall giving statements to a reporter named

Syed Khaderi?

A I've never spoken to a reporter named Syed Khaderi in my life.

Q Well, did you participate in the preparation of statements to be given to Syed Khaderi?

A I've never heard of Syed Khaderi, nor have I participated in any preparation of statements. I don't know who that is.

MR. WILSON: All right. I'm going to have Bryan Assink put on the screen a document.

And Bryan, can you go to Page 7? Bottom of -- the top of Page 7. Well, actually, before you do that, go to the very top of the document.

BY MR. WILSON:

Q Now, Mr. Seery, are you familiar with Lucy Bannon?

A Yes.

Q And who is Lucy Bannon?

A She is the Highland public relations person.

MR. WILSON: Okay. Now go back to Page 7.

BY MR. WILSON:

Q Now, do you -- do you see on your screen an email of September 14th from Syed Khaderi that says, Hi, Lucy, how are you?

A Yes.

Q Have you seen this email before?

A Not that I recall, no.

Q All right. It continues on that, I saw the filing on Friday about HarbourVest claims against Highland for a CLO investment, and I'm looking to put out a report tomorrow morning London time. Ahead of that, I wanted to check if Highland would like to comment on the matter.

MR. MORRIS: Your Honor, this is -- the Debtor respectfully objects. A, this document is not in evidence. B, it's rank hearsay.

THE COURT: Response, Mr. Wilson?

MR. WILSON: Your Honor, I am attempting to authenticate this document, but I'm using it in rebuttal to the testimony that Mr. Seery just offered.

THE COURT: All right. I'll allow it. Overrule the objection.

MR. WILSON: All right. Thank you, Your Honor.

BY MR. WILSON:

Q All right. Now, if we -- and oh, that September 14th date, that was three days after the September 11th date that we discussed was the date that HarbourVest filed its response to the omnibus objection, correct?

A Yes. If that's the date that they filed it, then I -- if you're representing that, I concede that the 14th is three days after the 11th.

Q All right. And if you go back to the first page of this, it looks like, on the following day, Lucy Bannon sends an

email to you, and is that your email address, jpseeryjr@gmail.com?

A That's correct, yes.

Q And do you recall receiving this email from Lucy Bannon?

MR. MORRIS: Your Honor, I renew my objection that this is hearsay. He's not rebutting anything that Mr. Seery testified to. He testified that he'd never heard of the gentleman at the bottom of the document. There's nothing in this document that rebuts Mr. Seery's testimony at all.

THE COURT: Response, Mr. Wilson?

MR. WILSON: Well, I'm not -- I'm not trying to rebut his statement that he hadn't -- that he hadn't heard of Syed Khaderi. My rebuttal is attempted to -- attempting to show that he has made various statements that he denied.

THE COURT: I'll overrule the objection.

BY MR. WILSON:

Q All right. So, back to this exhibit, Mr. Seery. You recall receiving this email from Lucy Bannon on Tuesday, September 15, 2020?

A Not specifically. But to be clear, I recall talking to Lucy Bannon about the HCMLP dispute with HarbourVest.

Q Okay. And --

MR. WILSON: Bryan, can you go down to the next page? Scroll down to where -- the James Seery email.

BY MR. WILSON:

Q Do you see this email on your screen that's dated September 15, 2020 at 10:33 p.m.?

A Yes, I do.

Q And do you recall sending this email to Lucy?

A Not specifically, no.

Q Well, do you deny that you sent this email to Lucy?

A It appears to be my email.

MR. WILSON: Your Honor, we would move to admit this document into evidence as Dondero Exhibit Letter N.

THE COURT: Any objections?

MR. MORRIS: I would consent to the admission of Mr. Seery's email, but the balance of it ought to be excluded as hearsay.

THE COURT: What about that?

MR. WILSON: Well, Your Honor, I think that this document -- and I'll get into this in a little more detail in a second -- but I think this document is a combination of the work product of Lucy Bannon and Mr. Seery in preparing a response for the reporter who requested comment from Highland.

THE COURT: Okay. I --

MR. MORRIS: Your Honor, um, --

THE COURT: Go ahead.

MR. MORRIS: I just -- I do question how they got this document, but that's for another day. That's number one. Number two, in addition to the hearsay argument, I just --

relevance grounds.

THE COURT: Okay. I'll allow the portion that is the communication of Seery, that portion of Exhibit N. All right?

MR. WILSON: Okay. With due -- thank you, Your Honor. With due respect, I -- to use that portion, I need to refer to the portion below it, because he says, Good to submit with your final edit/revisions. And so we need to know what those final edit/revisions are, which are contained in the email directly below that on the document that was four minutes earlier in time.

THE COURT: All right. Fair enough. That'll be allowed.

MR. WILSON: All right. Thank you, Your Honor.

(James Dondero's Exhibit N is received into evidence as specified.)

MR. WILSON: So, Bryan, now can you scroll to the next page? Oh, actually, let's just -- let's just stop at the top -- at the bottom of the page. What's this statement?

BY MR. WILSON:

Q So, to be clear, Mr. Seery, when -- in response to Mr. Khaderi's request for information and comment, you prepared actually two responses, and one of those was a statement on the record attributed to a spokesperson for HCMLP or something along those lines. And then --

MR. WILSON: Can you scroll down to that next page?

BY MR. WILSON:

Q And this says -- I think part of this got cut off for some reason, but it looks like the official statement is in quotation marks. It says, "We dispute the allegations made in the filing and believe the underlying claims are invalid and will be found to be without merit. Our focus continues to be treating all valid claims in a transparent, orderly, and equitable manner, and vigorously disputing meritless in the court. That focus will assure that HCMLP's reorganization process -- progress is towards an efficient and equitable resolution."

And then below that there's another section of this email that says, Background/Clarification, Not for Attribution. And do you know the purpose of this second section of the response?

A Do I know the purpose of that? Yes.

Q And what would that purpose be?

A Ms. Bannon was speaking on background to reporters. As I said earlier, I've -- I never heard of the gentleman from London. If he's at the bottom of the email, I didn't pay any mind, never heard of him. Nor have I heard it since. Ms. Bannon didn't ever reference the specific person.

But she is the public relations person. So, as I testified earlier, she does communicate with the press. And as I previously testified when Mr. Morris questioned me, one

of our tactics and our defenses for HarbourVest was going to be that we were going to be very public and aggressive about the investment and it would have a negative impact or negative perspective for viewers, in our opinion, about HarbourVest's investment.

Q All right. Well, look with me in the middle of that paragraph right after the closed parenthetical, where it says, "But it's important to note the background of HarbourVest's active and deep involvement in the investment of which it now complains."

And so it was your position that HarbourVest had an active and deep involvement in the investment, correct?

A No. I don't think that's correct. Ms. Bannon prepared the statement, it was a litigation defense on background, and that's our -- that was our position for this purpose. It was not my view that they were active and deeply involved. They were certainly involved. There's no doubt about it. But they got all their information, in our estimation and our research, from Highland.

Q But in any event, you would agree with me that four minutes after receiving this email, you approved this statement to go out to the reporter, correct?

A No, that's not correct. That's -- this portion is on background. That statement doesn't go out. The previous statement was the official statement. This is the background

discussion that she would have. So, no, she was not authorized in any way whatsoever to send that out. She was authorized to have conversations with those general facts.

MR. WILSON: Okay. Bryan, go to the top, or the bottom of the page immediately preceding that. That's it. Yes, that's it right there.

BY MR. WILSON:

Q Now, you'll see that this email from Lucy Bannon on September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know what you think of the below. And, again, the first would be on the record and the second will be sent for information purposes to ensure accuracy, not for attribution."

So the intent was that this -- that this entire statement be sent to the reporter, correct?

A I don't believe that's correct. I think when she goes on background she doesn't send them a written doc. It's got to be clear to the reporter, at least my understanding is that what on background means -- I've been involved with this before -- is that typically that's done orally. I don't know if she's done it in a written statement before. I have never seen that done in a written statement before. You give the official statement and then you walk the reporter through your other views on background. And you're not quoted. And it's usually attributed to a source with knowledge.

Q Okay. We'll come back to that in a minute. The next

sentence after the one I just read to you --

MR. WILSON: Go back to where we were on the background.

BY MR. WILSON:

Q Now, we just read you the sentence that starts with, "Then it's important." The following sentence says, "HarbourVest was not simply invested in HCLOF as an ignorant, unsophisticated, passive investor, but was an active and informed participant in the inception of its investment through all of the Acis bankruptcy proceedings, and HarbourVest played a material role in various outcomes related to that case and its impact on HCLOF."

And is it -- did you not just tell me before we investigated this document that HarbourVest did not play a material role in the various outcomes of the Acis bankruptcy?

A I don't know exactly what I said, but I think that's correct, after we'd done the research on it, yeah.

Q But you took the position in this email that you approved to go out to a reporter that says that -- that HarbourVest was an active and informed participant in the inception of -- of its investment through all of the Acis bankruptcy proceedings and played a material role in various outcomes related to that case and its impact on HCLOF. Can we agree with that?

A Yes.

Q And then the final sentence of this paragraph says that,

We believe that neither the facts nor the law support HarbourVest's, quote, We-were-too-lazy-to-know allegations.

Whose words were those, "We-were-too-lazy-to-know allegations"?

A I don't recall. They may be mine. It's aggressive the way I am, so that -- that may well be the case.

MR. WILSON: All right. Go -- go down to the next page.

BY MR. WILSON:

Q And with respect your comment that that second paragraph would not have gone to the reporter, look at this email in the middle of the page from Lucy Bannon to Syed Khaderi, September 16, 2020, at 1:51 a.m. And --

MR. MORRIS: Your Honor, this I will object to as hearsay. There is no witness here to testify to anything on this document.

THE COURT: All right. How about that?

MR. WILSON: Well, it's -- well, scroll up just a little bit. This email at the top of the page is three minutes after the one in the middle of the page, where Lucy Bannon is forwarding this to James Seery, saying, See below for responses sent to *Creditflux*. Will follow up with the story when it runs or with any other updates.

MR. MORRIS: Your Honor, these --

MR. WILSON: So I think this --

MR. MORRIS: These documents don't appear on the witness list. They're not being offered to impeach anything. They're just -- he's taking discovery as we sit here.

MR. WILSON: Your Honor, in response, I'm simply trying to rebut the statements that Mr. Seery made. In fact, he told me just a minute ago that that second paragraph would not have gone out to the reporter. However, this email from Lucy Bannon to Syed Khaderi directly rebuts that statement.

THE COURT: But your whole purpose in this line of questioning, with an undisclosed document, is to rebut the earlier testimony he gave before you even put this exhibit in front of him.

MR. WILSON: I'm trying to rebut multiple statements that Mr. Seery has made today, and I think it -- you know, if he's going to testify that this information did not go out to a reporter, I think I'm allowed to rebut that to demonstrate that it did.

THE COURT: All right. Why didn't you disclose this in advance? It's feeling less and less like an impeachment document the more we go through it.

MR. WILSON: Your Honor, I did not -- I did not actually have this document at the time we filed our witness and exhibit list, but I would also say that I didn't have any purpose to use it if I didn't need it for rebuttal.

THE COURT: Okay. First off, you're supposed to

disclose all exhibits you anticipate using except those for purposes of impeachment. Okay? Not rebuttal, to be technical.

So, if you didn't disclose this exhibit, the only way you can use it, subject to other possible objections, is if you're impeaching a statement. And I'm just saying I think we're going beyond trying to impeach the original statement and now we're trying to impeach statements he's made after seeing portions of the document.

What did you mean, you didn't have this document in time to disclose it?

MR. WILSON: Well, I actually just received this document this morning, Your Honor.

THE COURT: Where did you receive it from?

MR. MORRIS: From who?

MR. WILSON: I -- I honestly do not know the source of this document, although it was provided to me by my client.

MR. MORRIS: Your client being Mr. Dondero?

THE COURT: Could you answer that, Mr. Wilson?

MR. WILSON: Yes, that's -- yes, that's correct.

THE COURT: All right. I will -- that's --

MR. MORRIS: Your Honor, I'd like to --

THE COURT: That's a different can of worms. But for now, I sustain the objection. You're done questioning on this document.

MR. WILSON: That's fine, Your Honor. I can move on.

BY MR. WILSON:

Q Now, Mr. Seery, you would agree with me that whether or not HarbourVest played an active role in the Acis bankruptcy, it was kept apprised of the -- of the ongoings in the bankruptcy? (Pause.) I'm sorry. Could you hear that?

A Yes. My understanding is that -- that they were.

Q And in fact, did Highland have weekly conference calls with HarbourVest during the Acis bankruptcy to discuss what was going on in the bankruptcy?

A I don't know if they were weekly. I've been told that they had regular calls updating HarbourVest, yes.

Q Okay. And did Highland produce over 40,000 pages of documents to HarbourVest related to the Acis bankruptcy?

A I'm not aware of that, no.

Q Have those documents been provided to you?

A I hope not.

