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Counsel for Highland Capital Management, L.P.

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Reorganized Debtor.	Chapter 11 Case No. 19-34054-sgj11
In re: CHARITABLE DAF FUND, L.P., AND CLO HOLDCO LTD., Plaintiffs, vs. HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING, LTD. Defendants.	Adv. Pro. No. 21-03067-sgj

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

1934054221014000000000008

APPENDIX IN SUPPORT OF DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S RENEWED MOTION TO DISMISS COMPLAINT

Ex.	Description	Appx. #
1.	HarbourVest 2017 Global Fund L.P. Proof of Claim No. 143, HarbourVest 2017 Global AIF L.P., Proof of Claim No. 147, HarbourVest Dover Street IX Investment L.P., Proof of Claim No. 150, HV International VIII Secondary L.P., Proof of Claim No. 153, HarbourVest Skew Base AIF L.P., Proof of Claim No. 154, and HarbourVest Partners L.P., Proof of Claim No, 149.	1-61
2.	*Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625]	62-75
3.	*Settlement Agreement* and *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* [Docket No. 1631-1]	76-95
4.	*James Dondero's Objection to the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest*, [Docket No. 1697]	96-111
5.	The Dugaboy Investment Trust and Get Good Trust's *Objection to the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1706]	112-122
6.	*CLO Holdco, Ltd.'s Objection to HarbourVest Settlement* [Docket No. 1707]	123-133
7.	Deposition Transcript of Michael Pugatch, January 21, 2021	134-188
8.	*Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1731]	189-211
9.	Hearing Transcript, January 14, 2021	212-385
10.	*Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1788]	386-409
11.	*Original Complaint*, Case No. 21-cv-00842-B, Docket No. 1 (N.D. Tex. Apr. 12, 2021)	410-436
12.	*Memorandum Opinion and Order*, Case No. 21-cv-03129-B, Docket No. 28 (N.D. Tex. September 2, 2021)	437-458
13.	Members Agreement, November 15, 2017	459-487
14.	Second Amended and Restated Investment Advisory Agreement	488-510

Dated: October 14, 2022

PACHULSKI STANG ZIEHL & JONES LLP

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-and-

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/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

CLAIM 143

Claim #143 Date Filed: 4/8/2020

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410

Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

HarbourVest 2017 Global Fund L.P.
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**

☑ No
☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
HarbourVest 2017 Global Fund L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY 10022, U.S.A.	See summary page
Contact phone 2129096000	Contact phone 6173483773
Contact email eweisgerber@debevoise.com	Contact email agoren@harbourvest.com

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**

☑ No
☐ Yes. Claim number on court claims registry (if known) Filed on MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

☑ No
☐ Yes. Who made the earlier filing?

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ☑ No
   - ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ See Annex . **Does this amount include interest or other charges?**
   - ☐ No
   - ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
   Limit disclosing information that is entitled to privacy, such as health care information.
   See Annex

9. **Is all or part of the claim secured?**
   - ☑ No
   - ☐ Yes. The claim is secured by a lien on property.

   Nature or property:
   - ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
   - ☐ Motor vehicle
   - ☐ Other. Describe: _____

   Basis for perfection: _____
   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____
   Amount of the claim that is secured: $_____
   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ☐ Fixed
   - ☐ Variable

10. **Is this claim based on a lease?**
    - ☑ No
    - ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ☑ No
    - ☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☑ No

☐ Yes. *Check all that apply:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name: Michael Pugatch
First name Middle name Last name

Title: Managing Director - Company: HarbourVest 2017 Global Fund L.P., by Harbo

Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone

Email

KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
HarbourVest 2017 Global Fund L.P.
Attn: Erica Weisgerber
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY, 10022
U.S.A.
Phone:
2129096000
Phone 2:
Fax:
Email:
eweisgerber@debevoise.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Disbursement/Notice Parties:
HarbourVest 2017 Global Fund L.P. c/o HarbourVest Partners, LLC
One Financial Center
Boston, MA, 02111
U.S.A.
Phone:
6173483773
Phone 2:
Fax:
E-mail:
agoren@harbourvest.com
DISBURSEMENT ADDRESS

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
See Annex

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
See Annex

Includes Interest or Charges:
None

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No
Amount of 503(b)(9):
No
Based on Lease:
No
Subject to Right of Setoff:
No

Nature of Secured Amount:
Value of Property:
Annual Interest Rate:
Arrearage Amount:
Basis for Perfection:
Amount Unsecured:

Submitted By:
Michael Pugatch on 08-Apr-2020 4:40:16 p.m. Eastern Time
Title:
Managing Director - Company: HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its Gen Partner
Company:
by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

VN: 0DB62642624B41D1B004FEABCD97B964

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ANNEX TO PROOF OF CLAIM

1. This annex (the "Annex") is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the "Proof of Claim") and describes in more detail the claims of HarbourVest 2017 Global Fund L.P. (the "Claimant") against the debtor Highland Capital Management, L.P. (the "Debtor").

2. The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor's collateral loan obligations funds ("CLO") business. *See, e.g.*, *Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* ("Involuntary Petition Ruling") [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court's *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan* ("Confirmation Ruling") [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.*; *Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g.*, Involuntary Petition Ruling ¶ 27; *see also* Confirmation Ruling.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

***

CLAIM 147

Claim #147 Date Filed: 4/8/2020

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   HarbourVest 2017 Global AIF L.P.
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
HarbourVest 2017 Global AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY 10022, U.S.A.	See summary page
Contact phone 2129096000	Contact phone 6173483773
Contact email eweisgerber@debevoise.com	Contact email agoren@harbourvest.com

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☑ No
   ☐ Yes. Who made the earlier filing?

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ☑ No
   - ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ See Annex . **Does this amount include interest or other charges?**
   - ☐ No
   - ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
   Limit disclosing information that is entitled to privacy, such as health care information.
   See Annex

9. **Is all or part of the claim secured?**
   - ☑ No
   - ☐ Yes. The claim is secured by a lien on property.

   Nature or property:
   - ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
   - ☐ Motor vehicle
   - ☐ Other. Describe: _____

   Basis for perfection: _____
   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____
   Amount of the claim that is secured: $_____
   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ☐ Fixed
   - ☐ Variable

10. **Is this claim based on a lease?**
    - ☑ No
    - ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ☑ No
    - ☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☑ No

☐ Yes. *Check all that apply:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$_____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name: Michael Pugatch
First name Middle name Last name

Title: Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourV

Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

¨1¤}HV4$(⌈%«
1024[illegible]20040800000000050

KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
HarbourVest 2017 Global AIF L.P.
Attn: Erica Weisgerber
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY, 10022
U.S.A.
Phone:
2129096000
Phone 2:
Fax:
Email:
eweisgerber@debevoise.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Disbursement/Notice Parties:
HarbourVest 2017 Global AIF L.P. c/o HarbourVest Partners, LLC
One Financial Center
Boston, MA, 02111
Phone:
6173483773
Phone 2:
Fax:
E-mail:
agoren@harbourvest.com
DISBURSEMENT ADDRESS

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
See Annex

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
See Annex

Includes Interest or Charges:
None

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No

Nature of Secured Amount:

Value of Property:

Amount of 503(b)(9):
No

Annual Interest Rate:

Based on Lease:
No

Arrearage Amount:

Basis for Perfection:

Subject to Right of Setoff:
No

Amount Unsecured:

Submitted By:
Michael Pugatch on 08-Apr-2020 4:49:59 p.m. Eastern Time
Title:
Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative
Company:
Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr

VN: D6DFC1C831960C5278458EB4F287C249

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ANNEX TO PROOF OF CLAIM

1. This annex (the "Annex") is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the "Proof of Claim") and describes in more detail the claims of HarbourVest 2017 Global AIF L.P. (the "Claimant") against the debtor Highland Capital Management, L.P. (the "Debtor").

2. The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor's collateral loan obligations funds ("CLO") business. *See, e.g.*, *Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* ("Involuntary Petition Ruling") [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court's *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan* ("Confirmation Ruling") [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.*; *Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g.*, Involuntary Petition Ruling ¶ 27; *see also* Confirmation Ruling.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

***

CLAIM 150

Claim #150 Date Filed: 4/8/2020

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   HarbourVest Dover Street IX Investment L.P.
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
See summary page	See summary page
Contact phone 2129096000	Contact phone 6173483773
Contact email eweisgerber@debevoise.com	Contact email agoren@harbourvest.com

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☑ No
   ☐ Yes. Who made the earlier filing?

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ☑ No
   - ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ See Annex . **Does this amount include interest or other charges?**
   - ☐ No
   - ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
   Limit disclosing information that is entitled to privacy, such as health care information.
   See Annex

9. **Is all or part of the claim secured?**
   - ☑ No
   - ☐ Yes. The claim is secured by a lien on property.

   Nature or property:
   - ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
   - ☐ Motor vehicle
   - ☐ Other. Describe: _____

   Basis for perfection: _____
   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____
   Amount of the claim that is secured: $_____
   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ☐ Fixed
   - ☐ Variable

10. **Is this claim based on a lease?**
    - ☑ No
    - ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ☑ No
    - ☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☑ No

☐ Yes. *Check all that apply:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$_____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name: Michael Pugatch
First name Middle name Last name

Title: Managing Director-Company: HarbourVest Dover Street IX Investment L.P.,

Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

¨1¤}HV4$(\3«
1024Email20040800000000060

KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
HarbourVest Dover Street IX Investment L.P.
Attn: Erica Weisgerber
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY, 10022
U.S.A.
Phone:
2129096000
Phone 2:
Fax:
Email:
eweisgerber@debevoise.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Disbursement/Notice Parties:
HarbourVest Dover Street IX Investment L.P. c/o HarbourVest Partners, LLC
One Financial Center
Boston, MA, 02111
U.S.A.
Phone:
6173483773
Phone 2:
Fax:
E-mail:
agoren@harbourvest.com
DISBURSEMENT ADDRESS

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
See Annex

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
See Annex

Includes Interest or Charges:
None

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No

Nature of Secured Amount:

Value of Property:

Amount of 503(b)(9):
No

Annual Interest Rate:

Based on Lease:
No

Arrearage Amount:

Basis for Perfection:

Subject to Right of Setoff:
No

Amount Unsecured:

Submitted By:
Michael Pugatch on 08-Apr-2020 4:59:00 p.m. Eastern Time
Title:
Managing Director-Company: HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners Ireland Limited, its Alter
Company:
Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr

VN: 2FF3E3B762AB4570A51AF333808C6C3D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ANNEX TO PROOF OF CLAIM

1. This annex (the "Annex") is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the "Proof of Claim") and describes in more detail the claims of HarbourVest Dover Street IX Investment L.P. (the "Claimant") against the debtor Highland Capital Management, L.P. (the "Debtor").

2. The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor's collateral loan obligations funds ("CLO") business. *See, e.g.*, *Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* ("Involuntary Petition Ruling") [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court's *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan* ("Confirmation Ruling") [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.*; *Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

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4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

***

CLAIM 153

Claim #153 Date Filed: 4/8/2020

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   HV International VIII Secondary L.P.
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

   Where should notices to the creditor be sent?
   HV International VIII Secondary L.P.
   Attn: Erica Weisgerber
   Debevoise and Plimpton LLP
   919 Third Avenue
   New York, NY 10022, U.S.A.

   Contact phone 2129096000
   Contact email eweisgerber@debevoise.com

   Where should payments to the creditor be sent? (if different)
   See summary page

   Contact phone 6173483773
   Contact email agoren@harbourvest.com

   Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☑ No
   ☐ Yes. Who made the earlier filing?

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ☑ No
   - ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ See Annex . **Does this amount include interest or other charges?**
   - ☐ No
   - ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
   Limit disclosing information that is entitled to privacy, such as health care information.
   See Annex

9. **Is all or part of the claim secured?**
   - ☑ No
   - ☐ Yes. The claim is secured by a lien on property.

   Nature or property:
   - ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
   - ☐ Motor vehicle
   - ☐ Other. Describe: _____

   Basis for perfection: _____
   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____
   Amount of the claim that is secured: $_____
   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ☐ Fixed
   - ☐ Variable

10. **Is this claim based on a lease?**
    - ☑ No
    - ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ☑ No
    - ☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☑ No

☐ Yes. *Check all that apply:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name: Michael Pugatch
First name Middle name Last name

Title: Managing Director-Company: HV International VIII Secondary L.P., by HI

Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone

¨1¤}HV4$(av«

1024[illegible]20040800000000065

KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
HV International VIII Secondary L.P.
Attn: Erica Weisgerber
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY, 10022
U.S.A.
Phone:
2129096000
Phone 2:
Fax:
Email:
eweisgerber@debevoise.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Disbursement/Notice Parties:
HV International VIII Secondary L.P. c/o HarbourVest Partners, LLC
One Financial Center
Boston, MA, 02111
U.S.A.
Phone:
6173483773
Phone 2:
Fax:
E-mail:
agoren@harbourvest.com
DISBURSEMENT ADDRESS

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
See Annex

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
See Annex

Includes Interest or Charges:
None

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No
Amount of 503(b)(9):
No
Based on Lease:
No
Subject to Right of Setoff:
No

Nature of Secured Amount:
Value of Property:
Annual Interest Rate:
Arrearage Amount:
Basis for Perfection:
Amount Unsecured:

Submitted By:
Michael Pugatch on 08-Apr-2020 5:16:54 p.m. Eastern Time
Title:
Managing Director-Company: HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner,
Company:
by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

VN: 671DA480298CC9959BF07710FFD6AEBF

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ANNEX TO PROOF OF CLAIM

1. This annex (the "Annex") is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the "Proof of Claim") and describes in more detail the claims of HV International VIII Secondary L.P. (the "Claimant") against the debtor Highland Capital Management, L.P. (the "Debtor").

2. The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor's collateral loan obligations funds ("CLO") business. *See, e.g.*, *Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* ("Involuntary Petition Ruling") [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court's *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan* ("Confirmation Ruling") [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.*; *Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g.*, Involuntary Petition Ruling ¶ 27; *see also* Confirmation Ruling.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

***

CLAIM 154

Claim #154 Date Filed: 4/8/2020

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410

Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

HarbourVest Skew Base AIF L.P.
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**

☑ No
☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
HarbourVest Skew Base AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY 10022, U.S.A.	See summary page
Contact phone 2129096000	Contact phone 6173483773
Contact email eweisgerber@debevoise.com	Contact email agoren@harbourvest.com

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**

☑ No
☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

☑ No
☐ Yes. Who made the earlier filing?

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ☑ No
   - ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ See Annex . **Does this amount include interest or other charges?**
   - ☐ No
   - ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
   Limit disclosing information that is entitled to privacy, such as health care information.
   See Annex

9. **Is all or part of the claim secured?**
   - ☑ No
   - ☐ Yes. The claim is secured by a lien on property.

   Nature or property:
   - ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
   - ☐ Motor vehicle
   - ☐ Other. Describe: _____

   Basis for perfection: _____
   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____
   Amount of the claim that is secured: $_____
   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ☐ Fixed
   - ☐ Variable

10. **Is this claim based on a lease?**
    - ☑ No
    - ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ☑ No
    - ☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☑ No

☐ Yes. *Check all that apply:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$_____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name: Michael Pugatch
First name Middle name Last name

Title: Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVes

Company: Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

¨1¤}HV4$(`k«
1024[illegible]20040800000000064

KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
HarbourVest Skew Base AIF L.P.
Attn: Erica Weisgerber
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY, 10022
U.S.A.
Phone:
2129096000
Phone 2:
Fax:
Email:
eweisgerber@debevoise.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Disbursement/Notice Parties:
HarbourVest Skew Base AIF L.P. c/o HarbourVest Partners, LLC
One Financial Center
Boston, MA, 02111
Phone:
6173483773
Phone 2:
Fax:
E-mail:
agoren@harbourvest.com
DISBURSEMENT ADDRESS

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
See Annex

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
See Annex

Includes Interest or Charges:
None

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No

Nature of Secured Amount:

Value of Property:

Amount of 503(b)(9):
No

Annual Interest Rate:

Based on Lease:
No

Arrearage Amount:

Basis for Perfection:

Subject to Right of Setoff:
No

Amount Unsecured:

Submitted By:
Michael Pugatch on 08-Apr-2020 5:11:50 p.m. Eastern Time
Title:
Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Inv
Company:
Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr

VN: 37ADBC619BCE5E389F8F25C4DAB7545F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ANNEX TO PROOF OF CLAIM

1. This annex (the "Annex") is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the "Proof of Claim") and describes in more detail the claims of HarbourVest Skew Base AIF L.P. (the "Claimant") against the debtor Highland Capital Management, L.P. (the "Debtor").

2. The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor's collateral loan obligations funds ("CLO") business. *See, e.g.*, *Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* ("Involuntary Petition Ruling") [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court's *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan* ("Confirmation Ruling") [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings

in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.*; *Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g.*, Involuntary Petition Ruling ¶ 27; *see also* Confirmation Ruling.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

***

CLAIM 149

Claim #149 Date Filed: 4/8/2020

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410

Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

HarbourVest Partners L.P. on behalf of funds and accounts under management
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

☑ No

☐ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
See summary page	See summary page
Contact phone 2129096000	Contact phone 6173483773
Contact email eweisgerber@debevoise.com	Contact email agoren@harbourvest.com

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

_____

4. **Does this claim amend one already filed?**

☑ No

☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

☑ No

☐ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ☑ No
   - ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ See Annex . **Does this amount include interest or other charges?**
   - ☐ No
   - ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**
   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
   Limit disclosing information that is entitled to privacy, such as health care information.
   See Annex

9. **Is all or part of the claim secured?**
   - ☑ No
   - ☐ Yes. The claim is secured by a lien on property.

   Nature or property:
   - ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
   - ☐ Motor vehicle
   - ☐ Other. Describe: _____

   Basis for perfection: _____
   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____
   Amount of the claim that is secured: $_____
   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ☐ Fixed
   - ☐ Variable

10. **Is this claim based on a lease?**
    - ☑ No
    - ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ☑ No
    - ☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

	Amount entitled to priority
☑ No	
☐ Yes. *Check all that apply:*	
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$_____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name: Michael Pugatch
First name Middle name Last name

Title: Managing Director

Company: HarbourVest Partners L.P., on behalf of funds and accounts under manage
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

¨1¤}HV4$( ]A«
1024[illegible]20040800000000061

KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
HarbourVest Partners L.P. on behalf of funds and accounts under management
Attn: Erica Weisgerber
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY, 10022
U.S.A.
Phone:
2129096000
Phone 2:
Fax:
Email:
eweisgerber@debevoise.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Disbursement/Notice Parties:
HarbourVest Partners L.P. c/o HarbourVest Partners, LLC
One Financial Center
Boston, MA, 02111
U.S.A.
Phone:
6173483773
Phone 2:
Fax:
E-mail:
agoren@harbourvest.com
DISBURSEMENT ADDRESS

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
See Annex

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
See Annex

Includes Interest or Charges:
None

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No

Nature of Secured Amount:

Value of Property:

Amount of 503(b)(9):
No

Annual Interest Rate:

Based on Lease:
No

Arrearage Amount:

Basis for Perfection:

Subject to Right of Setoff:
No

Amount Unsecured:

Submitted By:
Michael Pugatch on 08-Apr-2020 5:06:59 p.m. Eastern Time
Title:
Managing Director
Company:
HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its Gen Partner

VN: EA86458428780C11DA6B606EDE1FA40A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ANNEX TO PROOF OF CLAIM

1. This annex (the "Annex") is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the "Proof of Claim") and describes in more detail the claims of HarbourVest Partners L.P. on behalf of funds and accounts under management (the "Claimant") against the debtor Highland Capital Management, L.P. (the "Debtor").

2. The Claimant manages investment funds that are limited partners in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor's collateral loan obligations funds ("CLO") business. *See, e.g.*, *Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* ("Involuntary Petition Ruling") [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court's *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third*

Amended Joint Plan ("Confirmation Ruling") [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g.*, *id.*; *Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g.*, Involuntary Petition Ruling ¶ 27; *see also* Confirmation Ruling.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor, as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

***

EXHIBIT 2

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 266326) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD & ASSOCIATES PLLC
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MHayward@HaywardFirm.com
Zachery Z. Annable (TX Bar No. 24053075)
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, TX 75231
Telephone: (972) 755-7100
Facsimile: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj11
Debtor.	§	

DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

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

Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession ("Highland" or the "Debtor"), files this motion (the "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), approving a settlement agreement (the "Settlement Agreement"),[2] a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion ("Morris Dec."), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest"). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the "Bankruptcy Code"), and Rule 9019 of the Bankruptcy Rules.

[2] All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

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

4. On October 29, 2019, the official committee of unsecured creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's case to this Court [Docket No. 186].[3]

6. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor's general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor's chief executive officer and chief restructuring officer [Docket No. 854].

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

[3] All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its $80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of $300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.[4]

[4] Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately $8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the "Transfers"), on January 24, 2018, Terry moved for a temporary restraining order (the "TRO") from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the "Acis Bankruptcy Case"). The Bankruptcy Court overruled the Debtor's objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the "Acis Trustee"). A long sequence of events subsequently transpired, all of which relate to HarbourVest's claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").

- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.

- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."

- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.

- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

D. The Parties' Pleadings and Positions Concerning HarbourVest's Proofs of Claim

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

agreements with the Debtor in connection with relating to" the Operative Documents "and any and all legal and equitable claims or causes of action relating to the forgoing harm." *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest's Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the "Claim Objection").

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the "Fraud Claims"), U.S. State and Federal Securities Law Claims (the "Securities Claims"), violations of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the "HarbourVest Claims").

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the "3018 Motion"). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than $300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;[5]
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of $45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of $35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of $45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

[5] The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately $22 million as of December 1, 2020.

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, "approval of a compromise is within the sound discretion of the bankruptcy court." *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, "with a focus on comparing 'the terms of the compromise with the rewards of litigation.'" *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: "(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise." *Id.* Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider "the paramount interest of creditors with proper deference to their reasonable views." *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the "extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

36. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court's TRO that restricted HCLOF's ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

38. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the HarbourVest Claims—including the Terry Litigation and Acis Bankruptcy—proceeded *for years* in this Court and in multiple other forums, and has already cost the Debtor's estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will expend significant resources litigating a host of fact-intensive

issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's $300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Dated: December 23, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
Ira D. Kharasch (CA Bar No. 109084)
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-and-

HAYWARD & ASSOCIATES PLLC

/s/ Zachery Z. Annable

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MHayward@HaywardFirm.com
Zachery Z. Annable
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Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

EXHIBIT 3

EXECUTION VERSION

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the "Debtor"), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a "HarbourVest Party," and collectively, "HarbourVest"), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the "Parties" and individually as a "Party."

R E C I T A L S

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

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor's case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the "Bankruptcy Court");

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. ("HCLOF") and acquired an a 49.98% ownership interest in HCLOF (the "HarbourVest Interests");

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor's claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the "HarbourVest Claims"), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor's First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor's First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response");

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the "3018 Motion" and together with the HarbourVest Response, the "HarbourVest Pleadings");

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WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of $300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the "Plan").[1]

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 ("Rule 9019").

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. **Settlement of Claims.**

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of $45,000,000 (the "Allowed GUC Claim"); and

(ii) an allowed subordinated claim in the aggregate amount of $35,000,000 (the "Allowed Subordinated Claim" and together with the Allowed GUC Claim, the "Allowed Claims").

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the "Transfer Agreements") and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. **Releases.**

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

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4. **Representations and Warranties**. Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of $45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a "Support Termination Event"): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability**. The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice**. Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

EXECUTION VERSION

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel**. Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement**. This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter**. The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation**. The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts**. This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

EXECUTION VERSION

14. **Governing Law; Venue; Attorneys' Fees and Costs**. The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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EXECUTION VERSION

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

EXECUTION VERSION

HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT

FOR ORDINARY SHARES OF

HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [__], 2020 (this "**Transfer Agreement**"), is entered into by and among Highland CLO Funding, Ltd. (the "**Fund**"), Highland HCF Advisor, Ltd. (the "**Portfolio Manager**"), HCMLP Investments, LLC (the "**Transferee**") and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the "**Transferors**").