Q So, in your role --

A I'm sorry. I don't -- I didn't receive 40,000 documents from anybody.

Q Well, did you receive any number of documents that were provided by Highland to HarbourVest during the Acis bankruptcy?

A I wasn't involved in this during the Acis bankruptcy. I'm sorry.

Q Well, I'm referring to, after you became involved in this Highland bankruptcy, whether you were provided with these documents that were sent from Highland to HarbourVest.

A I don't -- I don't know what the documents are. I've reviewed tons of documents with respect to the HarbourVest claims, but I don't know of the documents to which you're referring.

Q Okay. And after you performed your investigation into the HarbourVest claim, what was your opinion as to the cause in the reduction in value of HarbourVest's investment in HCLOF?

A I think the main cause of the reduction in the investment was the imposition of the Trustee and the failure of Highland HCLOF and then subsequently with the injunction to reset the CLOs.

You know, these are -- these are some of the worst-performing CLOs in the market because they weren't reset. And when the liabilities of the CLOs are set at a level to match assets, and then liability -- the assets run off, and the asset financings or the new deals come in at much lower levels, and the obligations of the CLO are not reset, the arbitrage that is the CLO shrinks. And that's what happened to these CLOs.

Q And during the course of the Acis bankruptcy, Acis and Brigade were given management responsibilities over the CLOs and HCLOF, correct?

A I believe that the Trustee had the overall, and then subsequently, with the confirmation of the plan, they took it over. So I think that ultimately Mr. Terry had the management authority, full management authority, and some advice through Brigade. But I think technically it wasn't actually during the Chapter 7. The Chapter 7 proceeding, I believe that Mr. Phelan had the actual authority.

(Echoing.)

Q I'm sorry. And so your testimony is that Mr. Phelan had the actual authority but he delegated that authority to Josh Terry and Brigade?

A I think that's fair, yes.

Q And do you know when that occurred?

A I believe that the control of the CLOs was in July of 2018, and then the ultimate confirmation of the case was at the very beginning of '19.

Q So, after being instituted as portfolio manager, and during the time when Acis and Brigade were working under the direction of the Trustee, who would have receive the fees for managing those portfolios?

A I believe -- I don't know. I believe the -- that the Acis estate would have received those fees.

Q And who -- and so is that your testimony, that prior to confirmation the Acis estate would have received the management fees?

A I believe that -- I believe they would have if they were the manager, yeah.

Q Okay. And who would have received the fees after confirmation?

A Acis.

Q Okay. And who would have had the discretion to set the amount of those management fees?

A They would be agreed to in the -- in the investment management agreement.

Q They would be agreed to?

A Yes. As far as I've seen, I've -- I haven't seen unilateral ability of a manager to set fees at its -- at its whim.

Q So is it your understanding that Acis and Brigade ended up charging substantially more fees than Highland had charged when it was under Highland's management?

A I think the fees were -- the fees were -- the fees were set by the agreement.

MR. MORRIS: Your Honor, I just object to the line of questioning on relevance grounds. This is a 9019 hearing, Your Honor. How -- I just don't think this has any relevance at all.

THE COURT: All right. Mr. Wilson, what is the relevance?

MR. WILSON: The relevance is that Mr. Seery has

testified that these Acis CLOs were among the worst-performing in the market, and frankly, we would agree with that, and I'm trying to get his understanding as to why, because I think there's direct relevance in the reason that the value of the HarbourVest investment diminished.

MR. MORRIS: I don't think that was his testimony, Your Honor. But at the end of the day, Your Honor has heard the litany of reasons why the Debtor is entering into this agreement. I just, I just think it's irrelevant, Your Honor.

THE COURT: All right. Mr. Wilson, I barely think this is relevant. I mean, I'm going to give you some benefit of the doubt on that because of, you know, the testimony that HarbourVest lost $50 million of value and --

(Echoing.)

THE COURT: -- maybe that shouldn't, you know, lie at the feet of Highland. I think the compromise reflects that they don't -- it doesn't lie entirely at the feet of Highland. But, you know, maybe two or three more questions.

MR. WILSON: Yes. Thank you, Your Honor. And I didn't have very much more on this point. But to be a hundred percent honest, I can't remember my question right before the objection.

THE WITNESS: I think you were asking me about the fees and somehow alluding or implying that the manager could unilaterally set fees.

The fees are set in the investment management contract. The manager doesn't get to wake up on Wednesday and say, you know, I'd like another half a basis point. It doesn't work that way.

BY MR. WILSON:

Q But you would agree with me that the fees and expenses charged to an investment would impact the performance of that investment in the market?

A Absolutely.

Q Would you also agree with me that there was one CLO -- and I think you referred to it in your direct testimony -- but CLO 7, which continued to be managed by Highland?

A That's correct.

Q And is it fair to say that CLO 7 exceeded the performance of the CLOs that were managed by Acis and Brigade?

A I think that's fair. I don't -- I don't recall the magnitude, but I think it's outperformed those -- those CLOs, yes.

Q All right. Well, thank you. I want to turn your attention to the portion of the settlement agreement that deals with voting of the HarbourVest claim. How did HarbourVest's commitment to vote for the plan become a part of the settlement?

A Pretty straightforward negotiation. We -- in negotiating the settlement, one of the key factors was the cost and

expense of the litigation, in addition to the risk on the -- on the fees, and whether we could wrap this up in a global settlement now. So in my experience, it's fairly typical, we would try to do this in every settlement, have the settling party, be that the claimant, agree to support the case and the plan.

You know, we did not do that with the Committee members, although we wanted to. (Echoing) I frankly still wish I had. Those little -- little bits that have been difficult (echoing). The Committee members have a different interest in (echoing) than their more global interest for creditors at large, which is more difficult than traditionally in bankruptcy cases, less likely to have a Committee member, a sitting Committee member, actually support the (echoing) of the plan.

THE COURT: Mr. Wilson, could you be careful to put your device on mute every time you're not talking? Because we're getting some feedback loop from you when Mr. Seery answers your questions. Okay?

(Echoing continues.)

THE COURT: Like right now. I'm hearing feedback of my own voice through your speakers.

Right, Mike? Isn't that what --

A VOICE: I am, too.

THE COURT: Yes. Okay. So please be sure you put

your device on mute whenever you are not speaking. All right. Go ahead.

BY MR. WILSON:

Q I mean, I think you just answered this question, but there was -- there was no similar voting provision in the Acis or the Redeemer settlements, correct?

A There is not, no. And just as a -- by way of explanation, if it's okay, the reason was my counsel advised against it. I did ask for it.

Q Your counsel advised against putting that voting requirement in the Acis and Redeemer settlements?

A For the reasons I stated. And in my experience, that's consistent, where sitting members of Committees don't generally sign up to resolve their own claims and support the plan because of their larger fiduciary duties to the creditor body as a whole.

Q And during the settlement negotiations of the HarbourVest claim, was this commitment to vote a topic of discussion?

A Not -- not particularly, no. It was pretty clear that HarbourVest, if they were going to agree to the settlement and the numbers, could see structure. Obviously, it wanted to understand what the potential distributions would be under the plan, but this was not a hotly-negotiated point.

Q And would you consider HarbourVest's commitment to vote for the plan an important part of the settlement?

A I think it's an important part of the settlement, that the part of the settlement is the subordinated claim. We could put that into presumably any plan. But our plan does -- does have a Class 9 for that. So I think it's a -- it's a part of the settlement that is important or we wouldn't have included it. It clearly wraps everything up and moves us towards confirmation.

Q And would you have made the deal with HarbourVest if they had pushed back on the commitment to vote for the plan?

A Yeah, I would have.

Q All right. Thank you.

MR. WILSON: No further questions.

THE COURT: All right. Mr. Draper, anything from you?

MR. DRAPER: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. DRAPER:

Q Mr. Seery, I may not understand the settlement, and I apologize, but the way I think the settlement reads, the interest that you're acquiring, you have the right to place in any entity. Is that my -- is that correct?

A I don't recall the -- the specifics, but just from a structural standpoint, we wanted to be able to put it into a subsidiary as opposed to putting it directly in HCMLP. If we couldn't do that, we would -- we would put it into HCMLP. So

there wasn't a -- I don't recall the actual specifics, but we certainly thought about holding that interest in a -- in a subsidiary, just to have a cleaner hold.

Q Why aren't you putting it into the Debtor so the Court and the estate have jurisdiction over that?

A I think the Court certainly has jurisdiction over an entity that the estate owns a hundred percent of. I don't think that's -- that's even a close call. So the important --

Q Now, --

A Can I finish?

Q Sure.

A You asked me why. To the extent that somebody thinks that problematic, I will consent to the Court having complete jurisdiction over it, since I control it a hundred percent.

Q No. The real reason is, if I remember correctly, Mr. Dondero and Judge Lynn filed a motion to have some say or some information as to sales by subsidiaries, and I think you took the position that they weren't entitled to it. And so my concern was that putting this in a subsidiary in a sense gave you unfettered control without any review of the item.

A I don't -- I don't think that's the case where we -- there's a directly-held subsidiary where we own a hundred percent of it. I don't think that that's the case.

Q Okay. But you're willing to (a) put this into the Debtor, number one; and number two, have the estate and have the Court

have complete control over the disposition of it and its actions, correct?

A That's not correct, no.

Q What -- what is incorrect about my statement?

A The debtor-in-possession has control of its assets. The Court doesn't have complete control over its assets. There's --

Q Well, --

A -- issues -- hold on a second. This is not -- this is not a game and a trap. We put it in a subsidiary for specific reasons. You asked why. I'm giving you the why. It's not to hide it from anybody. We're not going to sell the asset unless somebody comes up with a great price for it. We're going to monetize the assets. We're going to control HCLOF by a majority.

Q But, again, the issue is, if it's in the estate, the Court has supervision over it. If it's not in the estate, the Court has no supervision of it.

A I don't think that's correct, because the Court has supervision over the estate, which owns a hundred percent of the special-purpose entity that will own the shares.

Q Okay. All right. Now, let's talk about the $15 million that you discussed and the legal fees that were incurred. Is that the total amount that was spent, or is -- or is that -- was the total amount $30 million and HarbourVest was only

responsible for one half of it or functionally took the brunt of one half of it?

A I think the total amount is between $15 and $20 million. I don't have the exact numbers.

Q So, in fact, the HarbourVest loss due to its ownership would have been one half of that, not $15 million?

A Well, the vehicle lost the money. HarbourVest owned 49.98 percent of it, and Highland controlled the rest. So if you allocate it that way, I suppose that would be a -- that's how you would divide it, in -- roughly in half, yes.

Q And so HarbourVest's actual dollar loss due to the legal fees is really the 49-point-whatever percent of $15 million, not $15 million?

A I don't know if -- I certainly would argue that. I don't think that HarbourVest has that position.

Q Okay. Now, in connection -- you were asked a question about the documentation that was provided by Highland to HarbourVest both during the bankruptcy of Acis and before. You have control over the Harbour -- over the Highland server, correct?

A I'm sorry. Can -- can we do two things? One is, Mr. Draper, I can't see you, so it would be better if I could see you during the questioning.

Q Okay.

A And could you repeat the question?

Q All right. I'll be happy to. You were asked a question about the documentation that was provided by Highland to HarbourVest during the Acis bankruptcy and meetings that took place between the parties. Correct?
A Yes.
Q And you stated you were unaware of the material that was sent over?
A I think I testified that I didn't receive the 40,000 documents that were mentioned.
Q Did you do any search or order a search of the Highland server to see what material was sent over by any party to HarbourVest to analyze what -- what information they had available to them and what was provided to them?
A Yes, we did a search.
Q And did you review the documentation that was sent over?
A The -- the documentation that we looked at was very specific to the investment and to the OM. So we didn't look for the -- the supposed 40,000 documents, no.
Q Did you look for the material that was provided to them during the Acis bankruptcy and the periodic meetings that you discussed? Or that you testified to earlier?
A The answer is no.
Q One last question. I think, and just so I understand your testimony, you've broken out the HarbourVest claim into two pieces. One is the legal fee amount that we've just

discussed, and I gather the other piece of that is the fraud in the inducement to enter into the CLO purchase?

A It's -- it's more -- it's much more than that.

Q Okay. Well, let me say it in a different way. The other part of it is the losses as a result of the fraud in the inducement to purchase the interest?

A I don't think that's -- that's fair. If I could explain?

Q Sure.

A Yeah. The legal fee piece is pretty clear. The other piece starts with fraud in the inducement, but it's extensive fraud claims. Fraud in the inducement, as I testified earlier, would get them around the exculpation and liability limitations in the OM. You don't get around all of those with just the fraud. And so that's -- that's the split of that claim. So the fraud in the inducement contains fraud allegations. Even if you didn't have inducement, you'd have other potential fraud claims.

Q But let me state it in a different fashion. But for the investment, the fraud that you allege wouldn't have occurred?

A I -- HarbourVest alleges it.

Q No, I'm just -- in your analysis of the claim, but for the inducement, the rest of the damages wouldn't have flowed?

A That's HarbourVest's position, yes. But for the fraud, they wouldn't have made the investment.

Q All right.

MR. DRAPER: I have nothing further for this witness.

THE COURT: All right. Any redirect, Mr. Morris?

MR. MORRIS: Just a few very questions, Your Honor. Just a very few questions.

REDIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Seery, you were asked about that document that Lucy prepared. Do you remember that?

A Yes, I do.

Q In your experience, don't defendants often deny liability before entering into settlements, or even worse, getting adverse judgments entered against them?

A Of course. Yes.

Q Okay. And in response to Mr. Draper's questions, isn't the Guernsey claim another claim that the Debtor took into account in assessing the potential risks of this settlement?

A There's a number of claims contained in it. As I mentioned earlier, I mentioned the RICO claim. But there is a Guernsey shadow director claim, which is not dissimilar to U.S. claims that somebody effectively controls an enterprise, notwithstanding them not having the official role.

Q Okay.

MR. MORRIS: I have nothing further, Your Honor.

THE COURT: All right. Any recross on that redirect? All right.

MR. WILSON: No, Your Honor.

MR. DRAPER: No, Your Honor.

THE COURT: Thank you. Mr. Seery, that concludes your testimony. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: We need to take a bathroom break. Before we do, I just want to be clear with what we have left. As I understood it, we were having Mr. Pugatch from HarbourVest. Mr. Morris, will that conclude the Debtor's evidence? (Pause.) Okay. You were on mute, but I think you were saying yes.

MR. MORRIS: Sorry. But to be clear, Debevoise is going to be putting their witness on the stand.

THE COURT: Okay.

MR. MORRIS: But it's part of the evidence in support of the motion.

THE COURT: All right. Do the Objectors have any witnesses today?

MR. WILSON: Your Honor, Mr. Dondero intends to examine Mr. Pugatch, but if he's going to be called by his counsel, then we will do that as a cross-examination.

THE COURT: All right.

MR. DRAPER: This is Douglas Draper. I have no witnesses.

THE COURT: Okay. All right. Well, I'm asking --

well, I do want to ask: Can we get a time estimate potentially for Mr. Pugatch?

MS. WEISGERBER: For my examination, Your Honor, twenty minutes, perhaps.

THE COURT: Okay.

MS. WEISGERBER: Or less.

THE COURT: All right. Well, let me tell you what we're going to do. We're going to take a ten-minute bathroom break. But I have a 1:30 hearing and I have a 2:00 o'clock. Well, I have a 1:30 docket, multiple matters, and a 2:00 o'clock docket. So, you know, I'm really intending that we get finished in time to give me and my staff a little bit of a lunch break before launching into the 1:30 docket, so I'm hopeful we can get done around 1:00-ish. If we can't, then we're going to have to reconvene, I'm going to say probably 3:00-ish Central time. So let's hope we can get through everything. All right? Ten-minute break.

THE CLERK: All rise.

(A recess ensued from 11:58 a.m. until 12:08 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're going back on the record in the Highland matters. Do we have everyone? It looks like we do. Ms. Weisgerber is going to call the next witness; is that correct?

MS. WEISGERBER: Yes, Your Honor. We call Michael

Pugatch of HarbourVest to the stand.

THE COURT: All right. Mr. Pugatch, if you could turn on your video and say, "Testing one, two."

MR. PUGATCH: Two.

THE COURT: All right. There you are. Please raise your right hand.

MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

THE COURT: Thank you. You may proceed.

MS. WEISGERBER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. WEISGERBER:

Q Good morning. Can you please state your name for the record?

A Sure. It's Michael Pugatch.

Q And where do you work, Mr. Pugatch?

A HarbourVest Partners.

Q And what is your title?

A I'm a managing director in our secondary investment group.

Q Did HarbourVest file claims in the Highland bankruptcy, Mr. Pugatch?

A We did, yes. Several claims, in fact.

Q What was the basis for those claims?

A Yeah. Among other things, fraudulent inducement based on misrepresentations and omissions on the part of Highland in

connection with our original investment, mismanagement at the HCLOF level, including inappropriate fees that were charged to investors, among a number of other items as well.

Q Can you explain what you mean by misrepresentations made to HarbourVest by Highland?

A Yeah, sure. So, you know, based on a number of statements that were made to us around the litigation involving Mr. Terry, some of the intentions found, the structural changes that came to light with respect to HCLOF and our investment, as well as the fact that the arbitration award specifically against Mr. Terry would have no impact or implication on Highland's sale or business.

Q And can you explain what you mean by omissions made by Highland to HarbourVest?

A Sure. So I would say, really, the implications behind the structural changes that were made at the time of our investment into HCLOF. Also, the intention, clear intentions that Highland had to never, in fact, pay the arbitration award that came to light during our due diligence period to Mr. -- to Mr. Terry as part of the investment. And ultimately the -- what Highland went about doing in terms of stripping assets of Acis that led to the material value declines and destruction of value that we've experienced since our investment.

Q You mentioned a diligence period. Did HarbourVest

conduct diligence on the investment?

A We did. We conducted very detailed due diligence, as we do for all of our investments. That diligence period lasted several months ahead of our investment decision.

Q And did HarbourVest conduct that diligence by itself?

A No. So, in addition to internal investment professionals at HarbourVest, we engage with outside advisors, both consultants as well as legal advisors, in connection with that due diligence.

Q And did Highland answer all of HarbourVest's questions during that diligence period?

A They did. And they were numerous. But yes, they answered all the questions that we had for them.

Q Was the Terry dispute part of HarbourVest's diligence?

A It was. That came up as one of the outstanding items of litigation as part of our due diligence.

Q I'm going to ask my colleague to pull up on the screen an exhibit that was on our exhibit list as Items -- Exhibits 34 and 35. It's an August 15, 2017 email from Brad Eden to Dustin Willard. Mr. Pugatch, do you recognize this document?

A I do, yes.

Q And what is it?

A This was an email sent to us during our due diligence period in response to a request for more information on the outstanding litigation that Highland was involved with.

MS. WEISGERBER: And if my colleague can just scroll to the attachment to that email.

BY MS. WEISGERBER:

Q And do you recall the attachment as well, Mr. Pugatch?

A Yes, I do.

MS. WEISGERBER: And if you can scroll back up to the first email.

BY MS. WEISGERBER:

Q Who is Dustin Willard?

A Yes. Dustin is a colleague of mine at HarbourVest who worked closely with me on this investment.

Q And you said that this document was shared with HarbourVest during the diligence period before the HCLOF investment?

A It was, correct.

Q Is it typical during diligence to receive a description of litigation such as this?

A It is. It's a question that we always ask. Certainly a component of our diligence to understand any outstanding litigation on the part of our counterparty or manager that we're investing in.

MS. WEISGERBER: Your Honor, I'd move to offer this exhibit into evidence.

THE COURT: Any objection?

MR. DRAPER: No objection, Your Honor.

MR. MORRIS: No objection from the Debtor, Your Honor.

THE COURT: All right. What is the letter or number for this exhibit?

MS. WEISGERBER: It's HarbourVest Exhibit 34.

THE COURT: All right. So HarbourVest Exhibit 34 is admitted.

(HarbourVest's Exhibit 34 is received into evidence.)

THE COURT: And I need to be clear where it appears on the docket. Can someone tell me?

MS. WEISGERBER: So, it's identified on our exhibit list, not -- it's not attached to the exhibits. It is on the docket. We were -- when we initially filed the exhibit list, we were working out confidentiality issues. But it was subsequently filed with our reply last night. It's at Docket No. 1735 --

THE COURT: All right.

MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

THE COURT: All right. Very well. Thank you.

BY MS. WEISGERBER:

Q Mr. Pugatch, we'll just scroll down to the second page of the attachment. Can you describe generally what the litigation says regarding the Terry dispute?

A Yes. Generally speaking, this dispute was described as an employee dispute, employment agreement dispute, with Mr.

Terry, who was a former employee of Highland involved in their CLO business, and is described by Highland to us really having to do with a series of false claims, in their opinion, but having to do with a disgruntled former employee.

Q And did it strike you as an unusual or significant dispute?

A No. I would say we often -- we'll see, you know, former employees with, you know, claims against a former employer in connection with wrongful termination. I wouldn't say it's extremely common, but certainly not entirely out of the ordinary. And based on the explanations that we'd received from Highland, seemed to be more of an ordinary-course type former employee litigation suit.

Q Based on what you now know about the Terry dispute, do you believe that this was an adequate disclosure regarding the dispute?

A I would say very clearly not, you know, based on the facts that came to light subsequently, the various rulings in connection with the Acis bankruptcy case. What was very clearly not stated are the actual facts and implications of the ongoing litigation with Mr. Terry.

MS. WEISGERBER: I'd ask my colleague to put up the next exhibit. Okay. So, this is on a HarbourVest exhibit list, which is Document No. 1723. It's Exhibit 36 on that. Same issue with respect to initially not filed, but it is on

the docket at our response last evening at ECF No. 1735 at Page A351.

THE COURT: Page what?

MS. WEISGERBER: A351.

THE COURT: A351. Thank you.

MS. WEISGERBER: You're welcome.

BY MS. WEISGERBER:

Q Mr. Pugatch, I just put up a November 29, 2017 email from Hunter Covitz to Dustin Willard, Michael Pugatch, and Nick Bellisario. Do you recall this document?

A I do, yes.

Q And what is this document?

A This was an email sent to us by Highland a couple weeks after we closed on our investment on the (inaudible) in response to a *Wall Street Journal* article that had come out regarding Highland, a number of actions that they had taken, and what Highland was articulating to us, a number of false claims that had been made about Highland's prior actions, and specifically trying to explain some of that and also share with HarbourVest a letter that was being sent to the editor of the *Wall Street Journal* highlighting, in their view, some of the inaccuracies around the reporting.

Q And did you receive this document?

A We did, yes.

MS. WEISGERBER: I'd move to offer this, so

HarbourVest Exhibit 36, into evidence.

THE COURT: Any objections?

MR. WILSON: Your Honor, John Wilson. I would object as to the relevance of this document.

THE COURT: All right. What's your response?

MS. WEISGERBER: Your Honor, it shows misrepresentations that the witness will testify how it relates back to prior representations prior to HarbourVest's investment, as well as misrepresentations at that time.

THE COURT: Okay. I overrule the objection. I'm going to admit it.

(HarbourVest's Exhibit 36 is received into evidence.)

BY MS. WEISGERBER:

Q Mr. Pugatch, can you describe generally -- we spoke about this a little bit -- just what this communication from Highland was conveying to HarbourVest at the time?

A Yes. Specifically, again, responding to this *Wall Street Journal* article that had been published, trying to defend, again, Highland's own views why there were inaccuracies in the reporting. But importantly, from our perspective, trying to reassure us as to the fact that, you know, these accusations would have no bearing and any results from it would have no bearing on their ongoing business or partnership or the investment that we had made in HCLOF.

MS. WEISGERBER: And if you can scroll to the second

page.

BY MS. WEISGERBER:

Q We'll just look at the last paragraph of another email from Mr. Covitz. Can you just read that first sentence of the last paragraph?

A Sure. (reading) While the dispute has no impact on our investment activities, as always, we welcome any questions you may have.

Q Mr. Pugatch, was this email and the discussion regarding the Terry dispute consistent with the representations made to you prior to HarbourVest's investment into HCLOF?

A It was, yes. Both the message, the lack of any impact that ultimately the dispute with Mr. Terry, the arbitration award would have around Highland's ongoing CLO business, or HCLOF specifically, was all, you know, very clear in this document, but all consistent with the representations that had been made to us leading up to our investment in the middle of November 2017 as well.

Q Thank you.

MS. WEISGERBER: And you can take down the exhibit, Emily. Thank you.

BY MS. WEISGERBER:

Q You mentioned, Mr. Pugatch, an arbitration award to Mr. Terry. How did you learn about that arbitration award?

A That was initially disclosed to us by Highland as we were

in the late stages of our diligence and closing process on the investment into HCLOF.

Q And generally, what did Highland tell you about the arbitration award?

A We were aware of its existence. We were aware of the quantum of the award, I think it was around an $8 million arbitration award in the favor of Mr. Terry, and that was following the litigation around the wrongful termination and employee dispute that Highland had described to us previously.

Q Did you ask to see a copy of the arbitration award?

A No, we did not.

Q Why not?

A Ultimately, we -- you know, the explanations that Highland had provided to us all seemed very reasonable. We relied on their representations that this was, again, nothing more than a dispute with a former disgruntled employee, in their words, that had no bearing or, you know, would not have any bearing on our investment in HCLOF or their ongoing CLO business, which all very clearly was not the case, as we've -- as we've learned over the last several years.

Q Following learning about the arbitration award, did HarbourVest do other diligence?

A We did. So, in addition to asking questions related to the arbitration award and any impact that it would have, we

also spent some time diligencing a couple of structural changes that were proposed by Highland, and, in fact, ended up delaying the closing of our investment by about two weeks as we vetted some of those structural changes that Highland had proposed. Vetted those both, you know, internally with Highland directly and with external counsel in order to make sure that those structural changes were in fact legally sound in ultimately making our investment.