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares ("**Shares**") of the Fund set forth opposite such Transferor's name on Exhibit A hereto (with respect to each Transferor, the "**Transferred Shares**").

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. ("**HCMLP**") which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the "**Interest**") on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the "**Settlement Agreement**"), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

   a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.

   b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund's advisory board (the "**Advisory Board**") to replace the Transferors' appointed representative to the Advisory Board.

c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.

d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.

e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (*i*) this Transfer Agreement and (*ii*) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.

2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:

a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;

b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;

c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;

d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and

e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:

   a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;

   b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and

   c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.

4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).

5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (*i*) this Transfer Agreement and (*ii*) the Settlement Agreement (the "**Effective Date**"):

   a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and

   b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

   Prior to the Effective Date the Transferee shall procure that:

   c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.

6. Miscellaneous.

   a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.

c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.

d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.

e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.

f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.

g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFEREE:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:
Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

Transferee Name	**Number of Shares**	**Percentage**
HarbourVest Dover Street IX Investment L.P.	[_____]	[_____]
HarbourVest 2017 Global AIF L.P.	[_____]	[_____]
HarbourVest 2017 Global Fund L.P.	[_____]	[_____]
HV International VIII Secondary L.P.	[_____]	[_____]
HarbourVest Skew Base AIF L.P.	[_____]	[_____]

EXHIBIT 4

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

ATTORNEYS FOR JAMES DONDERO

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054**
	§	
	§	
Debtor.	§	**Chapter 11**

JAMES DONDERO'S OBJECTION TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
[Relates to Docket No. 1625]

James Dondero ("Respondent"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Objection to *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154)* [Docket No. 1625] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest") pursuant to Rule 9019 of the Federal

Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this objection, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is "fair, equitable, and in the best interest of the estate."[1] While Respondent recognizes the Debtor's efforts in arranging a settlement, there are at least three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim (as hereinafter defined); (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor's plan by giving HarbourVest a significant claim to which it would not otherwise be entitled; and (iii) the proposed settlement seeks to improperly classify the HarbourVest Claim[2] in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. Moreover, the proposed settlement does not satisfy the factors for approval fixed by case law. On information and belief, Debtor's CEO/CRO, Mr. Seery, has previously asserted on multiple occasions that the HarbourVest Claim had no value and that the Debtor could resolve such claim for no more than $5 million. While Respondent and Mr. Seery have had a number of disagreements in this case, Respondent agrees with Mr. Seery's initial conclusion that the HarbourVest Claim is substantially without merit. Respondent understands that any settlement will not necessarily provide the best possible outcome for the Debtor, but in this instance the proposed settlement far exceeds the bounds of reasonableness and, on its face, is an attempt by the Debtor to purchase votes in favor

[1] *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

[2] While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly $60 million[3] resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

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

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

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

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

[3] The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of $45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of $35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately $22 million as of December 1, 2020.

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Board"). The members of the Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")[4].

9. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response").

11. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. Docket No. 1625.

III. LEGAL STANDARD

12. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390

[4] While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms "fair and equitable," commonly referred to as the "absolute priority rule," mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

13. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

(i) the probabilities of ultimate success should the claim be litigated;

(ii) the complexity, expense, and likely duration of litigating the claim;

(iii) the difficulties of collecting a judgment rendered from such litigation; and,

(iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

14. In considering whether to approve a proposed compromise, the bankruptcy judge "may not simply accept the trustee's word that the settlement is reasonable, nor may he merely 'rubber stamp' the trustee's proposal." *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). "[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement." *See TMT Trailer*, 390 U.S. at 424, 434.

15. While the trustee's business judgment is entitled to a certain deference, "business judgment is not alone determinative of the issue of court approval." *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with "unfettered freedom" to do as it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight."). The Court must conduct an "intelligent, objective and educated evaluation"[5] of the proposed settlement "to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors." *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor's plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest's one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court's Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court's judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, "Acis") and seeking to revisit the Court's orders entered in that case years ago. HarbourVest appears to being arguing that the TRO and injunction

[5] *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) ("To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.").

entered in the Acis case that prevented redemptions or resets in the CLOs are now the root cause of the decrease in value of its investment in HCLOF.

18. Specifically, the claim states that HarbourVest incurred "financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF."[6]

19. Essentially, HarbourVest is saying that the orders entered in the Acis case did not actually protect the investors and their investments, but instead were a triggering cause for the alleged diminution in value of its investment in HCLOF. Nevertheless, even though the value of HCLOF dropped dramatically only after the Effective Date of Acis's Plan, years later and despite the lack of Debtor involvement in managing HarbourVest's investment, HarbourVest now seeks to impute liability to the Debtor through a flimsy narrative designed to recoup investment losses unrelated to the Debtor and for which the Debtor owed HarbourVest no duty.

20. That HarbourVest now, years later, seeks to revisit this Court's Acis orders raises a number of issues, including those as to HarbourVest's involvement (or lack thereof) in the Acis case, whether the orders, Plan, or Confirmation Order in the Acis case may bar some of the relief requested by HarbourVest here, and questions related to the merits of the HarbourVest Claim and the legal grounds allegedly supporting it.

[6] See Proof of Claim 143, para. 3 ("Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF.").

B. The HarbourVest Claim Lacks Merit and the Proposed Settlement is Not Reasonable

21. Based on the HarbourVest Claim and its filed response to the Debtor's objection, Respondent believes that the HarbourVest claim is meritless and the proposed settlement is not reasonable, fair and equitable, or in the best interest of the estate.

22. First, the proposed settlement is concerning particularly because HarbourVest's bare bones proof of claim contains very little in terms of allegations of specific conduct against the Debtor that would give rise to a $60 million claim against this estate. While HarbourVest's response to the Debtor's claim objection is lengthy, it contains very little in real substance supporting its right to such a claim against the estate. The response also omits a number of key facts that are relevant and potentially fatal to its claim for damages against the Debtor's estate. Among them is the fact that Acis (and thereafter Reorganized Acis), along with Mr. Joshua Terry, managed HarbourVest's investment for years after it was made.[7] Despite this fact, HarbourVest's alleged damages appear to be based largely on the difference between the value of its initial investment at confirmation of Acis's Plan and the current value of the investment—which amount was directly determined by the performance of the CLOs that Acis managed during this time.[8] Neither the claim nor the response directly address the implications of Acis's management of the CLOs during the period following HarbourVest's investment. Nor does HarbourVest address or discuss performance of the CLOs, the market forces that may have caused HarbourVest's investment to lose value, or other factors influencing the current value of its investment. The

[7] *See, e.g.*, HarbourVest Proof of Claim 143, p. 5 ("The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018.").

[8] *See* HarbourVest Response, Docket No. 1057, para. 40 ("HarbourVest has been injured from the Investment: not only has the Investment failed to accrue value, its value plummeted. The Investment's current value is far less than HarbourVest's initial contribution.").

speculative nature of the damages and the lack of specificity of the HarbourVest Claim and the role of Acis in the loss of value to HarbourVest all call into question the reliability of the allegations and the legal basis for the claim amount awarded in the settlement.

23. Also absent from Harbourvest's papers is any discussion of any contract or agreement between (i) HarbourVest and the Debtor; and (ii) any agreement that was executed in conjunction with HarbourVest's initial investment. While the proof of claim references a number of agreements, there is no explanation in the claim or in HarbourVest's response to the Debtor's claim objection of how these agreements give rise to liability against the *Debtor*. For example, neither the claim nor the HarbourVest Response (which includes more than 600 pages of attachments) attach *any* written agreement between HarbourVest and **any other party**. While HarbourVest has alleged a number of claims sounding in tort, many of those claims cannot exist absent a contract or other express relationship between the parties. Moreover, the terms of the relevant contracts themselves likely contain a number of provisions that may call into question Debtor's liability or would be otherwise relevant to merits of the HarbourVest Claim. For example, HarbourVest in its papers appears to assert or imply that the Debtor made a number of false or fraudulent representations to solicit HarbourVest's investment, but then fails to discuss or even identify the applicable agreements it alleges it was induced into signing in connection with its investment (this despite the substantial value of the investment when the Acis plan was confirmed).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

HarbourVest's investment is also directly tied to various market forces that may have impacted its value. The HarbourVest Claim is largely lacking in relevant facts and omits much salient information, such as who it contracted with in connection with its investment, the terms of such agreements, who controlled its investment during the entire period from November 2017 to the present, and the performance of its investment during the last two years. Given these issues, HarbourVest will be unable to demonstrate a causal connection between any conduct of the Debtor and the alleged damages it suffered from a reduction in value of its investment.

25. Because of the speculative nature of the HarbourVest Claim, and the fact that very little pleading or litigation has occurred, the proposed settlement in granting such a large claim is unreasonable, not fair and equitable, and not in the best interest of the estate. The lack of pending litigation, narrowing of threshold questions, and lack of detail in HarbourVest Claim make it impossible to determine whether the huge claim awarded under the proposed settlement is justified under the facts. Accordingly, the Motion should be denied.

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

26. The proposed settlement is a flagrant attempt by the Debtor to purchase votes in support of its Plan by giving HarbourVest a significant claim to which it has not shown itself entitled. Moreover, the separate classification of the HarbourVest Claim into two separate classes constitutes impermissible gerrymandering in violation of section 1122 of the Bankruptcy Code. The proposed settlement essentially gives HarbourVest a claim it is not entitled to in exchange for votes in two separate classes. This is not a proper basis for a settlement and the Court should deny the Motion.

27. Section 1122 of the Bankruptcy Code provides as follows:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

28. "Chapter 11 requires classification of claims against a debtor for two reasons. Each class of creditors will be treated in the debtor's plan of reorganization based upon the similarity of its members' priority status and other legal rights against the debtor's assets. Proper classification is essential to ensure that creditors with claims of similar priority against the debtor's assets are treated similarly." *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir. 1991).

29. "Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor's estate, should be placed in the same class." *Id.* at 1278.

30. The Fifth Circuit has stated that there is "one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." *Id.* at 1279. The Court observed:

> There must be some limit on a debtor's power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

In re Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991) (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986)).

31. Here, the HarbourVest settlement and the classification of the HarbourVest Claim under the Plan blatantly violate the Fifth Circuit's "one rule" concerning the classification of claims under section 1122. To the extent that HarbourVest even has a legitimate claim, not only should its claim be classified together with other unsecured creditors, its claim should be classified solely in one class. To allow the Debtor to do otherwise as proposed is improper gerrymandering in order to obtain a consenting class in express violation of section 1122.

D. There Are Other Reasons for the Court to Closely Scrutinize the Proposed Settlement that May Warrant Denial of the Motion

32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

33. First, the granting to HarbourVest of a claim in the total amount of $80 million potentially allows HarbourVest to achieve a significant windfall at the expense of other creditors and equity holders. The Debtor has asserted numerous times that the estate is solvent and, for this reason, the purported subordinated claim of $35 million (if allowed and approved) may be worth just as much as its general unsecured claim. This is a huge figure in this case, outshined only by the Redeemer Committee, which has an actual arbitration award obtained after lengthy litigation. By contrast, the HarbourVest Claim contains only a few paragraphs of generalized allegations that essentially argue that the Debtor's alleged actions related to the Acis bankruptcy, and this Court's orders in the Acis case, are a "but for" cause of the loss of its investment. While the HarbourVest Response is lengthy, it lacks necessary details for the Court to determine whether HarbourVest *may* be entitled to the relief requested by the Motion. The other significant creditors in this case—*inter alia*, Redeemer, UBS and Acis—all had pending claims that were litigated. Nor is HarbourVest a trade creditor, vendor, or other contract counter-party of the Debtor. The HarbourVest Claim is thus uniquely situated in this case and, given the size and the nature of its

claims, should invite close scrutiny. Under these facts, the potential allowance of an $80 million claim (less the value of its share in HCLOF, which may suffer by continued management by Acis) against the estate for an investment which was not held or managed by the Debtor would be a huge undue windfall.

34. Second, the Motion states that HarbourVest will vote its proposed allowed Class 8 (proposed at $45 million) and Class 9 (proposed at $35 million) claims in support of confirmation. There are at least two potential issues with this proposal. First, the deadline for parties to submit ballots was January 5, 2021, and as of the close of business on January 5, the HarbourVest Claim has not been allowed for voting purposes.[9] Second, the Motion and proposed settlement agreement state that the HarbourVest Claim will be allowed for voting purposes only as a general unsecured claim in the amount of $45 million. It is unclear how HarbourVest can, or would be authorized to, vote its purported Class 8 and 9 Claims in support of the Plan after the voting deadline and when the settlement provides only for a voting claim in Class 8.

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must "compare the terms of the compromise with the likely rewards

[9] The hearing on the 3018 and 9019 motions are set concurrently with confirmation.

of litigation."). Given the excessive amount to be paid under the settlement and the weakness of the HarbourVest Claim, this factor weighs in favor of denial of the Motion.

36. Fourth, it is unclear from the settlement papers whether the transfer by HarbourVest of its interest in HCLOF to the Debtor or an entity the Debtor designates will cause the value of the investment to be received by the Debtor's estate. Further, the interest of HCLOF being conveyed under the proposed settlement may be subject to the Acis plan injunction, which could potentially prevent the Debtor's estate from realizing the value of this interest. In the event the Court is inclined to approve the settlement, the order should make clear that the available value of the investment should be realized by the Debtor's estate.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court enter an order denying the Motion and providing Respondent such other and further relief to which he may be justly entitled.

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Dated: January 6, 2021

Respectfully submitted,

/s/ D. Michael Lynn

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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 6, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
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UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	*	Chapter 11
	*	
	*	Case No. 19-34054sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.	*	
	*	
Debtor	*	

OBJECTION TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

The Dugaboy Investment Trust and Get Good Trust (jointly, "Objectors"), submit this Objection for the purpose of objecting to the *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Dkt. #1625] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest") pursuant to Rule 9019 of the

Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this objection, Objectors respectfully represent as follows:

I. INTRODUCTION

1. Objectors recognize that Courts favorably view settlements and, as a matter of course, generally approve settlements as being in the best interest of the bankruptcy estate. The settlement proposed herein, however, is different than other settlements inasmuch as it represents a 180 degree departure from the Debtor's own analysis of the Claim of HarbourVest and the fact that the settlement is tied to HarbourVest approving the Debtor's plan. Little or no information is provided by the Debtor as to why its initial analysis was flawed and what information or legal principal it discovered to change a zero claim into a massive claim that will have a significant impact on the recovery to creditors.

II. BACKGROUND

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

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the venue of this case was transferred. [Dkt. #186].

5. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. [See Dkt. #854].

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")[1].

7. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the "HarbourVest Response").

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

> The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds ….. The HarbourVest Entities invested approximately $80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

a. An allowed, general unsecured claim in the amount of $45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

[1] While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

b. A $35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].

12. An integral element of the settlement requires that HarbourVest will "support confirmation of the Debtor's Plan including, but not limited to, voting its claims in support of the Plan."

13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].

14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor's position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.

15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth $22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

16. The law relative to approval of motions pursuant to BR 9019 is well settled. The settlement must be fair and equitable**.** *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). The factors the Court should consider are the following:

(i) the probabilities of ultimate success should the claim be litigated;

(ii) the complexity, expense, and likely duration of litigating the claim;

(iii) the difficulties of collecting a judgment rendered from such litigation; and,

(iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

17. Although the Debtor's business judgment is entitled to a certain deference, "business judgment" is not alone determinative of the issue of court approval. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). However, notwithstanding the business judgment rule, a debtor does not have unfettered freedom to do what it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.").

B. ISSUES WITH THE SETTLEMENT

18. Objectors believe that the following issues are not explained or addressed in the Motion and, thus, the Motion should be denied:

a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and

c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of January, 2021, a copy of the above and foregoing *Objection To Debtor's Motion For Entry Of An Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) And Authorizing Actions Consistent Therewith* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

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ATTORNEYS FOR CLO HOLDCO, LTD.

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

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

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Objection to Harbourvest Settlement* (the "**Harbourvest Settlement Objection**") which seeks entry of an order from this Court denying the Debtor's *Motion for Entry of an Order Approving Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "**Harbourvest Settlement Motion**") for the reasons stated below. In support of the Harbourvest Settlement Objection, CLO Holdco respectfully states as follows:

I.
BACKGROUND

A. TRANSFERRING SHARES IN HCLOF

1. CLO Holdco owns 75,061,630.55 shares, or about 49.02% of Highland CLO Funding, Ltd. ("**HCLOF**"). Other shareholders include Harbourvest 2017 Global AIF L.P., Harbourvest Global Fund L.P., Harbourvest Dover Street IX Investment L.P., and Harbourvest Skew Base AIF L.P., and HV International VIII Secondary L.P. (collectively, "**Harbourvest**"). Harbourvest owns approximately 49.98% of HCLOF. The remaining 1% is owned by the Debtor and a five other investors.

2. HCLOF is governed by a *Members Agreement Relating to the Company* dated November 15, 2017 by and between each of the members of HCLOF, including Harbourvest, the Debtor, and CLO Holdco (the "**Member Agreement**"). A copy of that agreement is attached hereto as **Exhibit A**.

3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred." *Id.* at § 6.2.

B. THE HARBOURVEST SETTLEMENT

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

Harbourvest Settlement Motion (the "**Settlement Agreement**") [Dkt. No. 3]. In the Settlement Agreement, Harbourvest represents and warrants that it is authorized to transfer its interest in HCLOF to the Transferee, HCMLP Investments, LLC (the "**Transferee**"). SETTLEMENT AGREEMENT, Ex. A. § 3. Further, the Transferee and Debtor agree to be bound by the terms and conditions of the Member Agreement. *Id.* at § 1.c.

5. In exchange for conveniently classified allowed claims under the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Plan**") [Dkt. No. 1472], Harbourvest agrees to vote in favor of the Plan and to transfer all of its interests in HCLOF to the Transferee. SETTLEMENT AGREEMENT, § 1.

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

II.
ARGUMENTS AND AUTHORITIES

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

7. The Fifth Circuit recognizes fundamental tenets of contract interpretation, and notes that "contracts should be read as a whole, viewing particular language in the context in which it appears. *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, 51 F. App'x 930 (5th Cir. 2002) (citing Restatement (Second) of Contracts § 202 (1981)). The Fifth Circuit has applied substantially the same tenets of contract interpretation across the laws of various jurisdictions, and consistently reasons that "[a]ll parts of the agreement are to be reconciled, if possible, in order to avoid an

inconsistency. A specific provision will not be set aside in favor of a catch-all clause." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (internal citations omitted); and *see Hawthorne Land Co. v. Equilon Pipeline Co., LLC*, 309 F.3d 888, 892–93 (5th Cir. 2002); *Luv N' Care, Ltd. v. Groupo Rimar*, 844 F.3d 442, 447 (5th Cir. 2016); *Wooley*, 51 F.Appx. at 930.

8. Reconciliation of terms that would otherwise render other parts of a contract redundant is fundamental to proper contract interpretation. *Hawthorne Land*, 309 F.3d at 892-93. As the Firth Circuit explained in *Hawthorne Land*, "each provision of a contract must be read in light of the other provisions so that each is given the meaning suggested by the contract as a whole. A contract should be interpreted so as to avoid neutralizing or ignoring a provision or treating it as surplusage." *Id.* (internal citations and quotations omitted). In other words, provisions of a contract should be read to create harmony, not internal inconsistencies, redundancies, and unnecessary surplus language. *See, e.g., Luv N' Care*, 844 F.3d at 447 (overturning district court on appeal by interpreting contract in manner that eliminated perceived redundancy).

B. ANALYZING THE MEMBER AGREEMENT

9. Section 6.1 of the Member Agreement will almost certainly be cited by the Debtor and Harbourvest as authority for their entry into the Settlement Agreement, regardless of whether other Members or the Portfolio Manager consent. It states, in pertinent part, that:

> No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager…

MEMBER AGREEMENT, § 6.1. Harbourvest will likely stress that under the terms of the Member Agreement, it can transfer its interests so long as the transfer is to "an Affiliate of an initial Member." Indeed, the Debtor will no doubt point out to this Court that Harbourvest is

conveniently transferring its interests in HCLOF to an Affiliate of the Debtor, and that the Debtor is an initial Member listed in the Member Agreement.

10. Section 6.1, however, must be read in the context of the Member Agreement, and in conjunction with the transfer restrictions found in section 6.2. Read together it is clear that the consent exception allowing a transfer in 6.1 was intended to allow a Member to transfer its shares to *its* own Affiliate, without required consents and effectuating a Right of First Refusal. Doing so would allow inter-company transfers within a corporate structure without the need for complicated procedures. Applying Fifth Circuit precedent, this interpretation fits squarely within the agreement and gives weight to the terms of section 6.2 of the Member Agreement, as explained below.

(i) Surplusage – Specific Allowance of Transfers by CLO Holdco to Debtor Affiliates

11. Recall that both CLO Holdco and the Debtor are initial Members to the Member Agreement. MEMBER AGREEMENT, p. 3. Section 6.2 of the Member Agreement states, in pertinent part, that "Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, *in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal*) a Member must first…" comply with the Right of First Refusal. *Id.* at § 6.2 (emphasis added). The italicized language above is important for two reasons: (i) it specifically enumerates that CLO Holdco can transfer its interests to Debtor Affiliates without having to pursue the Right of First Refusal; and (ii) it allows only limited transfers between Members, as opposed to between a Member and an Affiliate of an initial Member.

12. If, as the Debtor and Harbourvest will likely argue, Members are allowed to transfer their interests to any Affiliates of any other initial Members, there is absolutely no need for the Member Agreement to specifically authorize CLO Holdco to transfer its interests to the Debtor's Affiliates. Per Fifth Circuit fundamentals of contract interpretation, that purported redundancy

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer *all* of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow *all* of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in *every instance*. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply *cannot* be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the *debtor's* contract is a defacto restriction on assignment that may be excised

from the agreement. This case is very different. Here, it is a creditor that owes a right of first refusal to another non-debtor entity.

19. Even so, at least one court has issued telling commentary on a bankruptcy court's ability to excise provisions of a bargained-for contract, stating "A bankruptcy court's authority to excise a bargained for element of a contract is questionable and modification of a nondebtor contracting party's rights is not to be taken lightly." *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 51-52 (Bankr. M.D.N.C. 2003) (citing *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1991)). CLO Holdco was unable to find any case that would allow a bankruptcy court to invalidate or otherwise excise a third party's right of first refusal in what largely amounts to a non-debtor contract.

20. As the Member Agreement requires Harbourvest to provide a Right of First Refusal to the non-Debtor Members under section 6.2 of the Agreement, and such Members have 30 days to review and determine whether to purchase their pro-rata shares offered by Harbourvest, Harbourvest lacks contractual authority to enter into the Settlement Agreement.

D. HARBOURVEST'S LACK OF AUTHORITY PRECLUDES ENFORCEMENT OF SETTLEMENT

21. Harbourvest has not completed its conditions precedent to the transfer of its interest to Transferee under the Member Agreement. As detailed above, and in section 6.2 of the Agreement, Harbourvest must effectuate the Right of First Refusal before it can transfer its interests in HCLOF. MEMBER AGREEMENT, § 6.2. Harbourvest is, in essence, bound by the condition precedent of effectuating the Right of First Refusal before it is authorized under the Member Agreement to enter into the Settlement Agreement.

22. Courts should not enforce a settlement agreement where a party has a condition precedent to entry into the agreement and fails to satisfy that condition. *In re De La Fuente*, 409 B.R. 842, 846 (Bankr. S.D. Tex. 2009). As noted in part in *De La Fuente*, the court would not recognize

or enforce a settlement where the parties were subject to conditions precedent before the settlement could be effective, and the conditions precedent were not satisfied. This Court should similarly deny Harbourvest's proposed settlement, as it would deny the Members' Right of First Refusal, which is the benefit of their bargain under the Member Agreement.