Q And were those changes proposed following the arbitration award?

A They were, yes.

Q Did Highland tell you the reason for the structural changes?

A Yeah. So, so some of this -- and specifically, this involved a change of the portfolio manager at the HCLOF level that was really in connection with a rebranding as Highland was going through a rebuild of its CLO business and wanting to align, from a brand perspective, their business on an ongoing basis with the Highland brand as opposed to the Acis brand. But more specifically, in the case of a late change from a structured standpoint, the -- part of the intention and the investment thesis of HCLOF was to pursue a reset, a refinancing of all the underlying CLOs as they approached the end of their investment period or came out of their investment period.

And in connection with that, in light of the arbitration award, Highland's view was that there may be difficulties in the market in resetting certain of those Acis CLOs with the Acis brand associated with them, given, again, the existence of the arbitration award and concerns in the market around the Acis brand reputation.

Q And what did they tell you was the market view of Acis, or the Acis brand?

A Yeah. Their view or their concern was that the, you know, because of the existence of that arbitration award, the brand would be viewed as toxic.

Q Didn't this put you on notice that perhaps there was something wrong with the structural changes?

A I mean, we -- I mean, short answer, no. We ultimately asked questions, we diligenced the legal structure, but relied on the representations that were made to us by Highland around the rationale for the structural changes, that these are all changes that were within a Highland-managed vehicle or sat below the vehicle that we were investing in, and so ultimately were in Highland's purview, was the representations that we relied on.

Q And did HarbourVest alone do that diligence of the structural changes?

A So, no. I mean, in connection with the diligence that we did internally and with Highland directly, we engaged with

outside counsel who was working with us at the time to vet those structural changes as well.

Q Did HarbourVest rely on Highland's representations regarding the arbitration award and the structural changes in making its investment in HCLOF?

A We did, absolutely.

Q If Highland had disclosed the nature of the structural changes, of removing Acis as the portfolio manager and related transfers, would HarbourVest have proceeded with its investment?

A Definitively, no, we would not have.

Q Why not?

A I think the reality is if we had understood the intent, you know, that Highland was ultimately undertaking here, we would not have wanted to be any part of this, and certainly getting dragged into all of this, the hassle, the value destruction that we've seen on behalf of the investors and the funds that we manage. And I would say, lastly, we just full stop would not have done business with a firm who engages with this type of behavior, had we actually known the truth.

Q Mr. Pugatch, are you familiar with the bankruptcy that followed of Acis?

A Yes.

Q And what was your -- or, did HarbourVest participate in

that bankruptcy?
A So, initially, no. Subsequently, we ended up getting dragged into that on account of a number of misstatements by Highland about the role that HarbourVest had played as part of our investment into HCLOF and some of that structure and the structural changes that I alluded to.
Q How did HarbourVest learn about those misstatements in the bankruptcy about HarbourVest's role?
A So, ultimately, those came to light on -- you know, on account of the ongoing proceedings within the Acis bankruptcy process, and specifically brought to light to us by the Acis trustee at the time, who decided to pursue, you know, further diligence or discovery around the claims that Highland had made around HarbourVest's involvement in those changes.
Q And what is your understanding of what the allegations were that caused the Acis trustee to investigate HarbourVest?
A Sure. So, you know, our understanding was that Highland had made statements, again, false statements that HarbourVest had actually instructed some of those structural changes, that we were the ones that had said that we would not do business with Acis and had ordered some of the underlying transfer of assets or, again, structural changes, that, you know, very clearly I would say were not the case. Also, that HarbourVest was -- was calling the shots as it relates to any of the ongoing management or future resets of the CLOs.

Q Did HarbourVest instruct any of those structural changes or transfers to occur?

A We did not. Absolutely not.

Q Why didn't HarbourVest itself appear in the Acis bankruptcy and file a claim?

A Yeah. HarbourVest's role, again, in HCLOF, we were a passive investor in a Highland-managed company. We had no direct interaction with or relationship with Acis. There was really no reason for us to be directly involved until we were subsequently dragged into involvement on account of those misstatements. And then at that point our focus really pivoted to, you know, whether we needed to defend ourselves against those accusations that had been made by Highland and after a request for further information in discovery by the Acis trustee.

Q Did HCLOF participate in the Acis bankruptcy?

A They did, yes.

Q Did HCLOF incur fees for participating in the Acis bankruptcy?

A Yes. In fact, very meaningful fees, to the tune of well in excess of $15 million of legal fees, as we understand it, that have been incurred, largely in connection with the ongoing Acis bankruptcy and Highland's continued pursuit of and in connection with the litigation with Mr. Terry, which we firmly believe was entirely inappropriate that HCLOF and

ultimately investors in HCLOF bear those expenses, which were not just expenses of HCLOF but of Highland and a number of other Highland affiliates.

Q Do those expenses form a basis of separate claims filed by HarbourVest against Highland?

A They do, yes. One of the multiple claims that we had filed against Highland.

Q And a few more questions, just for the record, Mr. Pugatch. How much did HarbourVest initially invest in HCLOF?

A Sure. So, our initial investment in November of 2017 was right about $73-1/2 million, I believe.

Q Did HarbourVest invest any additional money in HCLOF?

A We did. There was a subsequent capital call investment of about $5 million, bringing our total investment to just under $80 million in aggregate.

Q When HarbourVest initially made the investment, did it anticipate making a profit on it?

A We did, yes.

Q How much did HarbourVest anticipate earning from the investment?

A Yeah. So, our -- based on the original $73-1/2 million investment, we had expected a total return of about $137 million on that -- on that investment.

Q What was that projection based on?

A So, that projection was based on materials that we had

received from Highland, their internal projection models on the future performance of the underlying CLOs that we were acquiring exposure to through our investment in HCLOF, and was one of the inputs or formed the basis in connection with our diligence that we ultimately ran different sensitivities -- projections around and helped employ -- helped inform our investment thesis.

Q Do you know the current value of HarbourVest's investment in HCLOF?

A Yes. The current value is right around $22-1/2 million.

Q So roughly how much has the investment itself decreased from HarbourVest's initial investment?

A So, net of what was about $4-1/2 million of distributions that we received early on in the investment, we've lost, to date, in excess of $50 million on our original investment.

Q And just for -- to close out, Mr. Pugatch, knowing all that you know, if HarbourVest had known that -- about the nature of the transfers by Acis or Highland's intent with respect to the arbitration award, would HarbourVest have made this investment?

A No. The reality is, had we known the truth, or even had a sense of the truth, the true intentions behind some of those transfers and ultimately what would have happened, we never would have made this investment, full stop.

Q Thank you, Mr. Pugatch.

THE COURT: All right. I didn't hear you, Ms. Weisgerber. Do you pass the witness?

MS. WEISGERBER: Yes, I pass the witness.

THE COURT: All right. Thank you.

Mr. Morris, any examination from you?

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

THE COURT: All right.

(Interruption.)

THE COURT: All right. I'm not sure whose voice that was, but please, again, mute your devices when you're not talking.

Any cross-examination of Mr. Pugatch? I'll start with you, Mr. Wilson.

MR. WILSON: Yes, Your Honor.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. WILSON:

Q How are you -- I guess we're afternoon now. How are you this afternoon, Mr. Pugatch?

A I'm doing well. Yourself?

Q I'm doing well as well. Do you recall that on Monday of this week I took your deposition?

A Yes, I do.

Q And so you understand that my name is John Wilson and I represent Jim Dondero, who has filed an objection to the 9019

motion filed by the Debtor?

I've got a few questions for you today. Has HarbourVest been around for over 35 years?

A We have, yes.

Q And does HarbourVest have ten offices around the world?

A Correct, yes.

Q And does HarbourVest employ over 150 investment professionals?

A Yes.

Q Does HarbourVest have over $74 billion in assets under management?

A Correct, yes.

Q And is HarbourVest's client base largely comprised of institutional investors?

A Also correct.

Q And you would agree with me that HarbourVest is a sophisticated investor, right?

A I would, yes.

Q How long have you worked for HarbourVest?

A I've been employed by HarbourVest for 17 years now.

Q And how long have you been a managing director?

A I've been a managing director for approximately six years.

Q And you were, in fact, the managing director for the investment that HarbourVest made in Highland CLO Funding,

Ltd., which has been referred to today as HCLOF, correct?
A I was, correct.
Q And HarbourVest, I think you just testified, invested approximately $73 million as its initial investment in HCLOF?
A Yes, correct.
Q And before HarbourVest made that investment, it had made many investments of this type, correct?
A Yeah. We've made hundreds of investments into partnerships over our history, correct.
Q So HarbourVest was well-experienced in evaluating and deciding whether to invest in large investments, correct?
A It was, yes.
Q Now, in your -- and by your, I mean HarbourVest -- in the response to the Debtor's omnibus objection, it says that by summer 2017 HarbourVest was engaged in preliminary discussions with Highland regarding the investment. Is that a correct statement?
A Correct, yes.
Q And, in fact, those talks began in the second quarter of 2017, correct?
A Yes.
Q And so the investment closed ultimately on November 15th, 2017?
A Yes, that's correct.
Q So it's fair to say that HarbourVest considered and

evaluated this transaction for over six months before investing its $73 million, right?

A From the time of the initial conversations that we had with Highland, yes.

Q And one of the reasons that it took over six months to complete the investment is that HarbourVest performs due diligence before it makes an investment, correct?

A Correct.

Q And when you're performing due diligence -- well, first off, you would agree with me that that's a common practice amongst sophisticated investors such as HarbourVest, correct?

A To perform due diligence?

Q Yes.

A Yes.

Q And describe -- describe what HarbourVest does in a general sense when it performs its due diligence.

A Sure. So, we spend time with the manager -- in this case, Highland -- certainly around the investment thesis, the opportunity, receive materials around the underlying assets. We take that and perform our own independent due diligence around the value of those assets, perform due diligence on the manager itself, the go-forward opportunity. In many cases, and certainly in this case, engage with outside advisors to assist with that due diligence. It's a very robust and thorough process.

Q And by outside advisors, are you referring to the outside counsel that you testified about earlier?
A Yes. Both outside counsel and outside consultants.
Q Okay. And so did you say that it's typical to engage outside counsel when performing due diligence?
A Yes.
Q And which outside counsel did you retain with respect to this due diligence?
A Debevoise and Plimpton as well as Milbank.
Q And during the course of HarbourVest's due diligence, did it identify some items of concern?
A As with any investment, there are always items that are identified that require further diligence, risks that are identified that we look to mitigate through our due diligence, et cetera.
Q And if Harbour -- I'm sorry, did you say something else?
A No.
Q You were finished? Okay. Now, if HarbourVest identifies an item of concern, is it typical to request additional information regarding those items of concern?
A It is, yes.
Q And so that actually happened with respect to the HCLOF investment, correct?
A In certain cases, yes.
Q HarbourVest identified several litigation matters that it

had questions about, correct?
A Correct. As we would with any investment.
Q And it went back to Highland and asked them to explain their position on those litigation matters?
A Correct.
Q And one of those litigation matters was the Joshua Terry litigation, correct?
A Yes.
Q And at the time that HarbourVest was considering this investment, beginning in the second quarter and continuing through the summer, that Josh Terry litigation had not resulted in an award or a final judgment, correct?
A Correct.
Q And I think we looked earlier at a document that your counsel admitted as HarbourVest Exhibits 34 and 35. There was an email from a HarbourVest -- or, I'm sorry, from a Highland representative to a HarbourVest representative that was discussing Highland's position on the litigation, including the Terry litigation, correct?
A Are you referring to the document that we looked at earlier?
Q I am. And I can put it on the screen if we need to.
A No. Right, I recall that, and yes, that's correct.
Q Okay. And just to be clear, that document, which stated Highland's positions on the -- and summaries of the

litigation, was issued months before the arbitration award to Josh Terry, correct?

A I don't remember the exact timing, but it was certainly during our due diligence period and prior to the arbitration award, yes.

Q Well, it seems to me that that email that you -- your counsel admitted as an exhibit was issued in August of 2017. Does that sound right to you?

A If that's what the email said, yes.

Q And if the Terry arbitration award came out in October, then you would agree with me that that is several months prior to the -- or at least two months prior to the arbitration award?

A Yes.

Q And so when HarbourVest made requests of Highland to provide information regarding its items of concern, Highland complied with those requests, correct?

A It did, correct.

Q And was there ever a time when HarbourVest requested Highland to provide information and that information was not provided?

A Our requests for information, or at least, you know, responses or color to a question, were always met either with, you know, written or verbal communication back to us, yeah.