III.
PRAYER FOR RELIEF

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

DATED: January 8, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

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ATTORNEYS FOR CLO HOLDCO, LTD.

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, a true and correct copy of the foregoing CLO Holdco Objection was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the United States Trustee at Lisa.L.Lambert@usdoj.gov and upon the following parties:

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EXHIBIT 7

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

IN RE:

	CHAPTER 11
	CASE NO.
HIGHLAND CAPITAL MANAGEMENT, L.P.	19-34054-SGJLL

Debtor.

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REMOTE DEPOSITION OF
MICHAEL PUGATCH
Zoom Videoconference
01/11/2021
1:07 P.M. (EDT)

REPORTED BY: AMANDA GORRONO, CLR
CLR NO. 052005-01
JOB NO. 188591

01/11/2021

1:07 P.M. (EDT)

REMOTE ORAL DEPOSITION OF MICHAEL PUGATCH, held virtually via Zoom Videoconferencing, pursuant to the Federal Rules of Civil Procedure before Amanda Gorrono, Certified Live Note Reporter, and Notary Public of the State of New York.

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ALSO PRESENT:
ALIZA GOREN, ESQ.

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MR. WILSON: I'm John Wilson with the firm of Bonds Ellis Eppich Schafer Jones LP. And I represent Jim Dondero.

MR. MORRIS: John Morris and Hayley Winograd of Pachulski Stang Ziehl & Jones for the Debtor.

MS. WEISGERBER: Erica Weisgerber from Debevoise & Plimpton for HarbourVest.

MR. KANE: John Kane of Kane Russell Coleman & Logan, for CLO Holdco Limited.

MR. DRAPER: Douglas Draper of Heller Draper & Horn, for The Dugaboy Investment Trust and the Get Good Trust.

MS. McLAUGHLIN: Shannon McLaughlin from Latham & Watkins LLP for UBS.

MR. MALONEY: Mark Maloney from King & Spalding, on behalf of Highland CLO Funding Limited.

MS. WEISGERBER: I'm joined on

the line by my colleagues from Debevoise, Natasha Labovitz and Emily Hush, and Aliza Goren from HarbourVest is on the line, as well.

MR. WILSON: As a preliminary matter, the witness' counsel has produced some documents to us that they've requested be subject to the confidentially order or a brief protective order entered at Document Number 382, in this case.

And she's also requested that all counsel and participants in this deposition agree to be bound by the terms of that order, because some of the documents that were produced are stamped "confidential," and they want to maintain that confidentially.

Do we have an agreement of all counsel and participants on the deposition to be bound by the terms of that agreed protective order?

(All agreed.)

MS. WEISGERBER: Okay. I think

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that was everyone. Thank you all for confirming. And the deposition will be marked "confidential" until and unless HarbourVest designates the testimony otherwise.

MR. WILSON: And that's fine.

(Whereupon, a request for Transcript be marked Confidential under the Protective Order was made.)

M I C H A E L P U G A T C H,

called as a witness, having been first duly affirmed by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION

BY MR. WILSON:

Q. All right. Mr. Pugatch, how do you pronounce your name? I'm sorry.

A. Yep, you've got it. Pugatch.

Q. Pugatch. Okay. Can you state your full name for the record?

A. Yeah. Michael Pugatch.

Q. Okay. And you've been designated by HarbourVest to discuss some

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matters related to the 9019 motion. And specifically we asked that HarbourVest produce a witness who could talk about the negotiations of the settlement with the Debtor, and also the factual allegations underlying HarbourVest's Proof of Claim, and those described in HarbourVest's response to the claim objection, including without limitation, its investment with Acis/HCLOF in the alleged representations made by the Debtor and/or Acis/HCLOF to HarbourVest, and any and all agreements entered into between HarbourVest and any other party related to its investment.

Do you agree that you're the best person to talk about these matters on behalf of HarbourVest?

A. Yes. Yes.

Q. Okay. Have you given a deposition before?

A. I have.

Q. Okay. So you understand how it works that you're under oath, and that I'm going to be asking questions and you're

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going to be giving answers. If at any time I ask a question that you don't understand, or we've had some problems with sometimes connectivity issues with Zoom. But yeah, any time that you don't understand my question or you didn't catch it, I'll be happy to repeat it.

Also, one thing I found with Zoom is that it's easier to talk over people. I'll try not to talk over you. I would ask that you try to ensure that I've finished asking my question before you start your answer. And I will likewise try to ensure that you've finished your answer before start my next question.

And at any time during this deposition if you feel the need to take a break, that's totally okay with me. The one thing that I would ask is if I've just asked a question, that you answer the question before requesting the break.

And if we have that agreement and the ground rules, then I think I'm ready to start asking you my questions.

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A. Sounds good.

Q. What's your current address?

A. 47 Wayne Road in Needham, Massachusetts.

Q. Okay. And where are you located today?

A. At that address.

Q. Okay. That's your home address?

A. Correct.

Q. And is anyone in the room with you there?

A. No.

Q. And did you talk with anyone about your deposition today?

A. Only counsel.

Q. Okay. And did you go over the facts of the underlying investment and the settlement negotiations with your counsel?

MS. WEISGERBER: I'm going to object on privilege grounds. He can -- he prepared for the deposition with counsel. I don't think you can inquire into specifics of the preparation.

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MR. WILSON: Okay. Well, you know, he was designated to talk about these matters, and I'm just asking if he discussed these matters with his counsel his before his testimony. That's all. I'm not asking the substance of those communications.

MS. WEISGERBER: You're asking about conversations with counsel. How about you just ask if he's prepared to talk about those topics today?

MR. WILSON: Okay.

BY MR. WILSON:

Q. Are you prepared to talk about those topics today?

A. Yes.

Q. Okay. Now, HarbourVest has filed several proofs of claim in this matter, and it looks like those are numbered 143 on behalf of HarbourVest, 217 Global Fund L.P., and 144 HarbourVest 2017 Global AIF, 149 HarbourVest Partners L.P., 150 HarbourVest Dover Street, IX Investment L.P., 153 HarbourVest -- or I'm

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sorry, HV International VIII Secondary L.P., and 154 HarbourVest Skew Base AIF LP.

And you're here to talk on behalf of all of those entities, and you have, for purpose of this settlement and you're -- the 9019 motion, these proofs of claim are all lumped together as one claim; is that correct?

MS. WEISGERBER: I'm just going to object quickly and clarify that he's not here as a 30(b)(6) witness, but he is here as someone from HarbourVest who signed those proofs of claim. So with that, I'll let you continue.

A. I'll just answered the question, yes, as a representative on behalf of all of those entities. I would defer to counsel, from a legal perspective, whether these are treated as a single or separate claims.

MR. WILSON: Okay. And we can move on for now.

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I'm going to submit the first exhibit. It's going to be Exhibit No. 1 to the deposition. I'm sending it by E-mail, and I'm also going to use a share screen.

(Whereupon, Exhibit 1, Proof of Claim 143 filed 4/08/2020 nine pages, was marked for identification.)

MR. WILSON: So this document right here is Claim Number 143 filed on April 8, 2020, and this one is filed on behalf of HarbourVest 2017 Global Fund L.P.

If we go down, scroll to the annex to proof of claim, it's Page 5 of the document. It says that the Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd.

And I'm going to now send out an E-mail with Exhibit No. 2. I'm going to pull this Exhibit No. 2 document up on the share screen, as well. I guess that's right.

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(Whereupon, Exhibit 2, Proof of Claim 149 filed 4/08/2020 nine pages, was marked for identification.)

BY MR. WILSON:

Q. Can you see the official proof, official form 410 proof of claim on your screen?

A. The first one that you shared?

Q. I'm now on Exhibit No. 2. Is it showing up on your screen?

A. No.

Q. Okay. Actually, I'm sorry. Is it now showing up on your screen?

A. Now, it's showing up, yep.

Q. Okay. So this one is Proof of Claim 149, filed on the same date. And this one's filed on behalf HarbourVest Partners L.P. And I'm going to scroll down to the annex to proof of claim, which looks largely like the annex to the previous proof of claim we looked at.

But this one says, in Paragraph No. 2, the Claimant manages investment funds that are limited partners in one of

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the Debtor's managed vehicles, Highland CLO Funding, Ltd.

And can you tell me why this HarbourVest Partners L.P. filed a separate proof of claim, from the entities that were investors in HCLOF?

A. I would only be able to answer that, based on conversations with counsel.

Q. But in any event, HarbourVest Partners L.P. did not invest in HCLOF, correct?

A. Not directly on behalf of itself, no.

Q. All right. I'm going to stop that share screen.

MR. WILSON: And this is going to be Exhibit Number 3.

(Whereupon, Exhibit 3, Declaration of Michael Pugatch in Support of Motion of HarbourVest Pursuant to Rule 3018(a), was marked for identification.)

MR. WILSON: And Exhibit No. 3 that I've just submitted via E-mail,

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and I'm about to put it up on the screen, is the Declaration of HarbourVest. Let me get it up here, so you can see it. This is the declaration of Michael Pugatch in support of motion of HarbourVest pursuant to Rule 3018(a).

BY MR. WILSON:

Q. Have you seen this document before?

A. Yes.

Q. And, in fact, this is your declaration; is that correct?

A. Yes.

Q. And at the first line of this, of Paragraph 1 says that you're the managing director of HarbourVest Partners LLC?

A. Correct.

Q. And how is HarbourVest Partners LLC connected to these claims?

A. That is the corporate entity or managing member of all of the underlying funds that are managed on behalf of

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HarbourVest Partners L.P.

Q. And you're the managing director of that entity?

A. A managing director to that entity, yes.

Q. You said "a managing director," are there others?

A. Yes.

Q. Who are the others?

A. There are over 50 managing directors at HarbourVest Partners LLC.

Q. And are you the managing director that has charge of this particular HarbourVest investment, the one in HCLOF?

A. Yes.

MR. WILSON: All right. I beg your patience. I'm trying to conduct this deposition solo. I've got a lot of stuff I've got to go through. So I'll do my best to do it efficiently.

But this next exhibit I'm going to submit is going to be Exhibit No. 4. I'm sending it in the E-mail now.

Confidential - Pugatch

(Whereupon, Exhibit 4, Member Agreement 28 pages, was marked for identification.)

BY MR. WILSON:

Q. Can you see this on your share screen?

A. I can.

Q. This is the Members Agreement relating to the Company.

A. (Nods.)

Q. I'm just going to scroll down. Okay. So this is the signature page for the HarbourVest entities that were invested in this company. And it says that you were the authorized person to sign on behalf of the first two entities: HarbourVest Dover Street, HarbourVest 2017 Global, and then the next one here it says you're managing director. And here we see that HarbourVest Partners LLC.

And if we scroll down, we see that you're the managing director of HarbourVest Partners LLC, again, on behalf of HV International, and that you're an

authorized person on behalf of HarbourVest Skew Base.

So you signed all these agreements on behalf of the HarbourVest entities, when HarbourVest made its investment in HCLOF. Would that be correct?

A. Correct.

Q. Okay. Sorry that was cumbersome, but I needed to get through it.

MR. WILSON: I'm going to now stop that share screen. And I'll need to go to Exhibit No. 5. I'm E-mailing out Exhibit No. 5 right now.

(Whereupon, Exhibit 5, HarbourVest Response to Debtor's First Omnibus Objection 617 pages, was marked for identification.)

BY MR. WILSON:

Q. This is -- I'll do another share screen -- this is Docket 1057 filed in the Highland bankruptcy. And this is HarbourVest Response to Debtor's First

Omnibus Objection.

Did you participate in the creation of this document?

A. Yes.

Q. So you had an opportunity to review this document, before it was filed?

A. Correct.

Q. And you agree with the statements and the positions taken in this document?

A. I do.

Q. All right. So what this says in Paragraph 8, that by the summer of 2017, HarbourVest was engaged in preliminary discussions with Highland, regarding the investment.

First off, why was HarbourVest engaged in preliminary discussions with Highland?

A. Highland had approached HarbourVest with an investment opportunity. This was really borne out of discussions that we had with them around a couple of investment opportunities, that

this opportunity with HCLOF being the one that by the summer of 2017, as stated here, was in, was advancing through discussions.

Q. And which individuals at Highland were you engaged in discussions with? By "you," I mean HarbourVest.

A. Yeah, I mean, originally it was through a couple of members of their investor relations team. My first point of contact was with Brad Eden, and then subsequently progressed to a larger subset of employees of Highland.

Q. And who on behalf of HarbourVest was engaging in these discussions?

A. It was primarily myself, my colleague, or two -- two colleagues primarily, alongside myself.

Q. I'm sorry. I didn't catch the last part.

A. Sorry. Myself and two other colleagues primarily.

Q. And who are these two other colleagues?

A. Dustin Willard and then a more junior member of the HarbourVest team.

Q. When you say "the HarbourVest team," what does that mean?

A. So the broader investment team and specifically in this context, the secondary investment team at HarbourVest, that this was an opportunity for.

Q. So who made the final decision, on behalf of HarbourVest, to make this investment?

A. Ultimately it was a decision made by the investment committee of HarbourVest.

Q. And who's on that investment committee?

A. It's a four-member committee comprised of managing directors within the firm.

Q. And who are those managing directors?

A. I don't recall at the time who the members were. I can tell you the members now, of that committee. It has

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changed or evolved over time.

Q. And that committee included you?

A. I was involved in the decisionmaking of that, yes, correct.

Q. So you were part of the four-man committee that made this decision?

A. Yes.

Q. All right. I'm going to go back to what we've marked as Exhibit 3, which is your declaration. And it says in Paragraph 2, that HarbourVest is a passive minority investor in Highland CLO funds, HCLOF, and by the way, I haven't stated this before, but in this deposition if I say HCLOF, I'm going to be referring to Highland CLO funds.

But it says that the vehicle is managed by Highland Capital Management, L.P.

And why do you say that that vehicle was managed by Highland Capital Management, L.P.?

A. I believe that is the named investment manager of HCLOF, per the

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organization documents of that vehicle.

Q. You believe that that was the investment manager on the organization documents, which --

A. Of the various transaction documents that we entered into, in connection with our investment.

Q. Would those have been the documents that you had entered on November the 15 of 2017?

A. Yes.

Q. Okay. It says that HarbourVest initially invested $73,522,928 for roughly 49 percent interest in HCLOF; and more specifically, that would be a 49.98 percent interest in HCLOF, correct?

A. Sounds right, yes.

Q. Okay. And then HarbourVest contributed an additional $4,998,501 following a capital call, and it's received three dividends, each totally $1,570,429.

Is all of that correct?

A. Yes.

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Q. And has HarbourVest received any additional dividends, since the making of this declaration?

A. No, we have not.

Q. Now, I want to skip down to Paragraph 3, where it says that HarbourVest expected proceeds from the original HCLOF investment were projected to exceed 135 million.

Do you agree with that?

A. That was the original projected value of the investment, yes.

Q. Well, whose expectation was that?

A. Those were figures, as I recall, that were originally provided to us by Highland to form the basis of our due diligence that we went through, and penultimately were included as part of our investment thesis in making the investment.

Q. So your testimony is that Highland told you that your investment would be worth over $135 million?

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A. Yes.

MS. WEISGERBER: Objection to the form. Misstates testimony.

Go ahead, Mike.

A. That was, that was part of our original due diligence, on the investment opportunity.

Q. When you say part of your due diligence, are you saying that the number originated from Highland or that the number originated from your due diligence operations?

MS. WEISGERBER: Objection to form.

A. The number originally came from Highland and formed the basis upon which we conducted due diligence on the investment opportunity.

Q. And after performing due diligence, you were satisfied that that was a reasonable projection?

A. Yes.

Q. And what was the, what was the estimated date, in which the value of your

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investment would exceed the $135 million?

MS. WEISGERBER: Objection to form.

A. I don't recall exactly. That would have been over, over several years. And again, this was the -- this was the projected value based on the original investment or the assets that were held by HCLOF, at the time of our investment.

Q. Now, when you talk about a portfolio manager -- I'm sorry, when you talk about investment manager, are you referring to the portfolio manager?

A. No.

Q. So what's the difference in an investment manager and a portfolio manager?

A. So in the context of this investment, the investment manager. We -- we had -- HarbourVest had an investment with HCLOF. Highland was the investment manager of HCLOF that in turn held equity positions in a variety of CLOs, which had various portfolio managers associated with

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those, all Highland affiliates.

Q. And so who was the portfolio manager for the HarbourVest investment in HCLOF?

MS. WEISGERBER: Objection to form.

A. There were various underling portfolio managers, depending on the underlying CLO position.

Q. Well, who was the initial portfolio manager?

A. So, again it would depend on which underlying assets we're talking about. HCLOF was a diversified portfolio of multiple underlying CLO equity positions, all with portfolio managers that were Highland affiliates, as we understood it.

Q. Well, I'm going to go back to Exhibit 1, Paragraph 2, this says, in the second sentence, "Acis Capital Management GP, LLC, and Acis Capital Management, L.P., together Acis, the portfolio manager for HCLOF," and then it continues on,

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"filed for Chapter 11."

Is this proof of claim correct, when it states that Acis Capital Management GP, LLC, and Acis Capital Management, L.P., were the portfolio manager for HCLOF?

MS. WEISGERBER: Objection to form.

A. I know that there was an issue with the portfolio manager for at least the Acis CLOs that were held by HCLOF.

Q. Well, how do you distinguish between the Acis CLOs and the Highland CLOs? Is that based on who was managing them?

MS. WEISGERBER: Objection to form.

A. Again, they were all underlying investments of HCLOF. We didn't distinguish the portfolio manager, if you will, of those vehicles, other than again they were Highland affiliates.

Q. But it's fair to say that Acis was managing at least a portion of the

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HCLOF investment, correct?

A. Correct. The underlying investments held by HCLOF, correct.

Q. And did anything -- from the time that you -- well, let's just go to the -- I think we had the members agreement up a second ago. This would have been Exhibit 4.

Yeah, right here. No. 14, Highland HCF Advisor, Ltd. is listed as the portfolio manager on the members agreement.

Is that accurate, that Highland HCF Advisor, Ltd. was the portfolio manager?

MS. WEISGERBER: Objection to form. Can you state as of what date you're asking, Counsel?

MR. WILSON: Well, the date of this memorandum is, it says right here, 15 November 2017.

BY MR. WILSON:

Q. So as of the date November 15, 2017, who was the portfolio manager for

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this investment?

A. I don't recall the specific names of the various entities that sat below the HCLOF level or below Highland Capital, as the investment manager of HCLOF.

Q. Well, are you familiar with a company called Brigade?

A. Yes.

Q. And was that company a sub-manager of this investment?

MS. WEISGERBER: Objection to form.

A. Not at the time of our investment.

Q. Not at the time. Well, when did the portfolio managers begin to change in this investment?

MS. WEISGERBER: Objection to form.

A. Do you mean subsequent to our investment?

Q. Yes.

A. So as I understand it in

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connection with the Acis bankruptcy that took place, there was a change in the underling either portfolio manager of certain of the CLOs, the Acis-managed CLOs or Acis-branded CLOs, I should say, and/or sub-advisor of those CLOs.

Q. And was that at the direction of the Chapter 11 trustee?

MS. WEISGERBER: Objection.

A. That's my understanding.

Q. And so when this investment was initially made, was Highland HCF Advisor, Ltd. the portfolio manager of the entire investment?

MS. WEISGERBER: Objection to form.

A. I don't recall the specifics underneath the HCLOF entity.

Q. Well, there aren't any other portfolio managers listed on this document, that I can see.

Is there any place in this document that you can point me to that would identify another portfolio manager?

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MS. WEISGERBER: Objection to form. The document speaks for itself.

A. Again, I think we may be distinguishing here between portfolio manager at the HCLOF level and portfolio manager sub-advisor, again, I'm not sure the proper terminology as it relates to each of the underlying CLOs that were partially owned by HCLOF.

Q. Well, after the Acis bankruptcy was filed, and after the Chapter 11 trustee appointed Acis as a portfolio manager of at least part of HCLOF, did Highland HCF Advisor continue to serve as portfolio manager?

MS. WEISGERBER: Objection to form.

A. All of HarbourVest's interaction was with Highland as the investment manager of HCLOF. My understanding of the change in those entities related to the portfolio management of the underlying Acis CLOs, not a change in the portfolio manager, at the HCLOF level.

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Q. Well, Highland is listed as a member under this -- Highland Capital Management LLP is listed as a member under this Member Agreement; is that correct?

MS. WEISGERBER: Objection to form.

A. If that's what the document says, yes.

Q. I'm going to look -- let me stop my share screen for a second.

All right. I'm now at the top of Page 5 of this Exhibit 4, where it says, "Dover IX shall mean HarbourVest Dover Street IX Investment L.P."

And Dover IX was the largest single investor of the HarbourVest Group; is that correct?

A. Correct.

Q. All right. I'm now going to go down to Paragraph 5. I'm sorry, it's not Paragraph 5. Paragraph 4, where it says "Composition of Advisory Board" in Paragraph 4.1, The Company shall establish an Advisory Board composed of two

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individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX.

And did this Advisory Board get created?

A. I believe it was created, yes.

Q. And who was the representative for CLO Holdco on the Advisory Board?

A. I don't know.

Q. Who was the representative for Dover IX on the Advisory Board?

A. I can't recall whether it was myself or one other colleague who jointly manages this investment with me.

Q. You don't recall if you were on the Advisory Board?

A. The Advisory Board never met formally under its capacity as an Advisory Board.

Q. Well, if you look down in Paragraph 4.3, I've got my mouse pointed here, I don't know if you can see it. About two-thirds of the way down in this

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paragraph it says, "The consent of the Advisory Board shall be required to approve the following actions," and then it lists a number of things.

Did the Advisory Board not have to -- was it not required that the Advisory Board ever meet, because they didn't take any of these actions?

MS. WEISGERBER: Objection. Objection to form.

A. There may have been one or two actions taken by the Advisory Board, I'm looking at the list here to see what those may even have been, during the duration of our investment; but if so, those would have been written resolutions or written consents, as opposed to any meeting that was convened amongst the entire Advisory Board.

Q. Okay. And the entire Advisory Board is just two individuals, correct?

A. Correct, that's my understanding.

Q. Okay. And if you go up a few

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sentences above that in Paragraph 4.3 it says, The portfolio manager shall not act contrary to advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the offering memorandum on the consider approval of the Advisory Board.

So the portfolio manager did not have the authority to disregard the advice of the Advisory Board; is that correct?

MS. WEISGERBER: Objection to form; misstates the document.

A. With respect to the limited role that the Advisory Board would have to play, yes, that would be my read.

Q. Now, what is your understanding of a reset transaction?

A. Has to do with a refinancing and reset of the investment period of an underlying CLO.

Q. And would a reset transaction be contained within this -- these actions that the Advisory Board's consent is required to approve?

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A. No, it would not.

MS. WEISGERBER: Objection.

MR. MALONEY: Join.

Q. It would not?

A. It would not.

Q. Well, if a reset was to be proposed, who would have the discretion to make that decision to enter a reset transaction?

MS. WEISGERBER: Objection to form and foundation.

MR. MALONEY: Join.

A. That would be Highland as the manager of HCLOF, who owns the equity position to the underlying CLOs.

Q. So you're saying that Highland would have the exclusive authority to enter a reset transaction?

A. Correct.

MS. WEISGERBER: Objection to form.

MR. MALONEY: Join.

Q. What if HarbourVest objected to a reset transaction? Would it have any

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rights or remedies, in your understanding?

MS. WEISGERBER: I'm going to object to form. And also just object to the extent that this is calling for legal conclusions.

Mike --

MR. WILSON: I've ask the witness, within his understanding of the way this investment worked.

MS. WEISGERBER: If you have an understanding separate from any other conversations with counsel, Mike, you can certainly answer.

A. Within my understanding, HarbourVest would not have had any ability or rights to object to a reset or for similar actions by Highland, as the manager of the HCLOF.

Q. Okay. And just to, just for clarity, in 4.2 it says that, All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance; or (ii), by written consent in lieu of a

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meeting signed by all of the members of the Advisory Board.

And we've talked about how there were two members, one of which represented CLO Holdco and one of which represented HarbourVest, and it was your testimony that you don't recall a meeting ever being conducted that you believed that there had been some written consents issued by the Advisory Board; is that correct?

MS. WEISGERBER: Objection to form.

A. That is my recollection, yes.

Q. I'm sorry? I didn't hear your answer.

A. That is my recollection, yes.

Q. Okay. So what is the Advisory Board's general function in your understanding?

MS. WEISGERBER: Objection to form.

You can answer, Mike, if you know, other than, you know, legal conclusions, things like that, legal

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advice.

And also, Mike, you're welcome to look at the document, I think John is E-mailing you the documents as well. I don't know if you have the full document in front of you.

THE WITNESS: Yeah, I can pull it up here.

A. I mean, my understanding is the Advisory Board, the Advisory Board's involvement is as spelled as in Section 4.3 of the agreement that you have on the screen. And that is the extent of the role that the Advisory Board would play.

Q. Well, but as a practical matter, what did that entail?

MS. WEISGERBER: Objection to form.

A. Again, as a practical matter, the listed items, which I can't see, that are off the screen further down in 4.3 are the items that would require approval by the Advisory Board.

Q. But other than those items, the

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Advisory Board was not a routine part of the decision-making of the portfolio manager?

MS. WEISGERBER: Objection to form.

A. Not at all.

Q. Did you say "not at all"?

A. Not at all, no.

Q. I'm going to refer back to Exhibit 5, which was Document -- or Docket 1057. I'll put that back on the share screen. I wanted you to scroll, sorry. It's a long document.

I want you to look at Paragraph 37, which should be on your screen. And it says that these are misrepresentations that HarbourVest alleges were made by Highland. And the first bullet point states that, "Highland never informed HarbourVest that Highland had no intention of paying the Arbitration Award and was undertaking steps to ensure that Mr. Terry could not collect on his judgment."

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Now, Mr. Terry did not have an arbitration award against Highland; is that correct?

MS. WEISGERBER: Objection to form and foundation.

A. My understanding is there was an Arbitration Award, awarded for the benefit of Mr. Terry.

Q. But that award was against Acis, correct?

MS. WEISGERBER: Objection to form.

A. I don't know all of the details. I do know that Acis was a subsidiary of Highland, and there was an arbitration award that was for the benefit of Mr. Terry.

Q. But you would agree with me that if, if Highland, or I'm sorry if Mr. Terry had an arbitration award against Acis, then Highland would not have any obligation to pay that award?

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

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MS. WEISGERBER: Objection to the form. Objection to the extent that it calls for a legal conclusion.

I don't -- Mike, if you have a layman's understanding of the answer to that question, you're welcome to answer. But if not, don't answer.

A. My understanding was Acis was a controlled subsidiary of Highland's.

Q. Okay. Well, the next bullet point says that, "Highland did not inform HarbourVest that it undertook the transfers to siphon assets away from Acis, L.P., and that such transfers would prevent Mr. Terry from collecting on the Arbitration Award."

So if your understanding was that Highland was responsible for the arbitration award, then why is it relevant that Highland siphoned assets away from Acis, L.P.?

MS. WEISGERBER: Objection to form. Misstates testimony.

Can you clarify that question,

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John? I think the beginning of it was a little muddled.

BY MR. WILSON:

Q. Well, this objection says that Highland had -- or response to objection, says that Highland had no intention of paying the arbitration award, but that seems to conflict with the next bullet point that says that it undertook transfers to siphon assets away from Acis, L.P., to prevent Mr. Terry from collecting on the arbitration award.

So where were those assets being siphoned to?

MS. WEISGERBER: Objection to form and foundation.

If you're capable of answering that question, Mike, you can.

A. I don't know the specific details of where those assets were siphoned off to, other than it was to another Highland affiliate.

Q. The next sentence says that, "Highland simply did not inform

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HarbourVest and represented to HarbourVest that the reason for changing the portfolio manager for HCLOF was because Acis was toxic in the industry."

Do you see that?

A. Yes.

Q. And it seems when I read these documents that have been filed in the Highland bankruptcy, and also the Acis bankruptcy, that there's a difference in position as to which entity, being either Highland or HarbourVest, had the belief that the Acis name was toxic. Can you shed any light on that?

MS. WEISGERBER: Objection to form.

A. I can unequivocally say that the idea to change the portfolio manager or the idea that the Acis brand was toxic did not come from HarbourVest.

Q. That was not at HarbourVest's suggestion or insistence?

A. Absolutely not.

Q. Well, whose suggestion was it

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that the Acis name was toxic?

A. Somebody at Highland.

Q. Do you know who?

A. I don't recall the conversation where that first came up or who said, or who at Highland said that.

Q. But that conversation did occur prior to HarbourVest's investment?

A. Yes.

Q. So Acis was previously the portfolio manager for HCLOF prior to November 15, 2017, and now November 17 -- or 15th, 2017, the portfolio manager was changed.

And what is HarbourVest's position as to why that change in portfolio manager damaged it?

MS. WEISGERBER: Objection; form, objection to the extent it calls for a legal conclusion.

Mike, you can answer --

MR. WILSON: I'm not asking for a -- with all due respect, I'm not asking for a legal conclusion. I'm

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asking for his understanding why the change in the portfolio manager damaged HarbourVest.

MS. WEISGERBER: Same objection.

You can provide any non-privileged answer that you have, Mike, if any.

A. Ultimately my understanding is that that change in portfolio manager and the subsequent litigation between Acis, Highland, and Josh Terry led to material diminution in value, as it relates to the underlying assets of HCLOF stemming from Highland's decision not to comply with the arbitration award to Mr. Terry.

Q. Okay. Now, if you go up to Page 4 in this document, it says that on October 27th, and this is Paragraph 11 now, "On October 27, 2017, Acis' portfolio management rights for HCLOF were transferred to Highland HCF"; is that correct?

A. That sounds right, yes.

Q. And this is over two weeks prior

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to HarbourVest's investment, correct?

A. Correct.

Q. So HarbourVest had full knowledge that that the portfolio manager of HCLOF was being changed prior to its investment, correct?

A. Correct.

MS. WEISGERBER: Objection to form.

And just to clarify, you're asking him, HarbourVest, he's testifying on behalf of himself. I could just take a standing objection to that because I know sometimes you're just saying HarbourVest meaning Mike, so...

BY MR. WILSON:

Q. Okay. And just to be clear, HCLOF changed its portfolio manager on October 27, 2017, but after the Acis bankruptcy was initiated the Chapter 11 trustee made changes to the portfolio manager, correct?

MS. WEISGERBER: Objection to

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form, foundation.

A. I know there were changes subsequent to the Acis bankruptcy, to the underlying management of the Acis CLOs.

Q. All right. I'm going to go back to Paragraph 37, and I want to look at these next two bullet points.

It says that, in the third bullet point, that "Highland indicated to HarbourVest that the dispute with Mr. Terry (which appeared on a litigation schedule presented to HarbourVest during diligence) would have no impact on investment activities."

And that would be the opinion of Highland, correct?

MS. WEISGERBER: Objection to form. The opinion of Highland? Is that what you meant to ask?

MR. WILSON: Right.

BY MR. WILSON:

Q. That's Highland expressing its opinion to HarbourVest, correct?

MS. WEISGERBER: Objection to

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form.

A. I would just say Highland presented that as facts to HarbourVest.

Q. Okay. And the next one, it says that "Highland expressed confidence in the ability of HCLOF to reset or redeem the CLOs notwithstanding that Highland was using HCLOF as part of its scheme to avoid the pending Arbitration Award."

That's again an opinion, right, that Highland expressed confidence in the ability of HCLOF?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

A. Ultimately, their ability, or HCLOF's ability to reset or redeem the CLOs would be subject to market conditions and the ability to actually affect those transactions, but they expressed their, you know, their belief or view in HCLOF's ability to do that notwithstanding the, that change in portfolio manager.

Q. Well, in Paragraph 39 on that

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same page, it says, "In reliance on Highland's misrepresentations and omissions, HarbourVest invested in HCLOF."

Now, HarbourVest is a sophisticated investor, correct?

A. Correct.

Q. And if we were to go to Paragraph 36, it says, right here in the middle, "These facts were material: indeed, HarbourVest expressed concern and requested further information regarding the Transfers, the Arbitration Award, and their implications for HCLOF, and the investment's closing date was delayed."

And the closing date was ultimately November 15, 2017, correct?

A. Correct.

Q. What was the initial closing date that had to be delayed?

A. I believe it was scheduled for November 1st.

Q. So HarbourVest had full knowledge of these facts that it, that it lays out here forming the basis of the

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alleged misrepresentations, and they requested further information regarding those facts.

Did they receive any further information?

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

MS. WEISGERBER: Objection to form. Misstates testimony.

A. We did have subsequent conversations and, I believe, receive subsequent information describing the intent around, and the, you know, new structure, pro forma structure, of the action that Highland had undertaken. And part of the reason for the delay in the closing was to ensure that we had adequate time to diligence those changes, ask questions, in connection with a thorough due diligence process, and ensure that the underlying legal structure was still sound.

Q. And HarbourVest was investing over $73 million, correct?

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A. Right.

Q. And HarbourVest had made investments of this nature previously, correct?

A. We did.

MS. WEISGERBER: Objection to form.

A. HarbourVest has made hundreds of investment over its years, yes.

Q. And HarbourVest has conducted due diligence regarding its investments in the past, correct?

A. Correct.

Q. And HarbourVest received additional information on items of concern and reviewed that information and satisfied itself that this was an appropriate investment, correct?

MS. WEISGERBER: Objection to form. Misstates testimony.

A. On the back of misrepresentations by Highland, yes.

MR. WILSON: Well, I think that's nonresponsive and I object.

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Q. I'm just, I'm just, reading from your pleading that you filed in the bankruptcy, where you say that these were material facts, and HarbourVest sought more information regarding these facts. And then you've testified that they performed additional due diligence regarding that information they received, and then they determined that the investment was appropriate, correct?

MS. WEISGERBER: Objection to form. Misstates testimony.

Go ahead, Mike.

A. Yeah, that is correct, on the back of the additional information we received from Highland.

And I would add, with, you know, with the benefit of external advisors and outside counsel reviewing those structural changes, as well.

Q. All right. Thank you.

Now, going back to your declaration, which we've marked as Exhibit 3, Paragraph 3 says that "The

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unaudited net asset value of HCLOF, as of August 31, 2020, was $44,587,820."

And is that a -- is that a book value, I guess?

A. That is a fair market value, in accordance with the valuation policy of HCLOF.

Q. Do you happen to know the net asset value of HCLOF as of February 1, 2019? And I don't want an exact number, I just want an approximation.

A. No, I do not.

Q. Do you know where I could get that information?

A. Presumably from the Debtor.

Q. We'll come back to this in a minute, but I'm going to --

MS. WEISGERBER: I think we've been going about an hour, John, if we can take a quick break.

MR. WILSON: Yeah, a break is fine.

MS. WEISGERBER: Actually, Mike...

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MR. WILSON: I'm sorry? I didn't hear you.

MS. WEISGERBER: It can be up to Mike.

Mike, do you want to take a quick break? Do you want to keep going?

MR. WILSON: No, we can, if y'all need a break, we can take a break, like 10, 15 minutes.

THE WITNESS: Yeah, why don't we take a break, please.

MR. WILSON: What do y'all prefer? 10, 15?

MS. WEISGERBER: Ten minutes is fine.

Mike, is that good with you.

THE WITNESS: Yeah, ten-minute break is fine.

MR. WILSON: Okay. Well, we'll break till, let's say, 1:20 central time.

THE WITNESS: Perfect.

MR. WILSON: All right. Thanks

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guys.

(Recess taken.)

MR. WILSON: Yes, I just sent out an E-mail with Exhibit 6, and I'm going to pull that up on the screen share, as well.

(Whereupon, Exhibit 6, Offering Memorandum 122 pages, was marked for identification.)

BY MR. WILSON:

Q. All right. So this is the Offering Memorandum, and I'm looking at the bottom of Page 1 -- I mean, the top of Page 1, I'm sorry.

The Company that was being invested in is Highland CLO Funding, Ltd. Do you see that, Mr. Pugatch?

MS. WEISGERBER: Objection to form.

A. I do. Okay.

Q. And then this document defines Highland, as Highland Capital Management, L.P. Do you see that?

A. Yes.

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Q. Okay. Now, if we go down to, I guess it's Page 8 of this document, and this first full paragraph at the top, it says, "No voting member of the Advisory Board shall be a controlled affiliate of Highland."

Do you see that?

A. I do.

Q. And then it also says that, "It being understood that none of CLO Holdco Ltd., it's wholly-owned subsidiaries, or any of their respective directors or trustees shall be deemed to be a controlled affiliate of Highland, due to their preexisting non-discretionary advisory relationship with Highland."

Do you see that?

A. Yes.

Q. So there were no affiliates of Highland on the Advisory Board, correct?

MS. WEISGERBER: Objection to form.

A. For voting purposes under the document, that is how this reads, correct.

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MR. WILSON: All right. I'm going to turn to the next exhibit. And this is going to be Exhibit No. 7 coming in the E-mail. I'm also going to put Exhibit No. 7 on the screen.

(Whereupon, Exhibit 7, Share Subscription and Transfer Agreement 31 pages, was marked for identification.)

Q. All right. Do you see that? The "Subscription and Transfer Agreement For Ordinary Shares"?

A. Yep.

Q. All right. So what this document says is that, it repeats that Highland HCLF Advisory Ltd. is the portfolio manager. Highland CLO Funding Ltd. is the fund, and CLO Holdco Ltd. is the existing shareholder.

And if we go down to the bottom half of this page, it says that HarbourVest was acquiring its shares in this investment from CLO Holdco, correct?

A. Yes.

MS. WEISGERBER: Objection to

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form.

Q. And prior to the date of this document, which I believe is November 15, 2017, CLO Holdco held 100 percent of the shares of HCLOF, correct?

MS. WEISGERBER: Objection to form, foundation.

A. I don't recall. I know they were the largest, the largest investor. I don't recall if it was 100 percent.

Q. Well, if you look at the chart below Paragraph A, it says that CLO Holdco Ltd. immediately prior to the placing on 100 percent share percentage.

Do you have any reason to disagree with that?

A. No.

MS. WEISGERBER: Objection to form.

Q. All right. Now, below CLO Holdco Ltd., these are the five HarbourVest entities that have filed proofs of claim in this bankruptcy, correct?

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MS. WEISGERBER: Objection to form.

A. Those are the five HarbourVest entities with a direct investment in HCLOF.

Q. And each one of those entities has filed a proof of claim in this bankruptcy, correct?

A. Yes.

Q. And the largest -- I think we discussed this earlier, but Dover Street IX is the largest of those investors, with a 35.49 percent share percentage, correct?

MS. WEISGERBER: Objection to form.

A. Correct.

Q. And if you take the total of those investments of the HarbourVest entities, you get a 49.98 percent total. Is that your understanding?

MS. WEISGERBER: Objection to form.

A. I know it has 49 percent, and some percentage. I'll take your math as

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correct.

Q. And 49.98 percent is larger than the next largest shareholder, which is CLO Holdco which is 49.02 percent, correct?

MS. WEISGERBER: Objection to form.

A. In taking all of the HarbourVest entities, collectively, yes, correct.

Q. And so I want to go back to earlier where we saw in documents filed by HarbourVest, where it refers to itself as a passive investor. What do you, I apologize if I've already asked you this question, but what do you mean by passive investor?

A. Meaning we were a minority investor in HCLOF. HCLOF was fully controlled by Highland as the investment manager. So HarbourVest did not have any governance, rights, or control as it related to the ongoing investment management and decisionmaking of HCLOF.

Q. HarbourVest has the largest percentage of the shares of any of these

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investors, correct?

MS. WEISGERBER: Objection to form.

A. Taken collectively, yes.

Q. And HarbourVest owned one of the two spots on the Advisory Board, correct?

MS. WEISGERBER: Objection to form.

A. Correct.

Q. And if you look down below the HarbourVest entities on this chart, you see that Highland Capital Management, L.P. is purchasing a .63 percent interest, correct?

MS. WEISGERBER: Objection to form. The document speaks for itself.

A. According to the document, yes.

Q. Do you have any reason to disagree with that document?

MS. WEISGERBER: Objection to form.

A. I do not.

MR. WILSON: All right. I'm going to stop that screen share. I'm

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going to E-mail out the next exhibit. This was Exhibit 8 that I just sent, and I'll pull it up on the screen share.

(Whereupon, Exhibit 8, E-mail 08/15/2017, was marked for identification.)

Q. Now, I'll represent to you that I received this document this morning from your counsel. Do you recognize this E-mail? Have you seen it before?

A. Yes, I have.

Q. And this E-mail is sent by Brad Eden. I think you mentioned that he was one of the representatives that was involved in the pre-investment discussions with Highland?

A. Correct.

Q. And I think you told me that Dustin Willard was involved in those discussions on the HarbourVest side, correct?

A. Correct.

Q. And so this is an E-mail sent on

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August 15, 2017 from Brad Eden to Dustin Willard. Are you familiar with Thomas Surgent?

A. Yes.

Q. Was he involved in those discussions with you and HarbourVest as well?

A. In some of those discussions, yes.

Q. Okay. So when it says, "Dustin, attached is a legal summary. Of course, Thomas is available to answer any follow-up questions." Do you know if Thomas was consulted with any follow-up questions?

A. I recall --

MS. WEISGERBER: Objection to form.

A. -- having follow-up conversations with Highland, I don't -- around these legal summaries. I don't recall with whom.

Q. Okay. And just to show you the attachment that's referenced in the

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E-mail, this says that SEC financial crisis matter crusader, Terry, Daugherty and UBS. So and then I guess these are -- this is information provided by Highland to HarbourVest regarding these matters. Why were these particular matters addressed in this E-mail, to your knowledge?

MS. WEISGERBER: Objection to form and foundation.

A. These were all outstanding litigation matters that we had become aware of in connection with our diligence that we asked for a further explanation from Highland on the underlying substance.

Q. Now, did you become independently aware of these in the course of your due diligence, or were these brought to your attention by Highland first?

A. I don't know.

MS. WEISGERBER: Objection to form.

Q. You don't know?

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A. (Nods.)

Q. Okay. And particularly with respect to Mr. Terry, is it your opinion that there are any material misrepresentations made in this summary?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

Mike, to the extent you have an answer that does not infringe on conversations with counsel, you can provide it.

A. Yeah, I would say our understanding or interpretation of that, or the answer to that question would be based on conversations with counsel.

Q. Well, this document was provided to you in the course of the discussions prior to HarbourVest's investment, and you've stated that Highland, or you've taken the position that Highland made material misrepresentations to HarbourVest, in the course of these discussions.

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Does this document evidence those material misrepresentations?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

A. Yeah, same answer as previous.

Q. Well, I'm not asking you for a legal conclusion. I'm asking you are there misrepresentations in this document that you claim Highland made?

MS. WEISGERBER: Same objections.

I think misrepresentations calls for a legal conclusion regarding legal misrepresentations, actionable misrepresentations. So if he doesn't have any non-privileged testimony to give, he can't give any testimony.

MR. WILSON: Well, I'm here today to investigate HarbourVest's claim and one of the basis of HarbourVest's claim is misrepresentation. So I'm trying to figure out what those

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misrepresentations were.

And I would ask that the witness tell me if there's a misrepresentation in this document that was provided in this E-mail.

MS. WEISGERBER: Same objections.

Mike, if you have a general understanding of, generally, misrepresentations that HarbourVest believes were made in connection or regarding the Terry litigation, et cetera, you can provide that information.

THE WITNESS: Yeah, sure.

A. So in general, my understanding and the way that Highland had characterized the ongoing litigation with Mr. Terry was that it was nothing more than an employment dispute with a former employee and that, you know, the arbitration -- well, actually, it was before the Arbitration Board, but the ongoing litigation had no impact, bearing,

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or ultimate result on the underlying CLOs that Highland managed, including the Acis CLOs.

Q. So you're saying that Highland --

MR. MORRIS: John, I'm sorry to interrupt. Before you go on, somebody with the initials DSD just joined the deposition. Can you please identify yourself?

MR. DRAPER: This is Douglas Draper. I just changed machines.

MR. MORRIS: Okay. No problem, Doug. Thank you.

BY MR. WILSON:

Q. So, and I'm not trying to put words in your mouth, but is the gist of what you're telling me that Highland represented that this was a minor dispute with a former employee and it would not affect its CLO business?

A. Correct.

MS. WEISGERBER: Objection to form.

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A. Correct.

Q. Well, are there any more specific E-mails or written communications, that you're aware of, that would contain misrepresentations by Highland to HarbourVest?

MS. WEISGERBER: Objection to form.

Are you asking about from today's production, or are you asking about just, in general?

MR. WILSON: Well, you produced two E-mails to us today. I'm just asking if there's anything else he's aware of where there's written misrepresentations from Highland to HarbourVest.

MS. WEISGERBER: Mike, if you have an answer separate from conversations with lawyers, et cetera, you can certainly answer.

A. Yeah, my understanding of the documents I reviewed that were part of the production to you earlier today, there is

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another document that would also include misrepresentations on the part of this, the Terry lawsuit and ultimate impact on the CLO business.

BY MR. WILSON:

Q. And what document is that?

A. That was the E-mail, E-mail with an attachment around a response to a Wall Street Journal article and some of the content in the E-mail itself.

Q. Okay. We'll look at that one.

What was the -- HarbourVest had seen the Terry Arbitration Award, correct?

MS. WEISGERBER: Objection to form.

Q. Prior to making its investment in HCLOF?

A. We were aware of the existence and the outcome of the Arbitration Award.

Q. Had you read the Arbitration Award?

A. No.

Q. Well, how did you know the substance of the Arbitration Award without

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reading it?

MS. WEISGERBER: Objection to form.

A. We were informed by Highland of the outcome of the ongoing litigation and the outcome of the Arbitration Award.

Q. Was that part of the documentation that you requested Highland provide you to continue your due diligence, before making the investment?

MS. WEISGERBER: Objection to form.

A. We certainly requested more color around the outcome of that, and any impact that it could have to HCLOF or the ongoing viability of Highland's CLO business.

Q. And what, what were you provided with respect to the Terry Arbitration Award?

MS. WEISGERBER: Objection to form.

A. The existence of that award, the quantum of that award, the judgment of

just under $8 million in connection with that award. That was the information that was disclosed at -- and represented as a settlement or, you know, arbitration ruling, in connection with the employee litigation, wrongful termination suit.

Q. So did HarbourVest not request a copy of the Arbitration Award to review?

MS. WEISGERBER: Objection to form.

A. We did not specifically, no.

Q. And so, to this day, have you read the Arbitration Award?

A. I have not.

MS. WEISGERBER: Objection to form.

Q. You have not?

A. I have not.

MR. WILSON: Okay. I think my last E-mail went out with Exhibit 9 on it. I will pull that up.

Q. Can you see that on the screen share?

A. Yes.

(Whereupon, Exhibit 9, 11/29/2017 E-mail with cover letter Highland Capital Management, was marked for identification.)

Q. Okay. So I think this is out of order, but this should have been first in the exhibit. But this is an E-mail from Hunter Covitz to Dustin Willard, Michael Pugatch and Nick Bellisario, carbon copies to Trey Parker and Brad Eden.

And Trey Parker and Brad Eden are Highland affiliates, right?