Q And you would agree with me that, in fact, HarbourVest delayed the closing of the investment by two weeks to continue its due diligence, correct?
A Correct, related to the structural changes that were made close to closing. That's right.
Q And after conducting that due diligence, HarbourVest satisfied itself that the investment was sound?
A That the legal structure that had been put in place in connection with those proposed changes by Highland was -- was legally sound, yes, and on the back of, again, statements and misrepresentations on the part of Highland around the nature and potential impact to their ongoing CLO business and HCLOF.
MR. WILSON: Well, I'm going to object to the latter part of your response as nonresponsive.
THE COURT: Sustained.
BY MR. WILSON:
Q Now, after you conducted the due diligence, HarbourVest made the investment of $73 million on November 15th, 2017, correct?
A Correct.
Q And so I think you testified earlier that prior to that investment HarbourVest had become aware that that Josh Terry litigation had resulted in an arbitration award, correct?
A Yes.
Q But I think you've also testified that HarbourVest did

not request that Highland provide a copy of the arbitration award, correct?

A That's correct.

Q And you further testified that you were represented by outside counsel at the time, correct?

A Correct.

Q And as of Monday of this week, you had not reviewed that arbitration award; is that correct?

A That's correct.

Q Have you reviewed that arbitration award since Monday of this week?

A I have not.

Q But in any event, you testified that Highland told you about the award?

A Yes.

Q And they told you the amount of the award?

A Yes.

Q And then they told you that the award had been converted to a judgment?

A When you say the award had been converted to a judgment, can you be more specific?

Q Well, I don't know how familiar you are with the litigation process, but in this instance, that award was taken to a court and the court entered a judgment on the arbitration award. Did you -- were you aware of that?

A I don't recall the specific legal terms of judgment against it. I was award of the existence of the arbitration award and the -- and the obligation for Highland to comply with that arbitration award.

Q And HarbourVest did not make an appearance in the Acis bankruptcy, right?

A We did not.

Q But you were aware of the Acis bankruptcy, correct?

A Yes.

Q And you were kept apprised of the Acis bankruptcy by Highland individuals, correct?

A We had conversations with a couple of Highland individuals throughout the Acis bankruptcy process, yes.

Q Right. And in fact, you testified that you participated in regular conference calls with Highland regarding that bankruptcy?

A That's correct, yes.

Q And do you recall having been provided with over 40,000 documents by Highland related to the Acis bankruptcy?

A I do not recall that, no.

Q Would those documents have been provided to your outside counsel, had you received them?

A I don't know the answer to that.

Q Did the outside counsel that represented you in the due diligence continue to represent you throughout the Acis

bankruptcy?

A They did. One of the counsels did, correct.

Q And which counsel was that?

A Debevoise.

Q So was your counsel actively involved with monitoring the Acis bankruptcy?

A They were, yes, particularly after we were ultimately accused of having something to do with the original structure and -- as a result of misstatements by Highland.

Q Did your counsel attend hearings in the Acis bankruptcy?

A I don't recall.

Q Are you familiar with the PACER system?

A I am not.

Q Now, I think that HarbourVest has been described as a passive investor. You recall that description of HarbourVest in this instance?

A Yes.

Q But, in fact, HarbourVest invested substantial assets such that it owned a 49.98 percent share of HCLOF. Would you agree with that?

A That's correct.

Q And in fact, the next largest investor was CLO Holdco, which owned 49.02 percent of the shares, correct?

A That sounds right.

Q And there was an advisory board that was created pursuant

to the formation documents of this investment, correct?
A That's correct.
Q And in fact, that advisory board only had two members, and one was a representative of HarbourVest and one was a representative of CLO Holdco, correct?
A Correct.
Q And the advisor -- I'm sorry, the portfolio manager was not allowed to disregard the recommendations of the advisory board, correct?
A With respect to the limited set of items that the advisory board could opine on, that is correct.
Q All right. I want to go over a couple of the misrepresentations that HarbourVest has identified in its filings related to its claim. The first one is -- and just for the record, I'm reading from Docket No. 1057 filed on September 11, 2020, HarbourVest Response to Debtor's First Omnibus Objection.

But the first misrepresentation identified in that document says that Highland never informed HarbourVest that Highland had no intention of paying the arbitration award. And was -- was Highland obligated to pay the Josh Terry arbitration award against Acis?

MR. MORRIS: Objection to the question to the extent it calls for a legal conclusion.

THE COURT: Sustained.

MS. WEISGERBER: Join in that objection.

THE COURT: Sustained. I think --

BY MR. WILSON:

Q Your understanding was --

MR. WILSON: I'm sorry, Judge?

THE COURT: I sustained the objection as calling for a legal conclusion. So, next question.

MR. WILSON: Yes, I -- I heard that. Thank you, Your Honor.

BY MR. WILSON:

Q In your understanding, was Highland responsible for paying the arbitration award to Josh Terry?

A My understanding is on the account of the fact that Acis --

MS. WEISGERBER: Objection, Your Honor. Objection, Your Honor, same basis.

THE COURT: Sustained. It was essentially the same question.

MR. WILSON: Well, Your Honor, I didn't ask --

THE COURT: It was essentially the same question, Mr. Wilson. Move on.

MR. WILSON: Okay.

BY MR. WILSON:

Q The next misrepresentation identified by HarbourVest said that Highland did not inform HarbourVest that it undertook

the transfers to siphon assets away from Acis, LP and that such transfers would prevent Mr. Terry from collecting on the arbitration award. So the basis for that allegation would be that Highland was siphoning assets from Acis to avoid having Acis pay the arbitration award, correct?

A That -- that would be the implication, yes.

Q Okay. And then that misrepresentation continues on and says that Highland represented to HarbourVest that it was changing the portfolio manager because Acis was toxic. And do you recall that representation being made to you?

A Yes, I do.

Q And would you agree with me that whether or not Acis is toxic in the industry would be an opinion?

A I suppose it would be an opinion, but by the manager of the vehicle responsible for managing the HCLOF investment and the underlying CLOs. Yeah, we viewed the Acis name and the Highland name as synonymous, if you will. I mean, Acis was a subsidiary of Highland. For all intents and purposes, it was the same from our perspective as we made the investment into HCLOF.

Q So did HarbourVest have an independent understanding of whether or not the Acis name was toxic in the industry?

A We did not, no. We relied on Highland's views of that as manager of HCLOF.

MR. WILSON: Your Honor, just a brief housekeeping

item. Did you say that we need to be done at 1:00 o'clock?

THE COURT: Well, I said I really wanted you to be done by 1:00 o'clock because I have a 1:30 docket and a 2:00 o'clock docket and I'd rather not have to hang up 70-something people and reconnect them again at 3:00 o'clock. How close are you to being finished?

MR. WILSON: Well, --

THE COURT: This is going at a very slow pace.

MR. WILSON: Well, I apologize for that, Your Honor. I think I've got at least ten more minutes, but -- but I know we also have closing remarks. And I was just going to ask if Your Honor had a preference of --

THE COURT: Keep going.

MR. WILSON: -- of breaking now --

THE COURT: Keep -- let's --

MR. WILSON: -- or keep going? Okay.

THE COURT: Let's talk fast and try to get through. You know, even if I'm sacrificing lunch today, I don't want to inconvenience 75 people this way. So we'll just probably start our 1:30 hearing a little late and inconvenience those people.

All right. Go ahead.

MR. WILSON: All right. Thank you, Your Honor.

BY MR. WILSON:

Q Did Acis form its -- I can't recall if you answered this

question, but did Acis form its own opinion on whether or not -- I'm sorry, strike that. Did HarbourVest form its own opinion on whether or not the Acis name was toxic in the industry?

MS. WEISGERBER: Objection, --

THE WITNESS: We did not. We didn't have a basis.

THE COURT: I'm sorry, did I have an objection?

BY MR. WILSON:

Q You did not --

THE COURT: Did I have an objection?

MS. WEISGERBER: Yeah. Objection. Yes. Objection, asked and answered, Your Honor.

THE COURT: Overruled. He can answer.

BY MR. WILSON:

Q Okay. But --

A We did not.

Q Did Highland have the ability to investigate the Acis name and make its own determination of whether that name was toxic? I'm sorry, I think I'm misspeaking. HarbourVest.

A HarbourVest had the ability to do that, yes.

Q I apologize I misspoke. I meant HarbourVest. Did HarbourVest have the ability to investigate that name and determine if it was toxic?

A It was irrelevant to our investment thesis. And as I said before, Acis was a subsidiary of Highland. We viewed

them as interchangeable in the context of our investment.

Q Okay. The next misrepresentation that you refer to says that Highland indicated to HarbourVest that the dispute with Mr. Terry would have no impact on its investment activities. Would you agree with me that that is also an opinion?

A It was a statement that --

MS. WEISGERBER: Your Honor, I'm going to object to the extent these questions are seeking a legal conclusion regarding, you know, if something's an opinion or not.

THE COURT: Okay. Overruled. He can answer.

THE WITNESS: It was -- it was a statement that was made to us by Highland and represented in multiple different formats as fact. And a representation that we relied on in connection with our investment.

BY MR. WILSON:

Q And finally, the misrepresentation, the last misrepresentation identified, is that Highland expressed confidence in the ability of HCLOF to reset or redeem the CLOs. Would you agree with me that that statement is an opinion?

A On the basis that it was the core investment thesis of the -- of the investment of HCLOF. Again, whether that's legally viewed as an opinion or a fact, it was -- it was certainly the investment thesis that we made the investment predicated upon.

Q And you just testified that you thought that Acis and Highland were interchangeable from the perspective of the investment opportunity, correct?

A Correct.

Q But you also accepted Highland's recommendation because HarbourVest agreed that the change in the -- to a Highland manager made commercial sense, correct?

A We took at face value what Highland recommended because this all had to do with the structuring of an entity that they fully managed with respect to multiple underlying subsidiaries that weren't managed by Highland.

Q But would you agree that, at the time, you -- HarbourVest thought that made commercial sense?

A It did not seem unreasonable to us based on the explanation we were given.

Q Okay.

MR. WILSON: I want to refer to HarbourVest Exhibit 39.

(Pause.)

THE COURT: What are we waiting on? What are we waiting on?

MR. WILSON: I'm trying to get the document on the screen, Your Honor.

(Pause.)

THE COURT: We can't hear you. We can't hear you.

MR. WILSON: I'm sorry. I'm sorry, Your Honor. I'm speaking with my --

THE COURT: Okay.

MR. WILSON: -- co-counsel here.

THE COURT: All right.

(Pause.)

MS. WEISGERBER: Mr. Wilson, is it 39 or 38 that you're referring to?

MR. WILSON: 39. HarbourVest 9019 motion on the main -- on the Dondero file. And then there's the -- it's -- it's John -- and then there's the HarbourVest, and then the exhibits are all in one file.

MS. WEISGERBER: Mr. Wilson, I'll just note that 39 was subject to confidentiality based on HCLOF's request. HCLOF's counsel is present. I think they know it's an excerpt. But I'd just -- that for HCLOF's counsel.

MR. WILSON: Well, is there an objection to showing this document on the screen? Yes. All right. We're not going to put Document 39 on the screen.

A VOICE: Yes.

MR. WILSON: All right. Scroll down to the next page.

BY MR. WILSON:

Q This is a -- this is a document that was produced to us this week, the Highland production. It appears to be a

Highland CLO Funding, Ltd. Statement of Operations for the Year Ended 31 December 2017. Do you see at the top of that -- at the top of that document where it says total investment income of $26 million?

A I do, yes.

Q And total expenses were roughly $1.8 million?

A Yes.

Q And then net change and unrealized depreciation on investments and net realized loss on investments was $4.26 million cumulative, resulting in a net increase in net assets resulting from operations of $20.224 million. Do you agree with that?

A Yes.

Q Okay.

MR. WILSON: Go to the next one.

BY MR. WILSON:

Q And you understand that, in the course of the Acis bankruptcy, the portfolio managers for certain of the CLOs were changed by the Trustee, correct?

A Yes, around the underlying CLOs. That's -- that's my understanding, yes.

Q And, in fact, Mr. Seery testified earlier today that that occurred in the summer of 2018, correct?

MR. WILSON: Scroll.

THE WITNESS: I don't recall the timing, but that's

what he testified to.

BY MR. WILSON:

Q Well, this document is HarbourVest Exhibit 40, and this is the statement of operations for the financial year ended 31 December 2018. Here, the total investment income is only $11.1 million. Do you see that?

A I do.

Q And do you see where the expenses have increased to $13.6 million?

A I do, yes.

MR. WILSON: Okay. Scroll down some more.

BY MR. WILSON:

Q And do you see where it says net change and unrealized loss on investments of $48.47 million?

A Yes.

Q And so after Acis and Brigade took over the managements of these CLOs, we had a net decrease in net assets resulting from operations of $52.483 million in the year 2018, correct?

MS. WEISGERBER: Objection, Your Honor. Assumes a fact not in evidence.

THE COURT: Overruled. He --

MR. WILSON: Your Honor, --

THE COURT: We're just looking at this statement and testifying about it says, so I overrule the objection.

MR. WILSON: Thank you, Your Honor. Thank you, Your

Honor. I'm now going to turn to HarbourVest Exhibit 41. All right. I'll --

BY MR. WILSON:

Q Did you answer the question, Mr. Pugatch?