A. Yes.

Q. And we've talked about Dustin Willard. Who's Nick Bellisario?

A. He was another member of the HarbourVest team.

Q. And was he on the, the four-member board that you talked about earlier, that made the investment decision?

A. No, he was the junior member of the investment team that I alluded to.

Q. Okay. And this, this E-mail

came out about two weeks after the HarbourVest investment, correct?

A. Correct.

Q. And it's your opinion or position that this E-mail contains misrepresentations that Highland made to HarbourVest?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

A. Yes.

Q. And there was a Wall Street Journal article that had come out shortly before this E-mail, correct?

A. Correct.

Q. And how did you became aware of that Wall Street Journal article?

A. I certainly would have seen it. I may have been sent it separately by Highland, I don't recall.

Q. You don't recall if you saw it independently or Highland telling you about it?

A. I don't.

Q. And what did you -- what was your reaction to receiving these E-mails from Highland regarding that article?

MS. WEISGERBER: Objection to form.

A. The article or the accusations in the article were something that required more explanation from our perspective.

Q. And attached to this E-mail was -- we just scrolled through it a second ago -- but a letter from James Dondero that was sent to the editor-in-chief of the Wall Street Journal, Mr. Gerard Baker, on November 28th.

And did you read this attachment?

A. Yes.

Q. And did this attachment to this E-mail aleve your concerns that you had regarding the article?

MS. WEISGERBER: Objection to form.

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A. I wouldn't say alleviated the concerns but certainly provided an explanation or refute to some of the claims made in the, in the article.

Q. And do you contend that this letter that was written to Gerard Baker and provided later to HarbourVest was a material misrepresentation?

MS. WEISGERBER: Objection to form.

Don't answer that, Mike. It calls for a legal conclusion.

MR. WILSON: I'm asking for his understanding.

Q. Do you contend that there's misrepresentations in this letter?

MS. WEISGERBER: Material misrepresentations absolutely calls for a legal conclusion, John.

MR. WILSON: Well, I've shortened it to misrepresentations. So I just want to know if he thinks there's anything that's misrepresented in this letter.

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MS. WEISGERBER: Same objections.

Mike, if you have an understanding, separate from conversations with lawyers, you can answer.

A. I would need to reread the letter to definitively answer that outside of conversations with counsel.

Q. But to be clear, this letter was issued two weeks after HarbourVest's investment, correct?

A. Correct.

MS. WEISGERBER: Objection; asked and answered.

MR. WILSON: I'm going to now send out the next exhibit, which is going to be Exhibit No. 10.

(Whereupon, Exhibit 10, 2004 Examination of Investor in Highland CLO Funding Ltd. 10/10/2018, was marked for identification.)

MR. WILSON: It just went through. So I'm going to pull it up on my screen share.

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So this Exhibit 10, the document I received this morning, filed in the Acis bankruptcy, it looks like, well, let's see, dated in, dated October 10, 2018.

BY MR. WILSON:

Q. Have you seen this document before?

A. Yes.

Q. And it's a motion for 2004 Examination of Investor in Highland CLO Funding, Ltd., correct?

A. Sorry. Was there a question, John?

Q. Yeah. I was just asking you to confirm that this was the motion for 2004 Examination of Investor in Highland CLO Funding?

A. Yes.

Q. And so if I scroll down to Paragraph 6, which is on, it looks like it's on Page 4. In the second sentence, it says that "Although HCLOF/ALF was a one

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time wholly-owned by an affiliate of Highland, it did an offering memorandum in November of 2017 and as a result, is now owned 49.985% by certain affiliates of a large investor and manager of private equity funds."

And that's defined as investor. So the Investor is the HarbourVest entities collectively, correct?

A. Correct.

Q. All right. And then the next sentence, says that "Despite its large ownership percentage in HCLOF in the alleged millions in losses that will result if the Acis CLOs are not reset to make them consistent with prevailing market conditions the Investor has not yet appeared in this case or taken any position in this bankruptcy case."

Do you see that?

A. I do.

Q. Is that correct?

MS. WEISGERBER: Objection to form.

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A. Is what correct?

Q. Well, I guess, I'm most concerned with this last part of the sentence. It starts with "The Investor has not yet appeared in this case or taken any position in the bankruptcy case."

Do you agree with that?

MS. WEISGERBER: Objection to form.

Mike, if you want to look at the whole document, you're welcome to. This is not a document that's a HarbourVest-prepared document.

BY MR. WILSON:

Q. Maybe a better way of asking the question is: As of the date of this document, which was in October of 2018, had HarbourVest appeared in the Acis bankruptcy?

A. No, we did not.

Q. And had they asserted any positions regarding the Acis bankruptcy?

A. Not through the court.

MS. WEISGERBER: Objection to

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form.

Q. Okay. Had Highland encouraged HarbourVest to participate in the Acis bankruptcy?

MS. WEISGERBER: Objection to form.

A. No.

Q. They did not?

MS. WEISGERBER: Objection to form.

Q. Highland did not encourage HarbourVest to participate in the Acis bankruptcy?

A. When you say "participate," can you define that, please.

Q. Well, appear in the case, as stated in this motion.

A. No, they had not.

Q. Did Harbour -- I'm sorry -- did Highland keep HarbourVest apprised of the events that occurred in the Acis bankruptcy?

MS. WEISGERBER: Objection to form. I'm just going to restate my

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objection to the extent you're asking questions about HarbourVest. This is Mr. Pugatch answering, based on his knowledge.

A. We were kept informed from time to time throughout the Acis bankruptcy proceeding.

Q. Well, did you, in fact, have weekly conference calls with Highland representatives regarding the Acis bankruptcy?

MS. WEISGERBER: Objection to form.

A. I don't recall them being weekly, no.

Q. You can agree with me you participated in the conference calls with Highland regarding the Acis bankruptcy?

A. Yes.

MS. WEISGERBER: Same objection.

Q. And on what, on what --

MR. WILSON: Sorry. Strike that.

Q. With what regularity would you

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estimate those conference calls occurred, if it's not weekly?

MS. WEISGERBER: Objection to form.

A. From memory, maybe once, once a month on average. Sometimes more frequently, sometimes less frequently.

Q. Did Highland provide you with documents and evidence that were filed in the Acis bankruptcy?

MS. WEISGERBER: Objection to form.

We're really starting to get pretty far afield here, John, from HarbourVest. You know, I'm not sure where you're going with this. This is a settlement motion that's teed up for the court.

You're welcome to keep going, but at some point we're going to cut it off.

MR. WILSON: Well, I think -- I don't think I'm going to go too far down this path, but I think this

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directly relates to the claims that HarbourVest has made. But I'll repeat my question.

BY MR. WILSON:

Q. Did Highland provide HarbourVest with documents and evidence that were filed in the Acis bankruptcy?

MS. WEISGERBER: Objection to form.

A. I don't recall what documents Highland may have provided to us, at that point in time.

Q. I don't want you to recall specific documents that were provided, but did, did Highland provide documents from the Acis bankruptcy to HarbourVest?

MS. WEISGERBER: Objection to form. Asked and answered.

A. I don't recall.

Q. You don't recall?

A. (Nods.)

Q. Would you dispute that between 2018 and 2019 that Highland provided over 40,000 pages of documents related to the

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Acis bankruptcy to HarbourVest?

MS. WEISGERBER: Objection to form, foundation.

A. I don't know and I don't recall.

Q. And the Acis plan became effective on February 1st, 2019. Is that your understanding?

A. I believe so, yes.

Q. And do you -- I asked you this earlier, but I'm going to ask again. Do you have any understanding of what the value of HCLOF was, at that date?

A. I don't recall.

MS. WEISGERBER: Objection to form.

Q. You don't?

A. I don't recall, no.

Q. And there was an injunction put in place in the Acis bankruptcy that prevented certain actions with respect to HCLOF, correct?

MS. WEISGERBER: Objection to form, foundation.

MR. MALONEY: Join.

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A. Yes.

Q. Now, I'm going to go back up to Paragraph 2. This says that Acis LP manages the Acis CLOs, that certain portfolio management agreement between Acis, and then it goes on. So what are the Acis CLOs, as it relates to the investment that HarbourVest made?

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

MS. WEISGERBER: Objection to form.

A. The Acis CLOs -- or HCLOF owned equity in certain of the Acis CLOs as a portion of its investment portfolio.

Q. And I think you were trying to distinguish earlier between who the portfolio manager was. And that would depend on whether it was an Acis CLO or a Highland CLO; is that correct?

MR. MALONEY: Objection to form.

MS. WEISGERBER: Objection to form, misstates testimony.

A. I was referencing the portfolio

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manager of the underlying CLOs, yes.

Q. But we can agree that Acis had responsibility for managing at least a portion of HCLOF, correct?

A. Highland --

MR. WILSON: Objection to form.

MR. MALONEY: Objection to form as well, foundation, and legal conclusion.

(Reporter clarification.)

A. It's my understanding it's Highlands' subsidiaries, yes.

Q. Okay. Well, I'm going to go down to Paragraph 4, at the top of your screen here where it says, "Recently William Scott, the director of HCLOF, testified that he wants to reset the Acis CLOs to bring them in line with current market interest rates, that the inability to do the reset is causing damages to HCLOF in the amount of approximately $295,000 per week."

Is that an accurate statement?

MS. WEISGERBER: Objection to

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form and foundation.

MR. MALONEY: Mark Maloney. Object to form and foundation.

A. I don't know. You'd have to ask William Scott.

Q. Well, were you aware, I mean, there's a citation to a, well, I don't know if there's a citation on this one. But it says that he recently testified. Were you aware that he testified that he wanted to reset the Acis CLOs?

MS. WEISGERBER: Same objection. We're really getting far afield.

MR. WILSON: I'm just asking if he was aware that this statement occurred.

A. At some point in time, yes, I became aware of that.

Q. Okay. Do you agree that the inability to do a reset was causing damages in the amount of $295,000 per week?

MS. WEISGERBER: Objection to form and foundation. This is not a

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HarbourVest-prepared document.

MR. WILSON: Well, I understand that. I'm just asking if he agrees with it.

A. I don't have enough information to assess that, specifically the $295,000 per week number.

Q. I want to go down to Paragraph 7 of this document, and this is going to be at the top of Page 5. It says "Mr. Ellington also testified that because it would be putting in additional capital in connection with any reset CLOs, the Investor," and we discussed that that's HarbourVest, "had the ability to start 'calling the shots' and dictate the terms of any reset transactions."

Do you agree with that?

A. No.

MS. WEISGERBER: Objection to form.

Q. I want to go down to Paragraph 9.

It says, "The Trustee also needs

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information regarding whether the Investor presently has any concerns about pursuing reset transactions with the Reorganized Acis and Brigade, under the plan now that Acis has been able to successfully serve as the portfolio manager for the Acis CLOs on a post-petition basis, and there are no impediments to the ability of the Reorganized Acis and Brigade to pursue a reset on the Acis CLOs."

Do you know whether the Investor had any concerns about pursuing a reset?

MS. WEISGERBER: Objection to form, foundation.

A. The context of a reset or refinancing of the various CLOs in HCLOF was part of the original investment thesis. So there would not have been concerns about the ability to do so. Our concerns were more in the inability to do so, as a result of the Acis bankruptcy.

Q. But here, you've got the Trustee representing in Paragraph 5, that according to the Trustee's Second Amended

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Joint Plan, it provides for such a reset to be performed by the Reorganized Acis and supervised by Brigade Capital Management.

And it appears to me that the Trustee is trying to get the Investor's position on whether a reset should be pursued. And I'm just asking you whether HarbourVest objected to a reset at this time?

MS. WEISGERBER: I'm going to object to all of the colloquy before. I'm going to object to any extent Mike's being asked about what the Trustee wanted or viewed. If you want to ask your question in isolation, go ahead.

Q. What was HarbourVest's position regarding a reset, as of the date that this was filed, and I'll look again, October 10, 2018?

MS. WEISGERBER: Objection to form. Objection to the extent it's asking HarbourVest's position. And I

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cannot conceive how this is relevant to the 9019 motion before the court right now.

Nonetheless, Mike, if you have an answer, on behalf of yourself, you can answer.

A. HarbourVest was a passive minority investor in HCLOF. It had no ability to control the underlying portfolio management or ability to reset, refinance, or call in any of the equity of the underlying CLOs. That was all under the purview of Highland.

Q. Did you understand that Mr. Ellington had given sworn testimony that the Investor is the party calling the shots for HCLOF, with respect to any reset transactions?

MS. WEISGERBER: Objection to form.

A. I did became aware of it, yes.

Q. When did you become aware of that?

A. At some point subsequent to that

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testimony being given.

Q. But was it when you read this motion that we're looking at as Exhibit 10?

MS. WEISGERBER: Objection to form.

A. It may have been. I don't recall the exact time or medium that I became aware of that.

Q. Was a deposition given as a result of this motion?

MS. WEISGERBER: Objection to form. If you have the whole document, Mike, that may make sense.

MR. WILSON: Well, this motion at the top says it's a Motion for 2004 Examination of Investor. And then attached to this motion are some document requests, and then deposition topics for a corporate representative of the Investor, and then a proposed order.

BY MR. WILSON:

Q. Do you recall whether a

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deposition was given, after this motion was filed?

A. Yes.

Q. And who was the designated deponent?

A. I was.

Q. And were documents produced, as a result of this?

A. Yes, there were.

Q. And were you asked at that deposition what the Investor's position on a reset was?

MS. WEISGERBER: Objection to form.

If you recall.

A. I don't recall specifically that question being asked.

Q. Well, do you know what the Debtor's position -- I'm sorry, the Debtor's -- the Investor's position on a reset was as of that day?

MS. WEISGERBER: Objection to form. Asked and answered.

A. I would just say again, in

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general, the original investment thesis here was predicated on a refinancing reset of the various CLOs, and we were not in control as a passive minority investor here to --

Q. Well, you said you weren't in control, but what would HarbourVest's preference have been?

MS. WEISGERBER: Objection to form.

A. I do not recall.

MS. WEISGERBER: If you recall.

A. I don't recall the specifics around what Acis CLO were referring to here or what the specific implications of a reset were at that time; but regardless, that was a decision for the investment manager of HCLO.

Q. But was it your opinion, your personal opinion, that a reset was appropriate?

MS. WEISGERBER: Objection to form.

A. Again, we were not the portfolio

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manager of HCLOF. We were not in control of those decisions or making recommendations on those decisions. That was the delegated authority of Highland, as the investment manager.

Q. I'm not asking for that. I'm asking for your personal feelings toward a reset.

MS. WEISGERBER: Same objection. He's only answering on behalf of himself, and it's been asked and answered three times since.

MR. WILSON: Well, he hasn't answered the question. He's just told me they don't have the authority to do the reset.

MS. WEISGERBER: And he told you the other information he'd be required to even have an opinion on it. So same objection stands. It's not a specific enough question for him.

Mike, you're welcome, if you have, if you have an answer, you're welcome to give it.

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A. Yeah, the investment guidelines of HCLOF, from the documents that we signed at the time we entered into the transaction, laid out the specific, again, investment guidelines that HCLOF would be guided under, including the opportunity to refinance or reset various CLOs over time, in accordance with Highland's, you know, expectations and ultimate decision to do so.

Q. But did you believe, at this time, that a reset was appropriate?

MS. WEISGERBER: Objection to form. This is asked and answered several times now, I think we should move on. He's given you an answer.

MR. WILSON: Well, I want to know what his personal opinion was about whether the reset was appropriate.

A. What reset are you referring to?

Q. A reset as of October 10, 2018. At that time, did you believe that a reset was appropriate?

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A. A reset of what?

MS. WEISGERBER: Same objection.

Q. A reset as been discussed all through this motion, the same reset we're talking about.

MS. WEISGERBER: Objection. Same objections. I just don't see how he could possibly answer this vague question.

Q. Okay. So William Scott, director of HCLOF, testified that he wanted to reset the Acis CLOs because if they don't, they are losing $295,000 a week.

Did you think that a reset was appropriate in line with what Mr. Scott believed?

MR. MALONEY: Objection to form, foundation.

MS. WEISGERBER: Same objections. And asked and answered numerous times.

A. We were not managing the portfolio. We were an investor in a

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company, an investment company that was managing this. We were not, I was not proximate enough to any of the underlying happenings of the look through CLO positions of HCLOF to have an informed view on this, at this time.

Q. Is your testimony that you did not have an opinion as to whether the Acis CLO should be reset in late 2018?

MS. WEISGERBER: Objection to form. Misstates testimony.

A. My view is that the original investment guidelines here called for a reset or refinance of the CLOs and that Highland was subsequently in full control of whether or not to pursue this, and we, HarbourVest, as an investor had no ability to object or to force that on a go-forward basis.

MR. WILSON: Objection. Nonresponsive.

Q. I want to know your personal opinion of whether you thought a reset was appropriate in October of 2018.

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MR. MORRIS: Objection to the form of the question. That's been asked and answered.

MR. WILSON: He has yet to give his answer to --

MR. MORRIS: He just told you he didn't have enough information. He just told you that, crystal clear.

MR. WILSON: Well, I'm not going to argue with you, John, but I just want an answer to my question.

His answer, he wouldn't agree with my, with my summation that he had no opinion, so I just want to know what his opinion is.

MS. WEISGERBER: Same objections.

You're not giving him enough information to answer the question, and at this point, it would be speculation. We can just keep going in circles on this, but your --

MR. WILSON: His opinion would be speculation?

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MS. WEISGERBER: He said that, he actually testified at some point that he doesn't recall specifics of the time, so that was another piece of the puzzle.

I mean, I don't want to be coaching the witness or giving testimony here, but I think you're not listening to the things he's saying, John, just because you don't like it.

BY MR. WILSON:

Q. Mr. Pugatch, did you have an opinion, in October of 2019, about whether the Acis CLOs should be reset?

MS. WEISGERBER: Objection to form.

A. I don't recall any definitive opinion I would have had, but as stated, was not proximate enough to have an informed opinion, in any event.

Q. And to your knowledge, have the Acis CLOs ever been reset?

MS. WEISGERBER: Objection to form, foundation.

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A. I do not believe that any of the Acis CLOs were ever reset.

Q. All right. So who negotiated this claim, the settlement of this claim on behalf of HarbourVest?

A. I did.

Q. And who negotiated for the Debtor?

A. Jim Seery.

Q. And when did those negotiations begin?

A. It started sometime in November, I believe.

Q. And are you aware that Jim Seery has ever taken the position that the HarbourVest claim was worthless?

MS. WEISGERBER: Objection to form, foundation.

A. No, I'm not aware of that.

Q. Has Jim Seery ever offered $5 million to settle the HarbourVest claim?

A. Not to my knowledge.

MS. WEISGERBER: Objection to

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form.

MR. WILSON: I'm going to send out Exhibit 11.

(Whereupon, Exhibit 11, Declaration of John A. Morris in Support of the Debtor's Motion For Entry of an Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions, 82 pages, was marked for identification.)

BY MR. WILSON:

Q. I want pull this up on the screen share. This Exhibit 11 is the Declaration of John Morris in Support of the Debtor's 9019 Motion, bears Document 1631. And attached to this exhibit is a trim cut copy of the Settlement Agreement executed December 23, 2020.

And the Settlement Agreement has Paragraph 1, Settlement of Claims, that HarbourVest is going to receive a $45 million unsecured, general unsecured

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claim, and a $35 million subordinated claim.

And then Part B of that paragraph states that HarbourVest is going to transfer all its rights, titles, and interests to its investment in CLOF to the Debtor or its nominee.

Is that your understanding of the general terms of this settlement?

MS. WEISGERBER: Objection to form.

A. Yes, it is.

Q. Okay. And also in Paragraph 5, Each HarbourVest party agrees that it will vote all of HarbourVest claims held by such HarbourVest party to accept the plan.

And I won't read all of that. But the gist of this paragraph is that HarbourVest is going to vote for the Debtor's proposed plan; is that correct?

MS. WEISGERBER: Objection to form.

A. Yes, correct.

Q. And how did that term come to be

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in this Settlement Agreement?

MS. WEISGERBER: Objection to form.

A. I believe it was put there as part of the drafting of the ultimate agreement to the fund.

Q. Well, whose suggestion was it that it be added to the drafting?

MS. WEISGERBER: Objection to form.

A. I believe that it came from Debtor's counsel, as they took the lead on drafting the documentation here.

Q. Did Jim Seery ever tell you that it was important to him that HarbourVest vote in support of the plan?

MS. WEISGERBER: Objection to form.

A. I don't recall that ever being discussed. Certainly it was not the prominent feature of any of the discussions or negotiations that I ever had with Jim.

Q. Okay.

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MR. WILSON: I'm going to take a ten-minute break, and I think I'm almost ready to wrap up. So I want to stop my screen share. And let's, well, let's start back at 2:30, and I think I'll be quick. Thank you.

(Recess taken.)

BY MR. WILSON:

Q. Mr. Pugatch, earlier you testified that consistent with your declaration you filed that as of August 31, 2020, the value of HCLOF was $44.5 million. And then if we look at -- I don't remember which --

Okay. So this would have been Exhibit 7. I'll do a share screen.

As of November 15, 2017 these shares were purchased at $1.02 and change apiece, and there were a total number of 143 million shares.

Was the value of this investment roughly $150 million, as of November 15, 2017?

MS. WEISGERBER: Objection to

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form. Foundation.

MR. MALONEY: Join.

MS. WEISGERBER: I don't know, Mike, if you're comfortable doing that math or what.

A. Yes, approximately that's correct.

Q. Okay. And you know, and I've read your papers and you talk about attorneys' fees that you say weren't appropriate to be charged to HCLOF and that part of it, but as to the loss of value of the actual investment, what's your understanding of what led to that?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

Mike, to the extent you have a nonlegal opinion on that, that's not based on conversations with counsel, you can answer.

A. Yeah, I think a lot of the value erosion was due to the inability to refinance, reset a number of the

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underlying CLOs that was part of the original investment thesis here, largely as a result of the ongoing litigation, that Highland was involved in, and the subsequent Acis bankruptcy.

Q. And so during the period of time when the injunction prohibited certain actions with respect to this investment, is it your opinion that this investment was losing value?

MR. MALONEY: Objection.

MS. WEISGERBER: Objection to form.

A. Can you repeat the question, John?

Q. Well, I guess I want to know, like, in a, on a timeline kind of basis, do you think that the significant reduction of value occurred prior to or after the confirmation of the Acis plan on February 1, 2019?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

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You can give your lay opinion, if you have one, Mike.

A. I think it's all been as a result of the events leading up to the Acis bankruptcy, including the inability to refinance or reset the CLOs which would have been to the benefit of the CLO equity holders including HCLOF.

Q. And so what, what was the cause of the inability to reset?

MS. WEISGERBER: Same objections: form, foundation, legal conclusion.

If you have a non-privileged answer, Mike, go ahead.

A. Yeah, my understanding was originally the TRO, preventing Highland and HCLOF from pursuing that, and then subsequent to the Acis bankruptcy ruling, a similar injunction that remained around the inability for the equity holders of those CLOs to redeem or refinances or reset.

Q. So do you -- is there any

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component, in your opinion, of the loss of value of these investments due to portfolio mismanagement?

MS. WEISGERBER: Objection to form, foundation, legal conclusion, or expert opinion, calling for speculation.

If you have a view, Mike.

A. Yeah. Can you be more specific with the question, John?

Q. Well, I'll ask it a different way.

Do you think that portfolio mismanagement was a portion of the cause of the reduction in value?

MS. WEISGERBER: Same objection.

A. I can't speculate as to, you know, the underlying management decisions around the CLOs, but what I do know is that the mismanagement and misrepresentations at the HCLOF level, that would ultimately result in the Acis bankruptcy and subsequent to that, the TRO and the inability to refinance or reset

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that has been the, far and away, the largest contributor to loss of value within the portfolio.

Q. One of the allegations that HarbourVest has made is that Highland improperly changed the portfolio manager. Is it your opinion that if that had not been done, the portfolio manager had not been changed at the inception of HarbourVest's investment, that that would have preserved any value of this fund?

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

MS. WEISGERBER: Same objection. Calling for speculation, hypothetical lay opinion.

If you have testimony, go ahead, Mike.

A. Sorry, could you just repeat the question, John? I want to make sure I'm answering it correctly.

Q. I guess I just want to know, and I think you kind of hinted at this a little bit earlier today, but I guess what

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I really want to know is do you think that the particular portfolio manager made a difference in the loss of value that HCLOF suffered?

MS. WEISGERBER: Same objections.

A. Again, it sounds like you're asking a different question there than what I thought I understood your question to be initially. What I would say to that is the decision originally to change the portfolio manager, and ultimately the events that took place following the Arbitration Award for Mr. Terry, resulted in the subsequent Acis bankruptcy, which in turn has led to the destruction of value, because of the inability to refinance or reset, the underlying CLOs.

Q. So HarbourVest is not alleging that the portfolio manager made any particular decisions or participated in any mismanagement that led to reduction in value?

MS. WEISGERBER: Objection to

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form.

A. When you're asking about portfolio manager, are we referring to the portfolio manager at the underlying CLO level or at the HCLOF level? I think there are two different levels here of portfolio management.

Q. Well, I'm talking about the portfolio manager, and you can tell me which one it is, but which portfolio manager has the ability to, to impact the performance of these funds?

MR. MORRIS: Objection.

A. If you're referring to HCLOF, the --

MS. WEISGERBER: Objection to form.

A. -- investment manager, or the portfolio manager of HCLOF has the ability to drive value creation by virtue of its equity position in the underlying CLOs.

Q. Well, which portfolio manager makes the day-to-day decisions about selling assets, trading assets, that, that

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I guess --

A. If you're referring to underlaying credits, that would be the portfolio manager in each of the individual CLOs. The impact in value to the equity investment in the CLOs is a decision at the HCLOF level, where the majority of that value erosion has resulted from the inability to refinance or reset those CLO entities.

Q. And that's what we're talking about when you said that they, that Highland changed the portfolio manager, you're talking about at the HCLOF level, right?

MS. WEISGERBER: Objection to form.

A. Well, I was responding to the question that I thought you asked. I wasn't necessarily stating that.

Q. I guess all I'm really trying to do here is just understand HarbourVest's position. And it sounds to me, and correct me if I'm wrong, it sounds to me

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that what you're saying is that the diminution of value wasn't attributable to poor investment decisions by a portfolio manager, as much as it was the consequences in the Acis bankruptcy of the change in portfolio manager; is that fair?

MS. WEISGERBER: Objection to form. Misstates testimony.

A. Yes, it is. That is my general understanding, yes.

MR. WILSON: Okay. No further questions.

MR. MORRIS: All right. Well, thank you very much.

THE REPORTER: Does anybody have any other questions?

MR. KANE: Yes. This is John Kane with CLO Holdco. I'll jump on video. I've got some questions, but I'm going to be relatively short. If anybody else has a little bit heavier schedule, let me know.

All right. I'll take that as a go-ahead.

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EXAMINATION

BY MR. KANE:

Q. This is John Kane. I represent CLO Holdco.

Hi, Mike Pugatch. It's nice to talk to you.

A. Likewise.

Q. I just wanted to briefly confirm. I believe you testified you participated in negotiations that lead to the Settlement Agreement, that is part of the 9019 motion, before the bankruptcy court; is that correct?

A. Correct.

Q. And did you actively negotiate the terms of that Settlement Agreement?

A. Yes.

Q. As in dollar amounts, what the consideration exchanged, how it would work, that kind of stuff, obviously with the assistance of counsel?

A. Yes. All of that. The negotiations were, you know, over the course of a number of weeks and a number

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of conversations directly with the Debtor, with counsel, all-hands calls, et cetera.

Q. Okay. And as part of that in the Settlement Agreement, you say the HarbourVest entities were members in HCLOF are in essence selling their shares to the Debtor, and also in exchange getting some claims back in the Debtor's plan. Is that a fair summary?

MS. WEISGERBER: Objection to form. Compound question.

Q. Let me ask it a different way.

A. Can you re-ask that, please?

Q. Yeah. I'm happy to do that.

Why don't you describe for me how you would summarize that settlement?

A. Largely, as I think you just described it, which was in exchange for, in exchange for the, both the unsecured creditors' claim, and subordinated creditors' claim, that settlement value is in exchange for us transferring the interest in HCLOF to the Debtor, as part of that overall negotiating package.

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Q. And what would you estimate, I going to have to imagine, let me rephrase the question.

Have you guys done kind of an internal best guess of what your unsecured and subordinated claims would be, under the plan, the value?

MS. WEISGERBER: Objection. Objection to form.

A. Just to be clear, John, are you referring to the expected recovery value of our claims?

Q. Yes, sir.

MS. WEISGERBER: Objection to form. Can we just clarify, so you're talking about what they'll recover ultimately? Is that the question, John? I'm confused myself. I just want to be sure I am following.

MR. KANE: Yeah. So I'm asking Mike how much he believes, based on his analysis, that HarbourVest is likely to recover from the $45 million allowed general unsecured claim and

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$35 million allowed subordinated claim, if the settlement is approved and the plan is confirmed.

MS. WEISGERBER: Objection to form.

But you can answer, if you have an answer, Mike.

A. We do have a sense. It's really a range of projected outcomes, as you can imagine, based on the recoveries, largely informed by conversations with the Debtor.

Q. And what is that range of value?

MS. WEISGERBER: Objection to form.

A. Our understanding, again, based on those conversations, is that the general unsecured claim could be valued in a 75 to 80 cents on the dollar recovery. And then a, you know, that the junior class claim is really sort of upside potential, to the extent there is more recovery or more asset value of the estate, for the benefit of creditors over time.

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Q. What is your understanding of the current value of the HarbourVest shares in HCLOF that would be transferred under this Agreement?

A. It's roughly $22.5 million of their value.

Q. So doing a little bit of, you know, back-of-the-table-cloth math, how do you allocate value between the releases that you are receiving and the shares that you are transferring?

MR. KANE: I'm sorry. Let me rephrase that. Let me ask that question differently.

Q. In addition to the claims under the plan, HarbourVest is providing the Debt -- sorry, in addition to the shares that are being transferred, HarbourVest is providing to the Debtor certain releases for its litigation claims; is that correct?

MS. WEISGERBER: Objection to form.

A. Correct.

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Q. So how has HarbourVest allocated value, as far as this Settlement Agreement is concerned?

And to make sure we're on the same page about what I'm asking, HarbourVest is trading a bundle of sticks, right? And there's really two things within that bundle of sticks, and please confirm that's correct, you're trading shares, and in addition, releases; is that right? In exchange you're getting back claims that have a potential future value.

So, how have you allocated value among the shares transferred and the releases that are being granted?

MR. MORRIS: Objection.

MS. WEISGERBER: Objection.

You can go ahead, Mike.

A. Yeah. So ultimately we looked at it as a package, and so it was less about the attribution of value between the two different sticks, as you described it, and more about the overall package value in exchange for the transfer of our

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interest and the release of the claims that we had outstanding as the Debtor.

MR. KANE: Now, I want to turn your attention to what I've included in the chat. You can pull it down pretty easily if you want. But it would be Holdco Depo Exhibit 2. If that would be easier than a screen share, if you'd like, I'm happy to do that as well.

MS. WEISGERBER: Which document is it, John? Because I just can't pull stuff off the Zoom right now.

MR. KANE: Oh, I'm sorry. It's the Settlement Agreement with the attached exhibits. I can share my screen so we're all on the same page.

Just to confirm we're looking at the same thing, here's the Settlement Agreement. There's a docket entry at the top so you can see it, 1631 filed by the Debtor 12/24/20.

This is Exhibit 1 to the Declaration of John Morris in Support

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of Debtor's Motion for an Entry Approving Settlement with HarbourVest.

BY MR. KANE:

Q. Now, this Settlement Agreement is a document that you assisted in negotiations; is that correct?

A. Correct.

Q. Okay. And here in Section 1B, this addresses the transfer of the shares of the HarbourVest entities to a Debtor affiliate; is that correct?

MS. WEISGERBER: Objection to form.

A. Correct.

Q. Is that your understanding, Mr. Pugatch?

A. Yes, correct.

Q. Okay. Thank you. Section 4A, and is this your understanding that HarbourVest is representing that it has the authority to enter into this agreement and to transfer the shares to the Debtor's affiliate if this is approved?

MS. WEISGERBER: Objection to

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form. The document speaks for itself.

Is that a question, John?

MR. KANE: Yeah. I asked if that was his understanding, that this is a representation by HarbourVest that it has the authority to transfer the shares if the Settlement Agreement is approved.

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

To the extent you have a nonlegal conclusion, non-privileged understanding, Mike, you can share that.

A. Yeah, I'm just saying I can only answer that based on conversations with counsel.

MR. KANE: Okay. I won't push that. That's fine.

Q. If we keep going down here as part of this attachment, there's a Transfer Agreement, Exhibit A to the Settlement Agreement. Are you familiar

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with this document?

A. Yes. I've seen it.

Q. And did you assist with the preparation or negotiation of this Agreement?

A. Yes.

Q. Okay. Did you understand that HarbourVest would need the consent of the HCLOF portfolio advisor to effectuate the transfer?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

Mike, if you have a view other than from privileged conversation, you can answer, otherwise do not answer.

A. Yeah, I'm sorry. I can only answer that based on conversation with counsel and the read of the document.

Q. So to make sure I understand that, you have no independent understanding of whether or not consent was required from the portfolio manager before you could effectuate a transfer; is

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that correct?

MS. WEISGERBER: Same objection.

I think you can give your general understanding, but then not get into specific conversations.

A. My understanding of that is based on conversations with counsel, but yes, that is my understanding, John.

Q. Okay. I'm going to highlight a passage here. Can you see this highlighted area? "Whereas, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a shareholder..."

Were you aware of that provision?

MS. WEISGERBER: Objection to form.

A. Yes. It's in the document.

Q. Do you have any understanding of why that provision was included in this agreement?

MS. WEISGERBER: Objection to form. Objection to the extent it

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calls for a privileged conversation.

A. As I answered before, based on conversations with counsel, my understanding is that consent is requiring in connection to transfer.

Q. I'd like to turn your attention now -- this is a document you've seen before during your deposition. This is the member's agreement related to the Company for HCLOF. This is previously produced by the Debtor, that's why it's got the Bates stamp on it. This is dated November 15, 2017.

Are you familiar with this document?

A. Yes.

Q. Do you see on Line 14, in the between, on Page 1 shows Highland HCF Advisor, Ltd. as the portfolio manager?

A. Yes, I see that.

Q. I know there was quite a bit of -- quite a few questions about this earlier, but you understand that Highland HCF Advisor, Ltd. is still the HCLOF

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portfolio manager?

MS. WEISGERBER: Objection to form.

A. Honestly, I don't have -- I don't have enough information to answer that definitively.

Q. Okay. Going back to the Settlement Agreement, there's a reference in here to a defined term, "portfolio manager."

Do you see that?

A. Yep.

Q. And is this the same one that's listed in the Member Agreement, Highland HCF Advisor, Ltd.?

A. I believe that seems to be the position, yes.

Q. Okay. So when we're talking about down here, "Whereas, the Portfolio Manager desires to consent," this consent provision is referring to the same definition of portfolio manager that's included in this Member Agreement; is that correct?

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MR. MORRIS: Objection to the form.

MS. WEISGERBER: Objection -- same objections. Objection to the extent it calls for privileged information.

A. That sounds like a legal conclusion.

Q. I would have thought it was reading, Mr. Pugatch.

A. Well, if you're asking me to definitively confirm that, that sounds like a legal interpretation.

Q. Let me ask that a different way.

Do you understand that the portfolio manager is listed as Highland HCF Advisor, Ltd. in the Member Agreement?

A. Yes.

Q. And in this Transfer Agreement, the portfolio manager is listed as Highland HCF Advisor, Ltd.?

A. Yes.

Q. And those are the same entities?

A. Yes.

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Q. All right. Are you familiar with Section 6 of this Member Agreement?

A. (Nods.)

Q. Have you ever read this document?

A. I have.

Q. Okay. And can you give me your understanding of what must take place under this document for HarbourVest to transfer its shares?

MS. WEISGERBER: Object to the form. Object to the extent it calls for a legal conclusion. Object to the extent it calls for any privileged information or conversations.

Mike, to the extent you have an independent understanding, separate from conversations with counsel, you can answer the question.

A. I would say my understanding of what's required in connection with the transfer is based on conversations with counsel.

Q. Do you believe that the

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HarbourVest entities can transfer its shares without obtaining the consent of the portfolio manager?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for a legal conclusion.

Same instruction, Mike, as to privileged conversations.

A. Again, my view on that would be based on conversations with counsel.

Q. Are you aware of whether HarbourVest provided any notice to other members of its intent to transfer its shares to the Debtor's affiliate under the Settlement Agreement, other than the filing of the 9019 motion?

MS. WEISGERBER: Same objection. But there is a factual question in there if you can answer it, Mike, but no privileged conversation.

A. Yeah, I'm not aware of that.

Q. Did you provide members 30 days after the receipt of notice of HarbourVest's intent to transfer its

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shares to the Debtor's affiliate and provide those members with an opportunity to purchase their pro rata amount of the shares?

MS. WEISGERBER: Same objection.

A. No.

Q. And just to make sure I'm not asking this question in a way that you don't understand what I'm asking: Do you see this highlighted provision here?

A. Yes.

Q. I'm asking whether HarbourVest provided members 30 days after the receipt of a notice letter and an opportunity to purchase their entire pro rata share of the shares proposed to be transferred by the HarbourVest entities?

MS. WEISGERBER: Objection to form. Objection to the extent it calls for privileged conversations or a legal conclusion. Objection to the extent it's asking about one piece of the document.

And you're welcome to look at

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the full document if you'd like, Mike. I think it was one of the ones that was E-mailed as well, or maybe you were able to pull it down.

THE WITNESS: Yeah, no, I was. Thank you.

A. And I'm sorry, John, could you just repeat the question?

BY MR. KANE:

Q. Yeah, sure, absolutely. And I'm not calling for any conversations with counsel. I'm asking you if you know whether HarbourVest did something or not. So let's -- let's keep it to that, because I --

MR. KANE: Erica, I appreciate your concerns, but I really don't want to have any disclosures from Mike about his discussions with you on whether something needed to be done or not. I'm asking simply the facts of whether HarbourVest did it or not.

Q. So did HarbourVest provide notice, 30 days' notice, to the members

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listed under this Member Agreement of HarbourVest's intent to transfer the shares that are the subject to the Settlement Agreement?

A. No.

Q. Has HarbourVest provided any members with a right of first refusal and a cash purchase price for which it would sell its shares instead of transferring those shares to the Debtor or the Debtor's affiliate under the Settlement Agreement?

MS. WEISGERBER: Same objections. Objection to form. Objection to extent it calls for a legal conclusion or privileged conversations, including -- regarding the specifics of that provision.

I don't think that's a purely factual question.

Q. Did HarbourVest offer to sell the shares to the other members? That's not a factual question?

MS. WEISGERBER: Objection --

A. On the basis of that factual

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question, no.

Q. So let me ask this question again, I don't recall if I got an answer or not.

Did HarbourVest affirmatively seek to obtain the consent of Highland HCF Advisors to transfer its shares to the Debtor affiliate under the Settlement Agreement?

MS. WEISGERBER: Same objections. Same instruction regarding the privileged conversation.

A. I mean, as a Highland-affiliated entity, the Debtor, who's obviously the other party here involved in the transfer, you know, was involved in these discussions.

Q. I'm sorry. Would you mind clarifying? Did you say that Highland HCF Advisors was involved in those discussions or the Debtor was involved in those discussions and you assume Highland HCF Advisors was?

MS. WEISGERBER: Objection to

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form. Misstates testimony.

A. Sorry, could you just repeat the question, please, John?

Q. Yes, Mr. Pugatch.

I'm actually just trying to get some clarification from you, because I don't think I understood your answer about -- I had asked just -- again, I don't want any correspondence with your counsel or what your counsel advised, I'm asking: Do you know whether HarbourVest sought written consent from Highland HCF Advisor for its -- or to transfer its shares to the Debtor or the Debtor's affiliate under the Settlement Agreement?

MS. WEISGERBER: Same objection.

A. My understanding is HarbourVest did not explicitly have those conversations or seek that consent.

Q. Okay. Are you aware of whether HarbourVest received any written consent from Highland HCF Advisors, other than what's in the Transfer Agreement attached to the Settlement Agreement?

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A. I am not.

MS. WEISGERBER: Same objection.

Q. Do you know if HarbourVest has any written consent? Not just to seek it, but do you know if HarbourVest has a piece of paper, other than the transfer agreement, in which Highland HCF advisors provided its consent to the transfer of shares to the Debtor's affiliate?

MS. WEISGERBER: Same objections.

A. I would have to speak with counsel. I am not aware of that directly, no.

Q. Are you aware of whether HarbourVest had any correspondence with HCLOF representatives about effectuating the transfer of the shares to the Debtor's affiliate under the Settlement Agreement?

MS. WEISGERBER: Same objection.

You can answer.

A. We have had discussions with them, yes.

Q. Did HCLOF representatives

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provide consent, whether written or otherwise, to the transfer?

A. I am not aware that that consent has been provided as of yet.

Q. Are you aware of whether any HarbourVest representatives have had conversations with the Debtor's representatives about the necessity of consent to the transfer of their shares?

MS. WEISGERBER: Objection to form --

MR. KANE: I'll re-ask the question. I want to clarify that point.

BY MR. KANE:

Q. Mr. Pugatch, are you aware of whether any HarbourVest representatives had conversations with the Debtor's representatives about the necessity of obtaining the HCLOF portfolio manager's written consent before transferring the shares to the Debtor's representative or affiliate under the terms of the Settlement Agreement?

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MS. WEISGERBER: Objection to form.

And, John, I'm sorry to do this, can you just clarify what you mean by "representative"?

MR. KANE: Yeah. I mean, anybody that has agency authority to act on behalf of the Debtor in negotiations, in the preparation of the documents, in negotiation of the terms of the Settlement Agreement.

I mean, I think that it's, you know, a pretty broad term here.

MS. WEISGERBER: Objection to form. Objection to the extent it calls for discussions with counsel.

As a factual matter, if you have an answer, you can give it.

A. I'm aware of conversations that have taken place about all of the terms of the Transfer Agreement in connection with the settlement, with all parties.

Q. Is it your understanding based on those conversations that written

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consent of the portfolio manager as defined in the Transfer Agreement was required before the shares could be transferred under the Settlement Agreement?

MS. WEISGERBER: Objection to the form. Objection to the extent it calls for a legal conclusion or privileged conversation. And I think that one does, John.

A. Yeah, I can only answer that based on conversation with lawyers.

Q. Wasn't the question whether -- I'm sorry. Maybe I forgot my own question.

But I thought it was based on your conversations with the Debtor's representative, was it your understanding, not based on your conversation with counsel.

MS. WEISGERBER: Can you repeat the whole question because I definitely misunderstood it then too.

Q. Okay. Based on your

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conversations with the Debtor's representatives, was it your understanding that the consent of the portfolio manager was required for the shares to be transferred from the HarbourVest entities to the Debtor's affiliate under the terms of the Settlement Agreement?

MS. WEISGERBER: Okay. Same objections. Also objection to the extent there is a common interest privilege.

A. I don't recall having that explicit conversation with representative of the Debtor.

MR. KANE: I'll pass the witness.

Thank you, Mr. Pugatch.

MR. MORRIS: Anybody else?

Thank you, all.

MS. WEISGERBER: Can we -- before we break, could we have a two-minute break and then come back before we conclude.

BY MS. WEISGERBER:

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Q. Mr. Pugatch, during Mr. Wilson's questioning, I believe his last question related to identifying as between two choices the primary source or the cause of HarbourVest's damages.

In your opinion, is -- are HarbourVest damages attributable to any one cause?

A. No, I would say there were multiple root causes of the damages and diminution in value that was suffered in connection with the investment.

MS. WEISGERBER: Okay. I don't have any further questions.

MR. WILSON: I think I'd like to ask a couple more.

BY MR. WILSON:

Q. Mr. Pugatch, I think you testified earlier that the investment in HCLOF was comprised of multiple CLOs, correct?

A. Correct.

Q. And some of those CLOs were managed by Acis, to your understanding?

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MS. WEISGERBER: Objection.

A. Correct.

MS. WEISGERBER: Just to clarify, John, is this within the scope of the questions I asked Mr. Pugatch?

MR. WILSON: I believe it is. I'm going to be really short. But so --

MS. WEISGERBER: I would like to have a standing objection to the extent it's not within the scope of the questions that was asked to Mr. Pugatch.

BY MR. WILSON:

Q. So some of those CLOs you contend are managed by Acis?

MS. WEISGERBER: Objection to form.

A. A majority.

Q. And just generally, do you contend that Highland managed the balance of those CLOs?

MR. MORRIS: Objection to the

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form of the question.

MS. WEISGERBER: Objection.

Same objection.

A. Yes.

Q. Yes. Okay. Thank you.

And I just had two more questions.

So, if there was going to be a reset, that would have to be done at the CLO level, each CLO would have to be reset?

MR. MORRIS: Objection.

MS. WEISGERBER: Objection to form.

A. That is correct.

Q. And do you know of any specific CLO that requested a reset but was not granted a reset?

MR. MORRIS: Objection to form.

MS. WEISGERBER: Same objection. And foundation.

A. When you say "CLOs who requested a reset," can be more clear, please?

Q. We just talked about how this

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investment is comprised of multiple CLOs and each one of those CLOs would have to be reset, according to its own terms, I guess. Do you know of any one of those CLOs that requested a reset?

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

MS. WEISGERBER: Same objection.

A. I'm aware of Highland having in its capacity as manager of the HCLOF having requested or pursued resets of certain of the Acis HCLOs.

Q. Your understanding is that Highland requested a reset of the Acis CLOs?

MS. WEISGERBER: Objection to form.

A. I'm sorry. I'm trying to understand what you said.

MS. WEISGERBER: I'm really wondering how this relates at all to the scope of the questions I asked Mr. Pugatch on follow up.

I think it's time to wrap this

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up, John.

MR. WILSON: This was my last question, I just need an answer to it. And I think he tried to answer, but I didn't understand what he said.

MS. WEISGERBER: Objection. Can you re-ask the question so we have a clear question.

MR. WILSON: Well, Madam Court Reporter, can you read back his last response?

(Record read.)

BY MR. WILSON:

Q. Can you repeat what you intended to answer to the last question?

MS. WEISGERBER: Same objection. If you recall, Mike.

A. I'm sorry, John. Can you just repeat the question, please, make sure I'm answering what you want me to answer.

Q. My question is the same as it's been: Are you aware of any CLO that requested a reset and was not granted one?

MS. WEISGERBER: Objection to

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form. Objection to foundation.

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

A. Again, my understanding is the CLOs do not request the reset. Highland, as manager of HCLOF in its capacity as majority equity owner of certain of the CLOs, have requested a reset post our original investment.

Q. Okay.

MR. WILSON: I'll pass the witness.

MS. WEISGERBER: I think we're done.

THE REPORTER: Will everyone put their orders on the record, please?

MR. MORRIS: John Morris for the Debtor. Expedited, please.

MR. WILSON: John Wilson. I'm not sure what arrangements my office has previously made, but we want an expedited transcript, as well.

THE REPORTER: Do you want a rough too?

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MR. WILSON: Yes, please.

MR. MORRIS: Yes, please.

MS. WEISGERBER: Same for HarbourVest, please.

MR. MALONEY: I don't need an expedited transcript. I'd just be happy to get one regular copy. I'll take whatever you would produce in the ordinary course. Same as what everyone else ordered.