A No, I -- I would agree with the second part of your statement that for the year 2018 the -- the loss was $52 million. I don't -- I don't believe that jives with the first part of your statement that that was after Acis and Brigade took over. As I understand, that was in the middle of the year.

Q But in any event, Acis and Brigade had been managing this for at least six months of 2018 when that loss occurred, correct?

A They had been managing a portion of the underlying CLO portfolio held by Highland CLO Funding.

Q All right. We're now looking at Exhibit #41, which is the Draft Unaudited Statement of Comprehensive Income, 31 December 2019. Total income has now dropped to $4.664 million.

MR. WILSON: And scroll down.

BY MR. WILSON:

Q Expenditures are at $3.645 million. And then it says investment gains and losses net out to $11.493 million, a negative $11.493 million. And --

MR. WILSON: Scroll down to the --

BY MR. WILSON:

Q And so would you agree with me that in the year 2019, HCLOF showed a net loss of $10.476 million?
A Yes, that's what the financial statements say.
Q And in this year, the Acis CLOs were solely managed by Acis and Brigade, correct?
A The Acis CLOs were. Yes, correct.
Q All right.

MR. WILSON: Now, go to 42.

BY MR. WILSON:
Q Now, this is HarbourVest #42.

MR. WILSON: Go down to the next page.

BY MR. WILSON:
Q And this is the Highland CLO Funding, Ltd. Unaudited Condensed Statement of Operations for the Financial Period Ended 30 June 2020. And so this is just half a year of operations. And would you -- and this actually has a comparison between 2019 and 2020. But do you see where it says investment income has dropped from a million dollars in the first half of 2019 to $381,000 in the first half of 2020?
A Yes.

MR. WILSON: Okay. Scroll down.

BY MR. WILSON:
Q And do you see where, in the first half of 2019, total expenses were $1.85 million, and then in the first half of 2020 total expenses were $2.16 million? Do you see that?

A I do.

Q And if you go down below that, where it says Net Realized and Unrealized Gain/Loss on Investments, the first half of 2019 HCLOF lost $12 million, and in the first half of 2020 it lost $39.472 million?

MR. MORRIS: Your Honor, I'm going to object. It's John Morris for the Debtor. I'm happy to stipulate. In fact, he can offer this document into evidence. There's no foundation that Mr. Pugatch has any particularized knowledge about any of the numbers behind this. All he's asking him to do is to confirm what the document says. It says what it says. But this -- I'll object on that basis, Your Honor.

THE COURT: All right. Mr. Wilson, what about it? You're just getting him to read numbers off of these exhibits.

MR. WILSON: Well, --

THE COURT: Shall we just --

MR. WILSON: -- I understood --

THE COURT: -- by stipulation get them into evidence?

MR. WILSON: Well, --

MR. MORRIS: No objection, Your Honor.

MS. WEISGERBER: No objection.

THE COURT: All right. So these are exhibits what? We've gone through 39, 41, and I don't know what else. 40, maybe?

MR. WILSON: It was Exhibits 39, 40, 41, and 42 that

were on the HarbourVest exhibit list.

THE COURT: All right. Those will be admitted, and we've already discussed what docket entry number they appear at.

(HarbourVest's Exhibits 39 through 42 are received into evidence.)

THE COURT: All right. Anything else? You told me you had 10 more minutes about 15 minutes ago.

MR. WILSON: Well, I'm sorry if I -- I think I had said I had at least ten more minutes, and I was looking at the -- it was 10:50 [sic] and you wanted to quit at 1:00. So I do have longer than that. I'm sorry, Your Honor.

THE COURT: Well, --

MR. WILSON: But --

THE COURT: -- I feel like I'm being --

MR. WILSON: -- I'll try to proffer --

THE COURT: Okay, Mr. Wilson, let me just tell you something. I feel like I'm being disrespected now, and the parties are. We really need to pick up the pace. I've told you I've got a 1:30 docket -- with four or five matters on it, by the way. I've got a 2:00 o'clock docket. I'm starting them late. No one advised my courtroom deputy that we were going to need all day today for this, okay? So you've got five more minutes to wrap it up, and then, of course, I have to go to Mr. Draper and see if he has cross. All right? So

please don't test my patience any more. Five minutes to finish.

MR. DRAPER: Judge, I have no questions.

THE COURT: I didn't hear you, Mr. Draper. What did you say?

MR. DRAPER: I have no questions.

THE COURT: All right. Very good.

MR. WILSON: I apologize, Your Honor. I was actually trying to be respectful of your time when I informed you that I had at least ten more minutes left at 12:50, but I will try to be as expedient as I can as I finish up.

BY MR. WILSON:

Q And I don't see you on my screen.

MR. WILSON: You can take that document down.

THE WITNESS: Here.

BY MR. WILSON:

Q Mr. Pugatch, do you have an opinion as to what caused these incredible losses of value at HCLOF?

MS. WEISGERBER: Objection to the extent it calls for a legal conclusion.

THE COURT: Overruled. He can answer.

THE WITNESS: I would say that there's no one cause for the decline in value. I can point to a number of different things, including the exorbitant fees that were charged to HCLOF, including the inability to be able to re --

refinance the CLOs on the part of HCLOF, all of which stems from the actions that Highland took prior to our investment in HCLOF.

BY MR. WILSON:

Q And you've -- I think it's been referenced several times in HarbourVest's arguments that -- that the reset was a fundamental -- the inability to get a reset was a fundamental cause of the loss in value. Is that -- is that HarbourVest's position?

A That -- that is a part of the -- the cause in the declining value of the CLOs, yes.

Q And you would agree with me that a reset is fundamentally a reset of interest rates, correct?

A Of the interest rates of the liabilities of the -- the timing for repayment of those liabilities, yes.

Q Now, just say with -- for the sake of a hypothetical example. If you had a home that was valued at $5 million, or let's just say $500,000, let's make it more realistic. If you had a $500,000 home and you had a mortgage on that home at five percent interest, your inability to refinance that home at a lower interest rate would not affect the underlying value of that home, correct?

MS. WEISGERBER: Objection, Your Honor. Hypothetical. And objection to relevance as well.

THE COURT: Sustained.

MS. WEISGERBER: Calls for speculation.

THE COURT: Sustained.

BY MR. WILSON:

Q Is there any reason to believe that the change in the interest rate would have prevented the massive losses of investment value that occurred in HCLOF?

MS. WEISGERBER: Object on the same grounds.

THE COURT: Sustained.

THE WITNESS: The short -- the short answer is yes, with a -- with the amount of leverage --

MS. WEISGERBER: I --

THE WITNESS: -- that exists. Oh, sorry.

MS. WEISGERBER: The objection was sustained.

THE COURT: Yeah, I sustained the objection. That means you don't answer.

THE WITNESS: I'm sorry, Your Honor.

BY MR. WILSON:

Q So, would you agree with me that if the expenses and the fees charged by the portfolio manager increased dramatically, that would -- that would impact the value of the investment, correct?

MS. WEISGERBER: Objection on the same grounds, and relevance. This is a 9019 hearing, Your Honor. We are not here to try every minutia. And in fact, we're trying to avoid a trial on the merits. And it feels like we're getting a bit

far afield now.

THE COURT: I sustain.

MR. WILSON: All right. I'll pass the witness.

THE COURT: All right. Mr. Draper said he had no cross. So, any redirect, Ms. Weisgerber?

MS. WEISGERBER: No, Your Honor.

THE COURT: All right. Mr. Morris, did you have any redirect?

MR. MORRIS: I do not, Your Honor. I have a very brief closing and then some additional remarks if -- if we finish.

THE COURT: All right. So, Mr. Pugatch, that concludes your testimony. Thank you. You're excused if you want to be.

All right. So, as I understood it, there would be no more evidence after this.

MR. WILSON: Well, Your Honor, along those lines, as a housekeeping measure, I think everything on my exhibit list is included on someone else's exhibit list, but just for belt and suspenders I would move to admit all of the exhibits on the -- on Mr. Dondero's exhibit list.

THE COURT: Well, is that agreed or not? Because we didn't have a witness to get them in.

MR. MORRIS: No objection, Your Honor.

THE COURT: Any objection? All right. If there's no

objection, I'll --

MR. MORRIS: Your Honor, --

THE COURT: I'm sorry. Was there an objection? I will admit Dondero Exhibits A through M, and those appear at Docket Entry 1721, correct, Mr. Wilson?

MR. WILSON: That is correct, Your Honor.

THE COURT: All right.

MR. WILSON: That is correct, Your Honor.

(James Dondero's Exhibits A through M are received into evidence.)

MR. WILSON: And one final matter is, during the examination of Mr. Seery, you at least partially admitted Dondero's Exhibit N, and I was wondering if we need to -- how we'd need to submit that for the record.

THE COURT: Okay. First, I'm confused. I think you said Mr. Terry's testimony. You --

MR. WILSON: I said Seery. I'm sorry.

THE COURT: Oh, Seery?

MR. WILSON: Or I may have said Terry, but I meant to say Seery.

THE COURT: Okay. Maybe you said it. Okay. During Mr. Seery's testimony -- oh, the email that I admitted a portion of?

MR. WILSON: That is -- that's correct, Your Honor.

THE COURT: What -- what are you asking? It's not in

your notebook. Are you asking do you need to separately submit it or what?

MR. WILSON: Yeah, I was just asking what the Court's preference on how we submit that for the -- put it in the record.

THE COURT: Okay. That was so garbled I didn't hear you. You need to file that on the docket as a supplemental exhibit that was admitted, okay?

MR. WILSON: Okay. Thank you, Your Honor.

THE COURT: All right. Closing arguments? Mr. Morris?

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: Yes, very briefly, Your Honor. The Debtor easily meets the standard here. The settlement consideration relative to the claim establishes and reflects the likelihood of success on the merits.

You know, I've never -- I did hear Mr. Pugatch in the deposition the other day, but I otherwise haven't heard from him. I found him to be incredibly credible, Your Honor, and I regret the fact that he and HarbourVest are being blamed twice here. The fact that they got 40,000 documents or didn't read the arbitration award, it's just -- it's a shame that they're being dragged through this yet again.

The fact is, Your Honor, there is no evidence that they made the disclosures that HarbourVest claims -- complains

about. They just don't. The fraudulent transfers led to the bankruptcy, led to the appointment of a trustee, led to -- right? So, so it's -- that's why -- but they're getting something for their claim.

It was a hard negotiation, Your Honor. There is no dispute that if we litigated this it would be complex. It would fact-intensive. The Debtor would be forced to rely upon witnesses who are no longer employed by it. That it would be expensive, for sure. There's no dispute about any of that. There's no dispute that the creditor body has spoken loudly here by unanimously refraining from objecting except for Mr. Dondero and the entities controlled by him.

And you heard Mr. Seery's testimony. I think he exhaustively informed the Court as to the process by which the transaction was analyzed and negotiated, and there's no evidence to the contrary that this was an arm's-length negotiation.

Unless Your Honor has any questions, we would request that the motion be granted.

THE COURT: Thank you. Ms. Weisgerber, your closing argument?

CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

MS. WEISGERBER: Sure. Thank you, Your Honor. I'll also be brief. We again join in Mr. Morris's arguments and comments.

The Court has now heard testimony from Mr. Pugatch regarding the factual detail underlying HarbourVest's claims. The Court has also heard about the significant damages that HarbourVest stands to recover for those claims. And HarbourVest came to this Court ready to litigate. It would -- it's ready to do so if needed. It believes it would prevail on its claims if it had to do so.

But the Court also heard from Mr. Seery about his understanding of HarbourVest's claims, his calculus, and his decision to settle them. And we submit that nothing further is needed by this Court in order to approve the settlement. This is a question of the Debtor's business judgment. We're not here to have a trial on the merits of HarbourVest's claims. The Objectors have made various arguments, including about the cause of HarbourVest's damages. But even the nature of the legal claims that HarbourVest is asserting, some do not require a loss causation. So we submit that's not even relevant to the merits of the claims.

The settlement is clearly in the best interest of the estate, and we respectfully request that the Court approve it.

THE COURT: Thank you. All right. Mr. Wilson, your closing argument?

MR. LYNN: Michael Lynn. I will give the closing argument, if that's satisfactory to the Court.

THE COURT: All right. Go ahead.

CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

MR. LYNN: Good afternoon, Your Honor. I just want to make a few points, and I'll try to do it as quickly as possible.

First, I feel compelled to address the argument of the Debtor that Mr. Dondero is repeating his litigious behavior from the Acis case. I don't know about the Acis case. I wasn't involved except very, very peripherally. But with respect to this case, we have only taken positions in court that we believed -- that is, his lawyers -- believed were warranted by law, facts as we knew them, and that are consistent with professionalism. I'd be glad to explain any position we took.

Often, through the Debtor's very persuasive powers, we never had the chance to explain our position previously to the Court. In fact, for the most part, as today, we have been reactive rather than commencing proceedings. In fact, during the first seven months of this case, we only appeared in court a few times, when we felt we had to -- for example, when discovery was being sought by the Creditors' Committee that we feared might invade privilege. Then, much to the Debtor's fury, we opposed the Acis 9019. We did so because we thought it was too much.