(Time Noted: 4:35 p.m. EDT.)

ACKNOWLEDGEMENT OF DEPONENT

I, MICHAEL PUGATCH, do hereby acknowledge that I have read and examined the foregoing testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any corrections appear on the attached Errata sheet signed by me.

_____ _____

(DATE) (SIGNATURE)

CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

I, Amanda Gorrono, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my direction; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of January, 2021.

_____

AMANDA GORRONO, CLR

CLR NO: 052005 - 01

Notary Public in and for the State of New York

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Debtor.	)	**Re: Docket Nos. 1625, 1697, 1706, 1707**

DEBTOR'S OMNIBUS REPLY IN SUPPORT OF DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154), AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

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

The above-captioned debtor and debtor-in-possession (the "Debtor") hereby submits this reply (the "Reply") in support of its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim No.143,147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion").[2] In further support of the Motion, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. If granted, the Motion will resolve a $300 million general unsecured claim against the Debtor's estate for less than $16.8 million in actual value.[3] The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested $80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF's interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor's employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor's estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

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

[3] Under the proposed settlement, HarbourVest would receive an allowed, general unsecured claim of $45 million and an allowed, subordinated claim of $35 million. Based on the estimated recovery for general unsecured creditors of 87.44% (which is a recovery based on certain outdated assumptions discussed *infra*), HarbourVest's $45 million general unsecured claim is estimated to be worth approximately $39.3 million and the $35 million subordinated claim, which is junior to the general unsecured claim, is currently estimated to have value only if there are litigation recoveries. In addition, HarbourVest is transferring to an affiliate of the Debtor its interest in HCLOF, which is estimated to be worth approximately $22.5 million. Thus, HarbourVest's estimated recovery on its general unsecured and subordinated claims is estimated at approximately $16.8 million on a net economic basis. This estimate, however, is dated and is based on the claims that were settled as of the filing of the Debtor's plan in November 2020.

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. In furtherance of these claims, HarbourVest alleges it was misled by the Debtor and its employees, including Mr. Scott Ellington (then the Debtor's general counsel), and that subsequent to investing in HCLOF, Mr. Dondero and the Debtor used HCLOF both as a piggybank to fund the litigation against Acis Capital Management, L.P. ("Acis") and as a scapegoat for the Debtor's litigation strategy, in each case to HarbourVest's substantial detriment.

4. Specifically, HarbourVest alleges that:

- the Debtor and its employees, including Mr. Ellington, misled HarbourVest about its intentions with respect to Mr. Terry's arbitration award against Acis and orchestrated a series of fraudulent transfers and corporate restructurings, the true purpose of which was to denude Acis of assets and make it judgment proof;
- the Debtor and its employees, including Mr. Ellington, misled HarbourVest as to the intent and true purpose of these restructurings and led HarbourVest to believe that Mr. Terry's claims against Acis were meritless and a simple employment dispute that would not affect HarbourVest's investment;
- the Debtor, through Mr. Dondero, improperly exercised control over or misled HCLOF's Guernsey-based board of directors to cause HCLOF to engage in unnecessary, unwarranted, and resource-draining litigation against Acis;
- the Debtor improperly caused HCLOF to pay substantial legal fees of various entities in the Acis bankruptcy that were unwarranted, imprudent, and not properly chargeable to HCLOF; and
- the Debtor used HarbourVest as a scapegoat in its litigation against Acis by asserting that the Debtor's improper conduct and scorched-earth litigation strategy was at HarbourVest's request, which was untrue.

5. The Debtor believed, and continues to believe, that it has viable defenses to HarbourVest's claims. Nevertheless, those defenses would be subject to substantial factual disputes and would require expensive and time-consuming litigation that would likely be resolved only after a lengthy trial all while the Debtor (or its successor) assumes the risk that the defenses might fail. The evidence will show that the proposed settlement is the product of substantial, arm's length – and sometimes quite heated – negotiations between and among the

principals and their counsel. The evidence will also show that one of HarbourVest's primary concerns in settling its claim was that part of that settlement would include the extrication of HarbourVest from the Highland web of entities and the related litigation. The proposed settlement accomplishes that and does so in compliance with HCLOF's governing agreements.

6. Pursuant to the proposed settlement, (a) HarbourVest will receive (i) an allowed, general unsecured claim in the amount of $45 million, and (ii) an allowed, subordinated claim in the amount of $35 million; (b) HarbourVest will transfer its 49.98% interest in HCLOF (valued at approximately $22.5 million) to a wholly-owned subsidiary of the Debtor; and (c) the parties will exchange mutual and general releases. The Debtor believes that the proposed settlement is reasonable and results from the valid and proper exercise of its business judgment. And the Debtor's creditors apparently agree. None of the major parties-in-interest or creditors in this case has objected to the Motion: not the Committee, the Redeemer Committee, Acis, Patrick Daugherty, or UBS.

7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts")), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero's Charitable Donor Advised Fund, L.P. (the "DAF")) (collectively, the "Objectors"). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor's settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.[4] Mr. Dondero's efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

[4] *See Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q.

Pleading	Objection/Reservation	Response
Objection of James Dondero [Docket No. 1697] (the "Dondero Objection")	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court's rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest's claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court's rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis's mismanagement, (2) how the Debtor is liable for HarbourVest's damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor's ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest's claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not $60 million; it is approximately $16.8 million against a claim of $300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest's claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest's rejection of the Debtor's plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest's Class 9 vote to confirm a plan.
Objection of the Dugaboy Investment Trust and Get Good Trust [Docket No. 1706] (the "Trusts Objection")	The settlement represents a radical change in the Debtor's earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest's claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest's vote.	The HarbourVest settlement provides for the resolution of HarbourVest's claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest's rejection of the Debtor's plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest's Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest's interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
Objection of CLO Holdco [Docket No. 1707] ("CLOH Objection")	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

8. These objections are just the latest objections filed by Mr. Dondero and his related entities to any attempt by the Debtor to resolve this case,[5] including the Debtor's settlement with Acis [Docket No. 1087] and the seven separate objections filed by Mr. Dondero and his related entities to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").[6] It will not shock this Court to hear that each of the Objectors is also objecting to the Plan. In contradistinction, the Debtor has heard this Court's admonishments about old Highland's culture of litigation as evidenced by this case, Acis's bankruptcy, and beyond. Although the Debtor has vigorously contested claims when appropriate, the Debtor has also sought to settle claims and limit the senseless fighting. The Debtor has successfully resolved the largest claims against the estate, including the claims of the Redeemer Committee, Acis, and, as recently announced to this Court, UBS. The Debtor would ask this Court to see through the pretense of the Dondero-related entities' objections to the HarbourVest settlement and approve it as a valid exercise of the Debtor's business judgment.

[5] As an example of Mr. Dondero's litigiousness, on January 12, 2021, Mr. Dondero filed notice that he will be appealing the preliminary injunction entered against him earlier on January 12, 2021.

[6] (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization (filed by Get Good Trust, The Dugaboy Investment Trust)* [Docket No. 1667]; (3) *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon)* [Docket No. 1669]; (4) *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrate Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund)* [Docket No. 1670]; (5) *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC*) [Docket No. 1673]; (6) *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]; and (7) *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank)* [Docket No. 1676].

REPLY

A. Standing

9. **James Dondero.** In the Dondero Objection, Mr. Dondero asserts he is a "creditor, indirect equity security holder, and party in interest" in the Debtor's bankruptcy. While that claim is ostensibly true, it is tenuous at best. On April 8, 2020, Mr. Dondero filed three unliquidated, contingent claims that he promised to update "in the next ninety days."[7] More than nine months later, Mr. Dondero has yet to "update" those claims to assert an actual claim against the Debtor's estate.[8]

10. Mr. Dondero's claim as an "indirect equity security holder" is also a stretch. Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. ("Strand"), the Debtor's general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor's Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero's recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his "indirect" equity interest, the Debtor's estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be satisfied.

11. **Dugaboy and Get Good.** Dugaboy and Get Good are sham Dondero "trusts" with only the most attenuated standing. Dugaboy has filed three proofs of claim [Claim Nos. 113; 131; 177]. In two of these claims, Dugaboy argues that (1) the Debtor is liable to Dugaboy

[7] Mr. Dondero filed two other proofs of claim that he has since withdrawn with prejudice. *See* Docket No. 1460.

[8] Without knowing the nature of the "updates," the Debtor does not concede that any "updates" would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero's claims.

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good's standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a "pecuniary interest . . . directly affected by the bankruptcy proceeding"); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff'd.* 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good's minimal interest in the estate should not allow them to overrule the estate's business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. "[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike." *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero's Objection and his "Trusts" Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) "the paramount interest of creditors with proper deference to their reasonable views" and (ii) whether the settlement is the product of arm's length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest's claim is based on the financial harm caused to HarbourVest from Acis's bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court's rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest's claims and the dangers such claims pose to the Debtor's estate.

16. HarbourVest's claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. HarbourVest is not arguing that Acis or this Court caused its damages; HarbourVest is arguing that *the Debtor* – led by Mr. Dondero – (a) misled HarbourVest as to the nature of Mr. Terry's claims against the Debtor and the litigation with Acis, (b) knowingly and intentionally failed to disclose that the Debtor was engaged in the fraudulent transfer of assets to prevent Mr. Terry from collecting his judgment, and (c) that *the Debtor* – under the control of Mr. Dondero – improperly engaged in a crusade against Mr. Terry and Acis, which substantially damaged HarbourVest and its investment in HCLOF, in each case in order to induce HarbourVest to invest in HCLOF.

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor's crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest's estimation – never should have happened. Acis did not cause HarbourVest's damages. Mr. Dondero's crusade against Mr. Terry and the Debtor's allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest's damages.

18. **The HarbourVest Claim Lacks Merit.** In their objections, Mr. Dondero and the Trusts argue that the HarbourVest settlement is not fair and equitable and not in the best interests of the estate because (a) it does not address the Debtor's arguments against the HarbourVest claims and (b) there is a lack of pending litigation seeking to narrow the claims against the estate. These arguments only summarily address the first two factors of *Cajun Electric*, which deal with success in the litigation, and, in doing so, mischaracterize the dangers to the Debtor's estate

posed by HarbourVest's claims. (Dondero Obj., ¶¶ 21-25; Trusts Obj., ¶ 18(a))

19. Both the Dondero Objection and – to a much lesser extent - the "Trusts" Objection allege that (a) HarbourVest's losses were caused by Acis and its (mis)management of HCLOF's investments (Dondero Obj.,¶ 22, 24), (b) there is no contract that supports HarbourVest's claims (Dondero Obj. ¶ 23; Trusts Obj., ¶ 18(a)), (c) there is no causal connection between HarbourVest's losses and the Debtor's conduct (Dondero Obj., ¶ 24), and (d) the Debtor should litigate all or a portion of HarbourVest's claim before settling (Dondero Obj., ¶ 25). Again, though, as set forth above, both Mr. Dondero and the "Trusts" seek to shift the cause of HarbourVest's damages away from the Debtor's misrepresentations and to Mr. Terry's management of HCLOF's investments. This is simple misdirection.

20. HarbourVest's claims are that it invested in HCLOF based on the Debtor's fraudulent misrepresentations. Fraudulent misrepresentation sounds in tort, not contract. *See, e.g., Clark v. Constellation Brands, Inc.*, 348 Fed. Appx. 19, 21 (5th Cir. 2009) (referring to party's claim based on fraudulent misrepresentation as a tort); *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 717 (S.D. Tex. 2000) (noting that party had common law duty not to commit intentional tort of fraudulent misrepresentation). There is thus no need for HarbourVest to point to a contractual provision to support its claim.[9] Moreover, in order to defend against HarbourVest's claims, the Debtor would need to elicit evidence showing that its employees did not make misrepresentations to HarbourVest. Such a defense would require the Debtor to rely on the veracity of Mr. Ellington's testimony, among others. That is a high hurdle, and no reasonable person would expect the Debtor to stake the resolution of HarbourVest's $300 million claim on the Debtor's ability to convince this Court that Mr. Ellington was telling HarbourVest

[9] Subsequent to filing the Motion, the Objectors requested all agreements between HarbourVest, HCLOF, and the Debtor, and such agreements were provided.

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving $60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the $45 million general unsecured claim and the $35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive $80 million in cash. From that $80 million, Mr. Dondero subtracts $20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success is settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth $22.5 million,[10] the actual recovery to HarbourVest will be less than $16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was $80 million and its claim against the estate was over $300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.[11] In brief, the Plan was approved without HarbourVest's Class 9 vote,

[10] It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

[11] The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

and the Debtor, therefore, has no need to "buy" HarbourVest's Class 9 claims. Accordingly, any claims of gerrymandering or vote buying are without merit.

C. CLOH Objection

26. CLO Holdco (and to a much lesser extent, the "Trusts") object to HarbourVest's transfer of its interests in HCLOF as part of the settlement. Currently, the settlement contemplates that HarbourVest will transfer 100% of its collective interests in HCLOF to HCMLP Investments, LLC ("HCMLPI"), a wholly-owned subsidiary of the Debtor. As set forth in the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd*. (which was appended as Exhibit A to the Settlement Agreement) [Docket No. 1631-1], each of the Debtor, HarbourVest, Highland HCF Advisors, Ltd. (HCLOF's investment manager) ("HHCFA"), and HCLOF agree that HarbourVest is entitled to transfer its interests to HCMLPI pursuant to that certain *Members Agreement Relating to the Company*, dated November 15, 2017 (the "Members Agreement"),[12] without offering that interest to other investors in HCLOF.

27. The *only* party to object to the transfer of HarbourVest's interests in HCLOF to HCMLPI is CLO Holdco. CLO Holdco holds approximately a 49.02% interest in HCLOF and is the wholly-owned subsidiary of the DAF, Mr. Dondero's donor-advised fund. CLO Holdco argues that the Member Agreement requires HarbourVest to offer its interest first to the other investors in HCLOF before it can transfer its interests to HCMLPI. In so arguing, CLO Holdco attempts to create ambiguity in an unambiguous contract and to use that ambiguity to disrupt the Debtor's settlement with HarbourVest.

28. As an initial matter, the Debtor and CLO Holdco agree that the transfer of HarbourVest's interests in HCLOF to HCMLPI is governed by Article 6 (Transfers or Disposals

employees, including Mr. Ellington and Mr. Isaac Leventon. The Debtor will demonstrate at confirmation that those objections are without merit and that Class 7 and Class 8 voted to accept the Plan.

[12] A true and accurate copy of the Members Agreement is attached hereto as Exhibit A.

of Shares) of the Members Agreement (an agreement governed by Guernsey law). (CLOH Obj., ¶ 3) The parties diverge, however, as to how to interpret Article 6. The Debtor, as set forth below, believes Article 6 is clear in that it allows HarbourVest to transfer its interests in HCLOF to any "Affiliate of an initial Member party" without requiring the right of first refusal in Section 6.2 of the Members Agreement. CLO Holdco's position appears to be that the Members Agreement, despite its clear language, should be interpreted as limiting transfers to an "initial Member's ***own*** affiliates" and that any other transfer requires the consent of HHCFA and satisfaction of the right of first refusal. (*Id.* (emphasis added)) CLO Holdco's reading is contrary to the actual language of the Members Agreement.

29. First, Section 6.1 of the Members Agreement provides, in pertinent part:

[redacted]

(Members Agmt, § 6.1 (emphasis added)) Under the Members Agreement, "Affiliate" is defined, in pertinent part, as "[redacted]

(Id., § 1.1) A "Member" in turn is a [redacted]." The "initial Member[s]" are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLO Holdco.

30. As such, under the plain language of Section 6.1, HarbourVest is entitled – without the consent of any party – to "Transfer" its interests in HCLOF to an "Affiliate" of any of the Debtor, HarbourVest, or CLO Holdco. And that is exactly what is contemplated by the settlement. HarbourVest is transferring its interests to HCMLPI, a wholly owned and controlled subsidiary of the Debtor, and therefore an "Affiliate" of the Debtor. That transfer is indisputably

allowed under Section 6.1; it is a transfer to an "Affiliate of an initial Member." CLO Holdco may, tongue in cheek, call this structure "convenient" but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.[13] The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to "Transfer" its interests in HCLOF to "Affiliates of an initial Member" (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the "ROFO"). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

[redacted]

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of "Transfers": (1) Transfers to "affiliates of an initial Member" from Members *other than* CLO Holdco and the

[13] Although HHCFA's consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

"Highland Principals" (*i.e.*, the Debtor and certain of its employees)[14] and (2) Transfers from CLO Holdco or a Highland Principal to the Debtor, the Debtor's "Affiliates," or another Highland Principal. The fact that a narrower exemption is provided to CLO Holdco and the Debtor than to HarbourVest (or any other Member) under Section 6.2 is of no moment; the language says what it says and was agreed to by all Members, including CLO Holdco, when they executed the Members Agreement.

33. In addition, and although not relevant, the language of Section 6.2 makes sense in the context of the deal. Although CLO Holdco and the Debtor may have disclaimed an "Affiliate" relationship, they are related through Mr. Dondero and invest side by side with the Debtor in multiple deals.[15] The different standards in Section 6.2 serve to ensure that HarbourVest's (or any successor to HarbourVest) right to Transfer its shares without satisfying the ROFO is limited to three parties: (i) HarbourVest's Affiliates, (ii) the Debtor's Affiliates, and (iii) CLO Holdco's Affiliates. This restriction keeps the relative voting power of each Member static and ensures that CLO Holdco and the Debtor, together, will *always* have more than fifty percent of HCLOF's total interests and that HarbourVest will *always* have less than fifty percent. This counterintuitively also explains the greater restrictions placed on CLO Holdco and the "Highland Principals." The Highland Principals include certain Debtor employees. Those employees – as well as CLO Holdco and the Debtor – are prohibited from transferring their HCLOF interests outside of the Dondero family. This restriction makes sense. If, for example, a Debtor employee wanted to transfer its interests to an Affiliate of HarbourVest, HarbourVest could have more than fifty percent of the HCLOF interests because of the thinness

[14] "**Highland Principals**" means: [redacted] (Members Agmt., § 1.1)

[15] There can be no real dispute that Mr. Dondero effectively controls CLO Holdco.

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation[16] and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.[17] It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

[16] *See* Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[redacted]

(Articles of Incorporation, § 18.1)

[redacted]

(*Id.*, § 18.2)

[17] *See* Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[redacted]

(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco's attempt to justify why this Court should re-write the Members Agreement to correct the "disparate treatment" is also unavailing. As an example of the absurd result caused by the "disparate treatment," CLO Holdco states: "[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer." (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

should have raised that objection three and a half years ago before agreeing to the Members Agreement. CLO Holdco should not be allowed to create ambiguity in an unambiguous contract or to re-write that agreement to impose additional restrictions on HarbourVest. *See Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996) (enforcing the "unambiguous language in a contract as written," noting that where a contract is unambiguous, a party may not create ambiguity or "give the contract a meaning different from that which its language imports") (internal quotations omitted); *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) ("Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity.").

38. It should go without saying, but CLO Holdco (and the other parties to the Members Agreement) should also be required to satisfy their obligations under the Members Agreement and execute the "Adherence Agreement" as required by Section 6.6 of the Members Agreement in connection with the Transfer of HarbourVest's interests to HCMLPI or any other permitted Transfer.

39. Finally, and notably, although CLO Holdco spends considerable time arguing that HarbourVest should be required to comply with the ROFO, nowhere in the CLOH Objection does CLO Holdco state that it wishes to purchase HarbourVest's interests in HCLOF. This omission is telling. CLO Holdco and the other Objectors have no interest in actually exercising their alleged right of first refusal contained in the Members Agreement. Rather, their only interest is in causing the Debtor to spend time and money responding to a legion of related (and coordinated) objections.[18]

[18] *See Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q; Exhibit T (email from Mr. Dondero as forwarded to Mr. Ellington stating "Holy bananas….. make sure we object [to the HarbourVest Settlement]"); Exhibit Y.

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WHEREFORE, for the reasons set forth above and in the Motion, the Debtor respectfully requests that the Court grant the Motion.

Dated: January 13, 2021

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EXHIBIT 9

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

In Re:	**Case No. 19-34054-sgj-11** Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Dallas, Texas Thursday, January 14, 2021 9:30 a.m. Docket - 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:

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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, but 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**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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Docket #1788 Date Filed: 01/21/2021

CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed January 20, 2021

United States Bankruptcy Judge

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	

ORDER APPROVING DEBTOR'S SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),[2] filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

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

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

Motion; (b) the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1631] (the "Morris Declaration"), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit "1"** (the "Settlement Agreement"); (c) the arguments and law cited in the Motion; (d) *James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (the "Dondero Objection"), filed by James Dondero; (e) the *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1706] (the "Trusts' Objection"), filed by the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts"); (f) *CLO Holdco's Objection to HarbourVest Settlement* [Docket No. 1707] (the "CLOH Objection" and collectively, with the Dondero Objection and the Trusts' Objection, the "Objections"), filed by CLO Holdco, Ltd.; (g) the *Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1731] (the "Debtor's Reply"), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [Docket No. 1734] (the "HarbourVest Reply"), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest"); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the "Hearing"), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.

2. All objections to the Motion are overruled.

3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion[3] are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

[3] This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906].

EXHIBIT 1

EXECUTION VERSION

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the "Debtor"), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a "HarbourVest Party," and collectively, "HarbourVest"), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the "Parties" and individually as a "Party."

R E C I T A L S

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

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor's case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the "Bankruptcy Court");

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. ("HCLOF") and acquired an a 49.98% ownership interest in HCLOF (the "HarbourVest Interests");

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor's claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the "HarbourVest Claims"), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor's First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor's First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response");

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the "3018 Motion" and together with the HarbourVest Response, the "HarbourVest Pleadings");

EXECUTION VERSION

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of $300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the "Plan").[1]

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 ("Rule 9019").

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. **Settlement of Claims.**

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of $45,000,000 (the "Allowed GUC Claim"); and

(ii) an allowed subordinated claim in the aggregate amount of $35,000,000 (the "Allowed Subordinated Claim" and together with the Allowed GUC Claim, the "Allowed Claims").

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the "Transfer Agreements") and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. **Releases.**

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

EXECUTION VERSION

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however,* that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

EXECUTION VERSION

4. **Representations and Warranties**. Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of $45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a "Support Termination Event"): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability**. The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice**. Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

EXECUTION VERSION

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel**. Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement**. This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter**. The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation**. The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts**. This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

EXECUTION VERSION

14. **Governing Law; Venue; Attorneys' Fees and Costs**. The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

EXECUTION VERSION

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

EXECUTION VERSION

HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of January ____, 2021 (this "**Transfer Agreement**"), is entered into by and among Highland CLO Funding, Ltd. (the "**Fund**"), Highland HCF Advisor, Ltd. (the "**Portfolio Manager**"), HCMLP Investments, LLC (the "**Transferee**") and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the "**Transferors**").

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares ("**Shares**") of the Fund set forth opposite such Transferor's name on Exhibit A hereto (with respect to each Transferor, the "**Transferred Shares**").

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. ("**HCMLP**") which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the "**Interest**") on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the "**Settlement Agreement**"), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

   a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.

   b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund's advisory board (the "**Advisory Board**") to replace the Transferors' appointed representative to the Advisory Board.

c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.

d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.

e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (*i*) this Transfer Agreement and (*ii*) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.

2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:

a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;

b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;

c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;

d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and

e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:

   a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;

   b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and

   c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.

4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).

5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (*i*) this Transfer Agreement and (*ii*) the Settlement Agreement (the "**Effective Date**"):

   a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and

   b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

   Prior to the Effective Date the Transferee shall procure that:

   c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.

6. Miscellaneous.

   a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.

c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.

d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.

e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.

f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.

g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFEREE:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:
Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

[Signature Page to Transfer of Ordinary Shares of Highland CLO Funding, Ltd.]