Since, as the Court can see, the principal instigators of litigation have been the Debtor, and to a lesser extent, the

Committee.

Indeed, in an apparent effort to drown Mr. Dondero and his counsel in litigation, the Debtor has repeatedly sought court action on a very short fuse, claiming need for expedited hearing.

Perhaps the most startling example of this is the recent contempt motion, for which there is no good reason for a quick hearing. Resolution of that motion is not necessary to reach the confirmation hearing. The motion could be heard after the confirmation hearing. There is no need to put Mr. Dondero and his professionals in a position where they have to respond in a couple of days, two business days, and then will have two days to prepare for trial.

Second, Your Honor, Mr. Seery has repeatedly asserted, contrary to today's motion, that the HarbourVest claim was of no merit. That is why, when he came in to settle for tens of millions of dollars, we opposed this motion. It appears that the motion is occurring without any cross-party discovery. There is no consideration, apparently, of trying dispositive -- dispositive motions first. There is no consideration for junior classes of equity, which Mr. Seery has previously opined were in the money. This, even though there's no reason that this settlement is necessary pre-confirmation, unless Mr. Seery wants HarbourVest's vote.

Third, for whatever reason, that seems to be the driving

factor for settling. On its face, the vote seems to be a key factor of the settlement. About the longest provision of the settlement agreement relates to voting. The motion itself -- in the motion itself, five of seven bullet points cited by the Debtor for approval of the settlement deal with and emphasize support of the plan or the vote that is to be cast for the plan.

If the settlement is a good deal, it didn't need to have as one of its parts the requirement that HarbourVest vote for the plan.

Your Honor, I'll stop there. I know Your Honor would like to get just a few minutes before your 1:30 docket. I've been there and I understand that, and I do apologize for taking the time we have, but I think that responsibility is shared with the Debtor and HarbourVest.

Thank you, Your Honor.

THE COURT: All right. Thank you for that.

Mr. Draper, any closing argument from you?

CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

MR. DRAPER: Yes, I have three comments. The first is the claim -- the loss claim, absent the fraud claim, is, at best, $7 million. I think Mr. Seery's argument that a hundred -- one hundred percent is attributable to there is just wrong. If he and I both invested in a company 50-50 and it goes broke, we only lost 50 cents each.

Number two, I think the Court heard the evidence. I think this is, at best, a subordinated claim under 5 -- under the Bankruptcy Code. It's really a "But for the misrepresentations, we wouldn't have invested."

And the last one is the -- Judge Lynn represented the voting, so I won't deal with that. But the one that troubles me the most is the fact that this asset that is ultimately being paid for in claim dollars that's being transferred over to the Debtor and being put it outside the estate, outside the purview of this Court, and placed in some subsidiary, this -- this transaction, if it is approved, must -- should contain a provision that the asset that's being acquired come into the Debtor and be owned by the Debtor.

THE COURT: All right.

MR. DRAPER: I have nothing further, Your Honor.

THE COURT: Thank you, Mr. Draper.

Mr. Morris, you get the last word since it's your motion.

MR. MORRIS: Very quickly, Your Honor. The subordination argument doesn't hold water. This is not a claim against the Debtor for the security; it's a claim for fraud. Okay? So, so 510(b), if it was a claim against HCLOF, that might make sense, but this is a claim against the Debtor. And it's a Debtor -- it's a claim for fraud. That's number one.

Number two, we need to keep this exactly as it's been

structured in order to avoid litigation. Mr. Seery told the Court. I'm sure the Court can make its own assessment as to Mr. Seery's credibility as to whether or not the Debtor is intending to somehow get this asset beyond the Court.

But there are reasons why we've done this, Your Honor. They could have made an objection on that basis. In fact, if they did, it would be overruled, because there's no -- there's no basis for this Court to find that somehow the Debtor and Mr. Seery are doing something untoward to get assets away from this Court's jurisdiction.

You know, I don't know what to say about Mr. Lynn's commentary. Much of it had nothing to do with any evidence in the record.

The fact remains, Your Honor, that this settlement is fair. It's reasonable. It's in the best interest of the estate. And we would respectfully request that the Court grant the motion.

THE COURT: All right. Thank you. Well, I appreciate all the arguments and evidence I have heard today. I'm going to be brief in my ruling here, but I reserve the right to supplement in a more fulsome written order, which I'm going to instruct Mr. Morris to submit. I am approving the motion to compromise the HarbourVest claim today, and I guess subsumed in that is granting the motion to allow their claim for 3018 voting purposes.

I in all ways find this compromise to meet the required legal standard set forth in such cases as *TMT Trailer Ferry*, *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit cases.

First, I'm going to specifically say for the record that I found both witnesses today, Mr. Seery and Mr. Pugatch, to be very credible. Very credible testimony and meaningful testimony was provided to the Court today. And based on that testimony, I find, first, that this compromise was the product of arm's-length negotiations. It was a hard-fought negotiation, as far as I'm concerned. The Debtor objected to these numerous HarbourVest proofs of claim. The Debtor did not want to allow HarbourVest a significant claim for voting purposes. I duly note the statements made in the disclosure statement before this compromise was reached suggesting, you know, the Debtor didn't think HarbourVest should have a large claim.

That is consistent with everything I typically see in a bankruptcy case when there's a claim objection. The objector vehemently denies the claimant should have a proof of claim, and then people sit down and think about the risks and rewards of litigating things. And I believe very fervently that's what happened here. There were good-faith, arm's-length negotiations that resulted in this proposed compromise.

I find the compromise -- and I'll add to that point, on

the good-faith point, I find nothing sinister or improper about the fact that the compromise includes a commitment of HarbourVest to vote in favor of the plan. Again, we see this a lot. You know, there's even a buzz word that doesn't even exist in the Bankruptcy Code: "plan support agreement." You know, we see those a lot -- you know, oftentimes negotiated before the case, but sometimes after. You know, it may be improper in certain situations, but there was nothing here that troubles me about that component of the compromise.

I find the compromise to meet the paramount interest of creditors here. Notably, we have very large creditors in this case who have not objected. The *Foster Mortgage* case from the Fifth Circuit tells me I am supposed to consider support or opposition of creditors. No opposition of UBS. No opposition of the Redeemer Committee Crusader Fund. No opposition from Josh Terry or Acis. No opposition from Daugherty.

But moreover, when considering the paramount interest of creditors, I find this compromise to be in all ways fair and equitable and in the best interest of the estate, and certainly within the range of reasonableness. The evidence showed that HarbourVest asserted over $300 million. Over $300 million. Granted, that was based on all kinds of legal theories that would be contested and expensive to litigate, but the evidence also showed that they invested over $70 million. You know, close to $75 million. I forget the exact

number. $75 or $80 million, somewhere in that range. And now the credible evidence is that investment is worth about $22 million.

So, certainly, while the claim may not have, at the ultimate end of the day in litigation, resulted in a $300 million proof of claim, certainly, certainly there were strong arguments for a very sizeable claim, more than this compromise amount. So it's certainly fair and equitable and reasonable when considering the complexity and duration of further litigation, the risks and rewards, the expense, delay, and likely success.

A couple of last things I'm going to say are these. I understand, you know, there is vehement disagreement on the part of our Objectors to the notion that Highland might have caused a $50 million loss to HarbourVest. But I will tell you, for what it's worth -- I want the record clear that this is part of my evaluation of the reasonableness of the settlement -- my reaction is that, indeed, Highland's litigation strategy in the Acis case caused HCLOF to lose a huge portion of its value, to the detriment of HarbourVest. You know, whether all evidence at the end of the day would convince me of that, I don't know, but that's -- that is definitely this judge's impression.

I'm very sympathetic to HarbourVest. It appears in all ways from the record, not just the record before me today, but

the record in the Acis case that I presided over, that Highland back then would have rather spent HarbourVest's investment for HCLOF legal fees than let Josh Terry get paid on his judgment. They were perfectly happy to direct the spending of other people's money, is what the record suggested to me.

And then, you know, I have alluded to this very recently, as recently as last Friday: I can still remember Mr. Ellington sitting on the witness stand over here to my left and telling the Court, telling the parties under oath, that HarbourVest -- he didn't use its name back then, okay? For the first phase of the Acis case, or most of the Acis case, we were told it was an investor from Boston. And at some point someone even said their name begins with H. I mean, it seemed almost humorous. But Mr. Ellington said it was they, HarbourVest, the undisclosed investor, who was insistent that the Acis name was toxic, and so that's what all of this had been about: the rebranding, the wanting to extract or move things away from Acis.

So, you know, I have heard for the -- well, at least the second time today, from Mr. Pugatch, what I perceive to be very credible testimony that that's just not the way it happened.

And I guess the last thing I want to say here today, and you know, I guess I have multiple reasons for saying this, not

just in connection with approving the settlement, you know, I've heard about how the Acis CLOs, the HCLOF CLOs have lost, you know, a crazy amount of value, that they underperform in the market, that, you know, during the Acis/Brigade tenure and, you know, they should have been reset. You know, I hope those who have not been around as long as some of us in this whole saga know that the -- Mr. Terry, Mr. Phelan, I think Brigade, they all desperately wanted to reset these things, but it was HCLOF, I believe directed by Highland, that wanted to redeem, wanted to liquidate, take the pot of money, warehouse it, and then do their own thing.

And there was, I think, from my vantage point, a monumental effort to try to get everyone to the table to do reasonable resets that would be good for the stakeholders at HCLOF and be good for the creditors of Acis, including Josh Terry. That was always the balancing act that most of us were focused on during the Acis bankruptcy. But Highland, I believe, directing HCLOF's strategy, just did not want the resets to happen.

So, again, part of me, I suppose, just wants to make the record clear on something that I fear not everyone is clear about. And I say that because the comment was made that the injunctions, the preliminary injunctions sought by the Acis trustee caused the plummet in value, and I think that's just not an accurate statement. I think litigation strategies are

what caused the plummet in value, and that's why I think ultimately HarbourVest would potentially have a meritorious claim here in a significant amount if this litigation were to go forward.

So, I approve this under 9019. And again, Mr. Morris, you'll upload an order.

It is now 1:41, so let's as quickly as possible hear the other motion that I don't think had any objections. Mr. Morris?

MR. MORRIS: Your Honor, just -- yes, just very quickly, just four things.

With respect to the order, I just want to make it clear that we are going to include a provision that specifically authorizes the Debtor to engage in -- to receive from HarbourVest the asset, you know, the HCLOF interest, and that that's consistent with its obligations under the agreement.

The objection has been withdrawn, I think the evidence is what it is, and we want to make sure that nobody thinks that they're going to go to a different court somehow to challenge the transfer. So I just want to put the Court on notice and everybody on notice that we are going to put in a specific finding as to that.

THE COURT: All right. Fair --

MR. MORRIS: Number two is --

THE COURT: Fair enough. I do specifically approve

that mechanism and find it is appropriate and supported by the underlying agreements.

And just so you know, I spent some time noodling this yesterday before I knew it was going to be settled, so I'm not just casually doing that. I think it's fine.

Okay. Next?

MR. MORRIS: Thank you very much, Your Honor. Number two, with respect to the motion to pay, there is no objection. If we can just submit an order. Or if Your Honor has other guidance for us, we're happy to take it.

THE COURT: Okay. Does anyone have anything they want to say about that motion?

Again, I looked at it. I didn't see any objections. I didn't see any problem with it. It's -- you know, you're going through this exercise because of the earlier protocol order.

MR. MORRIS: Correct.

THE COURT: All right. Well, if there's nothing, then, I will approve that, finding there is good cause to grant that motion.

MR. MORRIS: Okay.

THE COURT: All right. Is the only other housekeeping matter --

MR. MORRIS: I --

THE COURT: -- we have the contempt motion?

MR. MORRIS: It is, and I do -- I do have to point out how troubled the Debtor is to learn that Mr. Dondero was still receiving documents from Highland as late as this morning. It's got to be a violation of both the TRO -- I guess it's now the preliminary injunction.

I would respectfully request -- I know that time is what it is -- but maybe Mr. Dondero can answer now where he got the document, who he got the document from, what other documents he's gotten from the Debtor since Your Honor ordered him not to communicate with the Debtor's employees.

This is not saying hello in the hallway. I mean, this is just -- it is really troubling, Your Honor, and it's why we need the contempt motion heard as soon as possible.

THE COURT: Well, Mr. Wilson, do you want to address that? I think the words I heard were that you just got the document this morning, and you got it from Mr. Dondero, but we don't know where and when Mr. Dondero got it. Mr. Wilson, are you there?

MR. LYNN: I'm afraid I'm back, Your Honor.

THE COURT: Okay.

MR. LYNN: I am not sure whether Mr. Dondero had it in his files from some -- from back before he was asked not to communicate with members or with employees of the Debtor. I believe -- I believe he's with us, though I don't think he's available by video.

Are you there, Mr. Dondero?

THE COURT: We can't hear you, Mr. Dondero.

MR. DONDERO: Judge?

THE COURT: Oh, go ahead.

MR. DONDERO: Can you hear me now?

THE COURT: Yes.

MR. DONDERO: Yes, I -- I -- when I moved offices, I found it in a stack of paper, and --

MR. LYNN: I understand it shows that his microphone is working.

THE COURT: Okay. Go ahead.

MR. DONDERO: Can you hear me?

THE COURT: Yes, go ahead.

MR. DONDERO: Yeah, I -- I'm sitting in new offices. I've got everything in boxes. I was going through everything yesterday, and I found those emails in a stack of papers and I sent them over because I thought they would be relevant relative to Seery's initial impression.

THE COURT: Okay. Well, let's talk about the timing of this hearing. Mr. Morris, I'm going to -- I'm going to ask you why --

MR. LYNN: Michael Lynn, Your Honor. I don't want to waste the Court's time. We have not made available anything to the Court objecting to the expedited hearing on the contempt motion. We've been here.

I would say to Your Honor that if Mr. Dondero is indeed in contempt, or was in contempt toward the motion, which has nothing to do with the document that was presented as Dondero Exhibit N, there is no need to hear this on an expedited basis.

Every time we turn around, Your Honor, the Debtor is asking that something be heard on an expedited basis. And we have not opposed that. We have not fought that, to speak of, to date. But this is getting a little ridiculous. We're within days of confirmation of the Debtor's plan, and it is simply a means of causing pain and suffering to Mr. Dondero and those who are working with him and for him. And he does have employees at NexPoint who are assisting him.

So we most strongly object to being put on a schedule where we are expected to get a response to the contempt motion on file by Monday, today being Thursday, and a weekend intervening. And we strongly object to any setting of this contempt motion on Tuesday or Wednesday. It is absurd, and it is done solely, solely, Your Honor, to cause pain.

THE COURT: All right.

MR. MORRIS: Your Honor, if I may?

THE COURT: Please.

MR. MORRIS: Just very briefly, we had a hearing the other day. The evidence is the exact same. The evidence is crystal clear that the violations are meaningful, they're

substantial, and they are repeated.

After the TRO was entered into, Mr. Dondero and only Mr. Dondero chose to interfere with the Debtor's business. Mr. Dondero and only Mr. Dondero chose to communicate with the Debtor's employees, not about saying hello in the hallway but about coordinating a legal defense strategy against the Debtor.

The need is immediate, Your Honor, and I would respectfully request that the hearing be set for Tuesday or Wednesday. They've had this motion now since the 7th of January. They had a full evidentiary hearing, so they know most of the evidence that's going to be presented. They have a whole team of -- they have an army of lawyers, Your Honor, and half a dozen firms working on behalf of Mr. Dondero and his interests. For him to cry here, for him to cry that this is too much is really -- it's obscene. It just is.

THE COURT: All right. I'm going to say a couple --

MR. LYNN: That is absurd.

THE COURT: I'm going to say a couple of things. One is that I -- well, the one time I remember getting reversed for holding someone in contempt of court, the District Court felt like I had not given enough notice of that. The District Courts, what they think is reasonable notice, is sometimes very different from what the bankruptcy judges think. We're used to going very lickety-split fast in the bankruptcy

courts. And the Courts of Appeals, District Court, Courts of Appeals obviously, for good reason, are very concerned about due process in this kind of context. So I'm sensitive to that.

I'm also sensitive to the fact that it is monetary damages that are being sought here to purge the contempt. Okay? The shifting of attorneys' fees is basically what I understand is being sought at this point. You know, we have a preliminary injunction halting behavior at this point, and so I think that's another reason I'm hesitant to give an emergency hearing. I feel like monetary damages can wait and we can give 21-plus days' notice of the hearing.

But I'm going to throw this out there as well. If I do feel like there is a showing of contempt, if I do feel like the phone -- as I told you the other day, I'm very, very fixated on the phone that may have been destroyed or thrown away, maybe at Mr. Dondero's suggestion. I mean, the potential monetary sanction here may be very, very large if the evidence plays out in the way I fear it might play out. So I need to make sure everybody has adequate time to prepare for that hearing and make sure I get all the evidence I need to see. All right? Contempt of court is very, very, very, very serious, and I don't think anyone would deny that.

So, with that, it was filed what day? January 4th? Is that what I heard? Or --

MR. MORRIS: January 7th, I believe, Your Honor.

THE COURT: January 7th? All right. Well, Traci, are you there? Hopefully, you're not in a hunger coma at this point.

THE CLERK: I am here.

THE COURT: Okay. We have -- we're going to have to go to that first week of February, right? Because we've got the confirmation hearing that, you know, late in January, and then --

THE CLERK: Yes. Uh-huh.

THE COURT: Okay. Do you have an available date to give right now?

THE CLERK: How about -- if you're willing to hear them on Friday, February 5th.

THE COURT: Okay. I can do that. February 5th at 9:30. Any -- anybody want to argue about that?

MR. MORRIS: Thank you, Your Honor. That's acceptable to the Debtor.

THE COURT: Okay. Mr. Lynn, is that good with you?

MR. LYNN: We'll do that, Your Honor. I would say, by the way, that I'll be happy to buy Mr. Seery, out of my own pocket, five cell phones, which ought to make up for the one that was lost, though I recognize that those cell phones will not have on them the privileged information, the conversations between his lawyers and Mr. Dondero that I imagine he was

looking forward to seeing.

THE COURT: Well, I wouldn't want him to see that information, but I do think he's entitled to any nonprivileged information, texting, or calls that are on that phone. So, again, I'm either going to hear good explanations for that or not, but it's something very concerning to me.

All right. So we have a game plan.

I'm going to ask, Did we have good-faith negotiations between Dondero and the Committee and anything positive to report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

MR. CLEMENTE: Yes, Your Honor. I'll go first, Your Honor. Mr. Lynn and I have exchanged several emails over the weekend, and the message that I sent to Mr. Lynn was very clear. There had been a term sheet that Mr. Seery had sent back to Mr. Dondero. I had asked Mr. Lynn to take a pencil out and be very specific as to what it was Mr. Dondero was prepared to do in connection with the pot plan. I instructed him that some of the issues that the Committee still has is obviously the overall value, along with the concept that's signing up to a promise from Mr. Dondero to comply with (indiscernible) as part of that value. As Your Honor may understand, the Committee is obviously very skeptical of Mr. Dondero's future performance under an agreement that he enters into.

Those are but a couple of issues, Your Honor, that I

advised Mr. Lynn were very concerning to the Committee. And I suggested to him that if he wanted to move things forward, the best way to do it would be to come to us with a fulsome term sheet that explained exactly what it was in clear and precise detail that Mr. Dondero was proposing, and that would be the best way to move the process forward, Your Honor.

THE COURT: All right. Mr. Lynn, anything to add to that?

MR. LYNN: Well, Your Honor, my experience in negotiations is that it is useful to agree on substantive terms, or at least be in the ballpark, before term sheets are exchanged. Long ago, a term sheet was prepared and presented to the Committee. Ultimately, I think it was rejected, though I don't know if we ever received a formal rejection.

I explained in my emails, which I'm happy to share with the Court if Your Honor wants to see them, why I was reluctant to try to put into a term sheet form the proposal that I suggested to Mr. Clemente. As I said, I'm more than happy to provide you with that email chain and let you form your own judgment, Your Honor, as to whether we're proceeding in good faith.

THE COURT: All right. Well I'm not going to ask --

MR. POMERANTZ: Your Honor? Your Honor, this is Jeff Pomerantz.

THE COURT: -- to see any of that. Mr. Pomerantz?

MR. POMERANTZ: May I just be heard real quickly?

THE COURT: Sure.

MR. POMERANTZ: Your Honor, we also took Your Honor's comments to heart. We, Mr. Seery and I, had an over-an-hour conversation with Mr. Lynn and with Mr. Bonds. We provided them with our thoughts as to what they needed to do in order to move forward. Of course, it's not really the Debtor to agree. It's the creditors to agree. But as Mr. Seery has testified many times before and as I have told the Court, we would support a plan that the Committee and Mr. Dondero could get behind.

So we again -- I'm not going to divulge the nature of those communications, but we suggested several things that Mr. Dondero could do in order to move the ball forward, and unfortunately, we have not seen any of those things done thus far. So we are, at this point, not optimistic that there will be a grand bargain plan.

THE COURT: All right.

MR. DONDERO: Your Honor, could I comment for a second? This is Mr. Dondero.

THE COURT: If you and your counsel want you to comment, you can comment.

MR. DONDERO: I'd love to do a pot plan. I would love to reach some kind of settlement and everybody move on with their lives. The estate started with $360 million of

third-party assets and $90 million of notes. The $360 million of third-party assets are down to $130 million.

MR. POMERANTZ: Again, Your Honor, I must interrupt. I did this at the last hearing, and it's not my practice to interrupt, but issues regarding what the value is or not, it's going to require a response, and that's not really before Your Honor. I think before Your Honor is --

MR. DONDERO: Okay.

MR. POMERANTZ: -- have there been negotiations? Have they been in good faith? If Mr. Dondero wanted to address that, that's fine, but I object to having any discussion at this point, especially with Mr. Dondero not even under oath, on what the nature of the value of the assets and why they have changed and what not.

THE COURT: Well, --

MR. POMERANTZ: It's just not appropriate.

THE COURT: I understand --

MR. DONDERO: Okay. Can I --

THE COURT: Stop.

MR. DONDERO: Can I -- can I finish?

THE COURT: Let me please respond to that. I understand your concern, but I've heard from Mr. Seery testimony many months ago about the value plummeting during the case. And I asked why, and I got some explanations. This is not evidence. This is just, you know, this is not going to

be binding in any way. Mr. Dondero can speak as to what he thinks, you know, the situation is.

Go ahead, Mr. Dondero.

MR. DONDERO: Okay. I'm not trying to fixate on the numbers. And as far as the third-party assets are, we would be willing to pay -- I would be willing to pay for those. I'd be willing to pay more, and even some value for the affiliate notes that were really part of compensation agreements throughout the history of Highland and avoid the POC arguments. I'd be willing to pay for the assets and I'd be willing to pay even more than that.

I have no transparency in terms of what the assets are, and there's no fulsome discussion in terms of, well, here are the assets, here are the notes, here's what we think the values are, can you get to this number? It's just a -- you -- the -- it -- I don't view there is good-faith negotiations going on because it's always just a: You need to put a big number on a piece of paper; otherwise, you're going to get run over.

And there's no back and forth going on, but it's not due to a lack of willingness on my part. And maybe there needs to be a committee set up. Maybe there needs to be, I don't know, a mediator or an examiner or somebody to try and push through the pot plan, but there's nothing happening. People are not returning the judge's calls, I mean, Mr. Lynn's calls, or my

calls. They're -- there's -- despite efforts of our -- of my own and a willingness of my own, there's no negotiations of any sort going on at the moment.

THE COURT: All right. I don't want anyone to respond to that. I know people have different views of what's going on. But let me just say a couple of things, and then we're done.

We do have a Committee in this case. We have a Committee with very sophisticated members and very sophisticated professionals. Okay? That's who I wanted you to be talking to before the end of the day Tuesday.

We have had co-mediators in this case. Okay? And, you know, I identified very sophisticated human beings for that role. Okay? And in fact, there ended up being settlements that flowed out of the co-mediator process.

We're now 15 months into the case. There are major, significant compromises now: HarbourVest, UBS, Acis, Terry, and Redeemer Committee. I hate to use a worn-out metaphor, but the train is leaving the station. We've got confirmation. I've pushed out two weeks. I mean, you all are either going to get there in the next few days or we're just going to go forward with I think what everyone, you know, would rather be a pot plan, but if we can't get there, we're just going to have to consider the plan that's on the table now. Okay?

You know, the Committee, again, they're sophisticated.

They can compare apples to oranges and decide whether the plan on the table, with its risks of future litigation and recoveries, whether it's better or worse than whatever consideration you're offering, Mr. Dondero.

And you know, as we all know, there is distrust here, there, and everywhere among these parties. So I can totally understand them, you know, taking a hard line: We either get all cash or we're just not going to mess with it. We don't want to risk broken promises. We'd rather just do litigation.

So, anyway, that's as much as I'm going to say except I am going to further direct good-faith negotiations. It sounds like to me a written term sheet might be the appropriate next step, given where I've heard things are at the moment. But, you know, I guess we don't have any hearings between now and the 26th, right? No Highland hearings that I can think of between now and the 26th.

MR. POMERANTZ: I don't think so.

MR. MORRIS: I think that's correct, Your Honor.

THE COURT: So you have all this time --

MR. MORRIS: At the moment.

THE COURT: You have all this time to negotiate and simultaneously get ready for the confirmation hearing without any other battles. So I know you will use the time well.

All right. We're adjourned.

THE CLERK: All rise.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 2:04 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **01/16/2021**

/s/ Kathy Rehling **As Amended 05/26/2022**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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