Exhibit A

Transferee Name	Number of Shares	Percentage
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

EXHIBIT 11

Docket #0001 Date Filed: 4/12/2021

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

CHARITABLE DAF FUND, L.P. and CLO HOLDCO, LTD., ***directly and derivatively,***	§	
Plaintiffs,	§	
v.	§	**Cause No. _____**
HIGHLAND CAPITAL MANAGEMENT, L.P. , HIGHLAND HCF ADVISOR, LTD., and HIGHLAND CLO FUNDING, LTD., ***nominally,***	§	
Defendants.	§	

ORIGINAL COMPLAINT

I.

INTRODUCTION

This action arises out of the acts and omissions of Defendant Highland Capital Management, L.P. ("HCM"), which is the general manager of Highland HCF Advisor, Ltd. ("HCFA"), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act"),[1] and nominal Defendant Highland CLO Funding, Ltd. ("HCLOF") (HCM and HCFA each a "Defendant," or together, "Defendants"). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act's anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages.

[1] https://adviserinfo.sec.gov/firm/summary/110126

At all relevant times, HCM was headed by CEO and potential party James P. Seery ("Seery"). Seery negotiated a settlement with the several Habourvest[2] entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for $22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value ("NAV") of those interests. Upon information and belief, the NAV of HCLOF's assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM's internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

[2] "Habourvest" refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 lobal Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the "Harbourvest interests").

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the "HCM Bankruptcy" and the Court is the "Bankruptcy Court").

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around $15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost $15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than $7.5 million). Harbourvest claimed that it had lost over $100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over $300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some $52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities[3])—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of $15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

[3] Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing $45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around $31,500,000 from the allowed claims.

33. As part of the consideration for the $45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating $22.5 million of the net value of the $45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., $31.5 million—was realized, because $22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true "settlement" for Harbourvest's legal claims was closer to $9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for $9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for $22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of $41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over $34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the "net asset value" of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks[4] meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was $22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

[4] The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over $20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay $22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as $22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that "[Judge Jernigan] is laughing at you" and "we are coming after you" in response to the latter's attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery's plan to liquidate the funds.

54. HCM's threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court's sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Breaches of Fiduciary Duty

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.[5]

[5] *See e.g, SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) ("§ 206 establishes 'federal fiduciary standards' to govern the conduct of investment advisers."); *Santa Fe Indus, v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court's reference to fraud in the "equitable" sense of the term was "premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"). *See also* Investment Advisers Act Release No. 3060 (July 28, 2010) ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own") (*citing* Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the "RIA Agreement"). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF's attorney-in-fact for certain actions, such as "to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner." RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets "in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request." RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM's fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 ("Rule 10b5-1") explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM's own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.[6]

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

[6] *See* Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship."); *see also SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'").

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Habourvests's 49.98% interest in HCLOF was worth around $22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of $24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over $25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the "Company Agreement").

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member "other than … CLO Holdco [Plaintiff] or a Highland Affiliate," intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for $22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of $22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for $22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of $20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a $22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the elicit purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to 18 U.S.C. § 1961(1)(B) and (D).

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of $72,969,492 as of November 30, 2020. Harbourvest's share of that would have been $36,484,746.

124. The HCLOF net asset value had reached $86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was $22.5 million, when it was actually closer to $43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM's motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser's Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios' securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing "equatization" of CSS Medical's debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly $30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one's conduct of an enterprise to include "fraud in connection with a [bankruptcy case]". The Advisers' Act antifraud provisions require full transparency and accountability to an advisers' investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a "scheme or artifice … for obtaining money or property by means of false … pretenses, [or] representations[.]"

132. Accordingly, because Defendants' conduct violated the wire fraud and mail fraud laws, and the Advisers' Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, 18 U.S.C. § 1964.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys' fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member "other than … CLO Holdco [Plaintiff] or a Highland Affiliate," intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as $22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

a. Actual damages;

b. Disgorgement;

c. Treble damages;

d. Exemplary and punitive damages;

e. Attorneys' fees and costs as allowed by common law, statute or contract;

f. A constructive trust to avoid dissipation of assets;

g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

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EXHIBIT 12

Docket #0028 Date Filed: 9/2/2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Debtor,	§	
----------	§	
THE CHARITABLE DAF FUND, L.P. and CLO HOLDCO, LTD.,	§	
	§	
Plaintiffs/Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. 3:21-CV-3129-B
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Defendant/Appellee.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Appellants The Charitable DAF Fund, L.P. (Charitable DAF) and CLO Holdco, Ltd. (CLO Holdco)'s appeals from the bankruptcy court's Motion to Dismiss Order and Motion to Stay Order. For the reasons that follow, the Motion to Dismiss Order is **REVERSED** and **REMANDED**. The Motion to Stay Order is **AFFIRMED**.

I.

BACKGROUND[1]

These are consolidated appeals from an adversary proceeding in a bankruptcy case. The Debtor, Highland Capital Management, L.P. (HCM), filed for Chapter 11 bankruptcy on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware and that court transferred venue to the United States Bankruptcy Court for the North District of Texas. *In re Highland Cap. Mgmt. L.P.*, 2022 WL 780991, at *1 (Bankr. N.D. Tex. Mar. 11, 2022).

In 2017, Charitable DAF—through the holding entity CLO Holdco—purchased 49.02% of the available shares of Highland CLO Funding, Ltd. (HCLOF) based upon investment advice from HCM.[2] Doc. 9, Appellant's Br., 5. Another entity, HarbourVest, acquired 49.98% of the HCLOF shares and HCM and its employees acquired the remaining 1%. *Id.*; Doc. 21, Appellee's Br., 7. A company agreement (the HCLOF Member Agreement) governing the rights and obligations of HCLOF shareholders purportedly prohibited a member from "sell[ing] shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price" (the Right of First Refusal). Doc. 9, Appellant's Br., 6. The value of the HCLOF shares fluctuated throughout the bankruptcy proceedings; the actual value is one of the issues giving rise to some of Charitable DAF's causes of action. *Id.* at 6–7; R. at 551–65.

[1] Because these are two consolidated appeals with separate appellate records, the Court indicates when it switches between the separate appellate records by footnotes. The Appellant's Brief and record cites in this Background section are in Doc. 6 in case No. 3:22-CV-0695-B. Appellee's Brief, which was filed after consolidation, is in case No. 21-CV-3129-B.

[2] Except where otherwise stated, the Court refers to Charitable DAF and CLO Holdco collectively as Charitable DAF because Charitable DAF controls and owns CLO Holdco and both entities have the same director. Doc. 21, Appellee's Br., 7 & n.6. Appellant Charitable DAF does not dispute this relationship and imputes the actions of CLO Holdco to itself throughout Appellant's brief. *See* Doc. 9, Appellant's Br., 13–14 (imputing the Objection to both Appellants).

During the bankruptcy, "HarbourVest filed proof of claims against [HCM] totaling over $300 million, notionally." Doc. 9, Appellant's Br., 6. As part of the settlement for these claims, "HarbourVest agreed to sell its interest in HCLOF to [HCM]." *Id.* at 8. HCM would then have majority ownership of HCLOF. *See id.* at 5; Doc. 21, Appellee's Br., 7. "CLO Holdco filed an objection to the settlement, contending that the HCLOF Member Agreement entitled [CLO] Holdco to a Right of first Refusal" (the Objection). Doc. 9, Appellant's Br., 8. At the beginning of the settlement hearing (the Rule 9019 Settlement Hearing), CLO Holdco withdrew its Objection. Doc. 21, Appellee's Br., 10–11; R. at 6269–70. After overruling the remaining objections from the other parties, the bankruptcy court approved the HarbourVest Settlement. Doc. 9, Appellant's Br., 9.

This Adversary Proceeding stems from the complaint filed by Appellants on April 12, 2021, in this Court in *Charitable DAF Fund, L.P. et al. v. Highland Capital Management, L.P., et al.*, Case No. 3:21-CV-0842-B. *Id.*; Complaint, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D Tex. Apr. 12, 2021), Doc. 1. On September 20, 2021, this Court referred that case to the bankruptcy court for "docket[ing] as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P." Order of Reference, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Sept. 20, 2021), Doc. 64. During the Adversary Proceeding, Appellants moved for a stay of the case (the Motion to Stay) and Appellees moved to dismiss the case (the Motion to Dismiss). R. at 1634–67, 3248–52. On November 23, 2021, the bankruptcy court held a hearing on the Motion to Stay and Motion to Dismiss. *Id.* at 5951. The bankruptcy court denied the Motion to Stay at the hearing and later entered an order granting the Motion to Dismiss, dismissing all causes of action with prejudice. *Id.* at 5977; *In re Highland*, 2022 WL 780991, at *12. Appellants promptly appealed both orders; this

Court consolidated the appeals. *In re Highland Cap. Mgmt.*, 2022 WL 2193000, at *1, *4 (N.D. Tex. June 17, 2022). While the appeals were pending, the Fifth Circuit affirmed the HCM reorganization plan (the Plan), but vacated the exculpatory provision "as to all parties *except* [HCM], the Committee and its members, and the Independent Directors for conduct within the scope of their duties." *Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, 2022 WL 3571094, at *14 (5th Cir. Aug. 19, 2022).

The appeals are fully briefed and ripe for review. The Court considers them below.

II.

LEGAL STANDARDS

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted).

A. *Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim*

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) authorizes a court to dismiss a plaintiffs complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). But the court will "not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts." *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). When well-pleaded facts fail to meet this standard, "the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (quotation marks and alterations omitted).

B. Motion to Stay

Incidental to a court's inherent power to control its docket is the power to stay proceedings before it. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court considers four factors when determining whether to stay a case pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). "The first two factors of the traditional standard are the most critical." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 434).

III.

ANALYSIS

The Court begins with the appeal of the Motion to Dismiss Order because it can only review the appeal of the Motion to Stay Order if it reverses the bankruptcy court's decision to dismiss the causes of action in the adversary proceeding. *In re Highland*, 2022 WL 2193000, at *2. Finding reversal of the Motion to Dismiss Order warranted, the Court then reviews the appeal of the Motion to Stay Order.

A. *Appeal of the Motion to Dismiss Order*[3]

Charitable DAF raises three issues in its appeal of the Motion to Dismiss Order: (1) whether the bankruptcy court "commit[ted] reversible error by sua sponte dismissing this action on the basis of collateral estoppel without giving notice and an opportunity to respond"; (2) whether collateral estoppel barred Charitable DAF's claims when the claims were adjudicated in a Rule 9019 Settlement Hearing; and (3) whether the bankruptcy court's application of judicial estoppel erroneously relied on a transcription error, an ostensibly inconsistent position of Charitable DAF, or a failure to conclude that "subsequently discovered evidence . . . render[ed] the ostensible inconsistency 'inadvertent.'" Doc. 9, Appellant's Br., 2.

An appellate court reviews a dismissal under Rule 12(b)(6) de novo. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000). "[T]he application of collateral estoppel is" also reviewed de novo. *Id.* (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). However, "a [bankruptcy] court's decision to invoke the equitable doctrine of judicial estoppel [is reviewed] for abuse of discretion." *Cox v. Richards*, 761 F. App'x 244, 246 (5th Cir. 2019) (citing

[3] For this appeal, the record and document citations are in case No. 3:22-CV-0695-B. However, Appellee's Brief is in case No. 21-CV-3129-B.

United States ex rel. Long v. GSDMIdea City, L.L.C., 798 F.3d 265, 271 (5th Cir. 2015)). Therefore, this Court reviews the bankruptcy court's sua sponte invocation of collateral estoppel de novo, the application of collateral estoppel de novo, and the invocation of judicial estoppel for abuse of discretion. The Court addresses each in turn below.

1. Sua Sponte Dismissal

The bankruptcy court dismissed Charitable DAF's claims with prejudice based on collateral estoppel—even though neither party raised the issue "per se"—finding their res judicata arguments relevant to the issue. *In re Highland*, 2022 WL 780991, at *7. The Court first considers whether the sua sponte application was proper.

Charitable DAF challenges the bankruptcy court's sua sponte invocation of collateral estoppel to dismiss its claims. Doc. 9, Appellant's Br., 11–12. Specifically, Charitable DAF argues that the bankruptcy court could "only do so if the 'procedure employed is fair'—that is, if prior notice is given with adequate time for the plaintiff to prepare a response." *Id.* at 12 (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177–78 (5th Cir. 2006)). The failure to provide "notice and an opportunity to dispute the claimed bases for dismissal is reversible error," according to Charitable DAF. *Id.*

The Court disagrees. The Fifth Circuit has recognized two instances when a court may dismiss a case sua sponte on the basis of collateral estoppel: when (1) "both actions were brought in courts of the same district" or (2) "all of the relevant facts are contained in the record and . . . uncontroverted." *OneBeacon Am. Ins. Co. v. Barnett*, 761 F. App'x 396, 399 (5th Cir. 2019) (first quoting *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, 574 F. App'x 513, 522 (5th Cir. 2014); and then quoting *Mowbray v. Cameron Cnty.*, 274 F.3d 269, 281 (5th Cir. 2001)). This case easily

fits into the first category because all of the proceedings at issue took place in the bankruptcy court before the same judge. *See In re Highland*, 2022 WL 780991, at *7 (relying on the former category to dismiss the case). Thus, the bankruptcy court did not err by raising the collateral estoppel issue sua sponte.

This case is unlike the *Carroll* case cited by Charitable DAF, which did not involve collateral estoppel. 470 F.3d 1171. In *Carroll*, the Fifth Circuit held that a court may dismiss a case sua sponte under Federal Rule of Civil Procedure 12(b)(6) if the "procedure employed is fair[,]" which requires "both notice of the court's intention and an opportunity to respond." *Id.* at 1177 (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). The district court erred by not providing "notice or opportunity to be heard" and "did not even . . . mention [some of the dismissed] claims in its order of dismissal." *Id.*

This case is more akin to *McIntyre v. Ben E. Keith Co.* where the Fifth Circuit upheld the district court's sua sponte raising of the issue of res judicata to dismiss the case under Rule 12(b)(6). 754 F. App'x 262, 265 (5th Cir. 2018). In *McIntyre*, the plaintiff's "Civil Rights Act and FLSA actions were brought before the same federal district court." *Id.* Because the latter action closely resembled the former action, the Fifth Circuit found no reversible error with the district court's raising the issue of res judicata sua sponte. *Id.*

First, dismissal for failure to state a claim like in *Carroll* and dismissal for collateral estoppel as in the instant case are conceptually and procedurally different. In the former, the plaintiff is in the process of attempting to "allege[] [their] best case," *Bazrowx*, 136 F.3d at 1054, while collateral estoppel occurs after a plaintiff "alleged [their] best case" and fully litigated the issue. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). Put more succinctly, collateral estoppel eliminates "unnecessary

judicial waste" from repeated attempts at alleging the best case. *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). Second, the parties addressed res judicata during oral argument and in their pleadings before the bankruptcy court. While res judicata is not collateral estoppel, it is closely related. *Hous. Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) ("[R]es judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion."). Thus, the bankruptcy court employed a fair procedure by allowing the parties to litigate the issues, including res judicata, before dismissing the case sua sponte. *See generally Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021) ("District courts may, for appropriate reasons, dismiss cases *sua sponte*.").

The Court next considers whether the bankruptcy court's substantive application of collateral estoppel was proper.

2. Collateral Estoppel

"Collateral estoppel prevents litigation of an issue when: '(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.'"[4] *Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)). "Relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings." *In re Southmark Corp.*, 163 F.3d at 932.

Charitable DAF attacks each element of collateral estoppel, so the Court addresses each

[4] Appellant lists a fourth element occasionally referenced by the Fifth Circuit—"there is no special circumstance that would make it unfair to apply the doctrine"—but the Court finds no reason to address this possible fourth element in this case. *See In re Southmark Corp.*, 163 F.3d 925, 932 n.9 (5th Cir. 1999) (declining to apply the fourth element because appellant "failed to support it factually").

element individually.

i. Identical issue

The bankruptcy court found "(a) consideration of the value that the estate was both receiving and paying, as well as (b) the potential existence of a 'Right of First Refusal' . . . [were] the gravamen of [Charitable DAF's] Complaint." *In re Highland*, 2022 WL 780991, at *9 (emphasis omitted). During the settlement hearing, the bankruptcy court had to determine whether the HarbourVest Settlement "was 'fair and equitable' and in the 'best interests of creditors,' and whether it was the 'product of arms-length bargaining, and not of fraud or collusion[.]'" *Id.* at *8. This determination entailed "arguments and evidence regarding the methodology for the valuation of the HCLOF interest and the existence or non-existence of a 'Right of First Refusal.'" *Id.*

Charitable DAF argues that the issues are not identical because the Objection "only addressed whether HarbourVest . . . had performed all conditions precedent to being able to transfer the interest to Highland *as another co-investor*" and did not present an identical claim "for breach of the HCLOF [Member] Agreement" and associated damages. Doc. 9, Appellant's Br., 13–14. Further, "even if this one contract issue was fully . . . litigated," only the second cause of action in Charitable DAF's complaint arguably parallels that issue, according to Charitable DAF—the others are distinct. *Id.* at 14–15. Charitable DAF contends that these non-contract causes of action rely on evidence that was not known at the Rule 9019 Settlement Hearing, "stem from events that either occurred post-hearing, or were not discovered until after the hearing." *Id.* at 15.

The Court finds the issues are identical. CLO Holdco's Objection specifically argued:

> Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally

> inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless.

R. at 4730. The bankruptcy court also heard argument and testimony from Seery, HCM's chief executive and chief restructuring officer, and Pugatch, a managing director of HarbourVest, about the valuation of HCLOF's assets at the settlement hearing. *Id.* at 6273, 6292, 6303–05 ("The twenty-two and a half [million] is the current—actually, the November value of HCLOF—the HarbourVest interests in HCLOF."), 6358, 6374 ("The current value is right around $22-1/2 million.").

In the Original Complaint, Charitable DAF brought five causes of action: breach of fiduciary duties, breach of the HCLOF Member Agreement, negligence, RICO, and tortious interference. *Id.* at 551–65. The breach of fiduciary duties and negligence causes of action center around the alleged concealment of the rising value of HCLOF's assets and failing to offer the purchase of the assets to CLO Holdco or Charitable DAF before offering to HCM. *Id.* at 553–55, 559–60. The breach of the HCLOF Member Agreement cause of action encompasses the Right of First Refusal in the agreement. *Id.* at 558–59. The RICO cause of action alleges that HCM used mail and wire fraud "to obtain or arrive at valuations of the HCLOF interests," and "conceal[ ] the true value of the HCLOF interests." *Id.* at 560–64. Lastly, the tortious interference cause of action stems from HCM's alleged interference with CLO Holdco's Right of First Refusal in the Member Agreement and "misrepresenting the fair market value" of HCLOF's assets. *Id.* at 564–65. In sum, all of these causes of action involve either the valuation of HCLOF or the Right of First Refusal, so the issues are the same as those before the bankruptcy court at the Rule 2019 Settlement Hearing.

ii. Actually Litigated

The bankruptcy court found the same arguments were also actually litigated, reasoning:

> The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

In re Highland, 2022 WL 780991, at *9.

Charitable DAF argues that because the Objection was withdrawn and no one objected to the withdrawal, the issue asserted therein was not litigated. Doc. 9, Appellant's Br., 16. Additionally, it claims the Rule 9019 Settlement Hearing is not a mini-trial and, therefore, cannot serve as an opportunity for a party to litigate their claims. *Id.* at 17–18 (citing *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Refin., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015)).

An issue is not actually litigated and, thus, precluded unless the legal standard in the prior action mirrors the legal standard of the latter action. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citations omitted). The bankruptcy court approved the HarbourVest Settlement after applying the *Jackson Brewing* test, which considers:

> (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

R. at 5568; *see also In re Highland*, 2022 WL 780991, at *8 (quoting *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015)). Stated more succinctly, when faced with a settlement, the bankruptcy court ensures the "compromise is truly 'fair and equitable' and 'in the best interest of the estate.'" *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th

Cir. 1980) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson (TMT Trailer)*, 390 U.S. 414, 424 (1968)).

However, in the context of litigating actual claims—such as those asserted by Charitable DAF—a court applies a preponderance of the evidence standard, not the probability of success standard from *Jackson Brewing*. *Copeland*, 47 F.3d at 1423; *In re Zale Corp.*, 62 F.3d 746, 766 n.60 (5th Cir. 1995) ("We also note for future reference that the legal standard in a settlement hearing differs from that applicable in an adversary proceeding or state court trial . . . . Consequently, we doubt that the findings of the bankruptcy court in a settlement hearing would have preclusive effect in adversary proceedings or state court trials."). *See generally Weaver v. Aquila Energy Mktg.*, 196 B.R. 945, 957 (S.D. Tex. 1996) ("[S]ettlement hearings and preference actions involve the application of different legal standards."). "Examining whether a particular settlement is fair or equitable and in the best interest of the estate and creditors is a different inquiry, driven by different policies, than litigation of the actual claim." *Copeland*, 47 F.3d at 1423. While the issues of the Right of First Refusal and the valuation of HCLOF were raised in the Rule 9019 Settlement Hearing, the parties did not fully litigate the issues as one would at trial, and the bankruptcy court did not resolve the issues according to a preponderance of the evidence standard. Because the bankruptcy court applied a legal standard in the Rule 9019 Settlement Hearing that is inapplicable to the adjudication of Charitable DAF's causes of action, the issues were not actually litigated in the Rule 9019 Settlement Hearing and collateral estoppel does not apply.[5] The Court **REVERSES** the bankruptcy court on this issue.

[5] Having found the second element of collateral estoppel unmet, the Court need not address the third element—necessity of the previous determination to the prior decision.

3. Judicial Estoppel

The bankruptcy court found the elements of judicial estoppel met and barred the second and fifth causes of action, which rely on the Right of First Refusal. *In re Highland*, 2022 WL 780991, at *12. The Court now addresses whether judicial estoppel applies to Charitable DAF's second and fifth causes of action.

Judicial estoppel is an equitable common law doctrine aimed at preventing a party from asserting an inconsistent legal position from a previous proceeding. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* (alteration in original) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). A court examines three criteria when determining the applicability of judicial estoppel: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc).

Charitable DAF raises arguments for each of the judicial estoppel elements, so the Court addresses each element below.

i. Inconsistent legal position

Charitable DAF argues that the bankruptcy court's determination relies on a transcription error that amounted to an admission of HCM's compliance with the Right of First Refusal. Doc. 9, Appellant's Br., 22–23. The corrected transcript makes clear that no admission was made on behalf of CLO Holdco, according to Charitable DAF. *Id.* at 23–24.

The relevant portion of the original transcript reads:

> 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.

R. at 6280. The corrected transcript reads:

> 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.

Doc. 9-1, Appellant's Br. Ex. A, 4.

Accepting this verison of the record, CLO Holdco refused to "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." *Id.*; R. at 6280. However, moments before this, CLO Holdco withdrew its Objection premised on the Right of First Refusal stating:

> 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.

R. at 6269–70. The bankruptcy court's decision rests primarily on this earlier withdrawal of the Objection and only later buttresses its argument with the then-unknown transcription error. *In re Highland*, 2022 WL 780991, at *11 (following discussion of the withdrawal of the Objection with "[i]f that weren't enough" before mentioning the then-unknown transcription error). Thus, if the earlier withdrawal—without the transcription error—satisfies the first element of judicial estoppel then the bankruptcy court did not commit any error even if it referenced an incorrect transcription of the latter exchange.

The Court finds the bankruptcy court did not err in finding the first element of judicial estoppel. CLO Holdco made clear in the withdrawal of its objection that it no longer disputed the other parties' interpretation of the Right of First Refusal, which now forms the basis of Charitable DAF's second and fifth causes of action. *See* R. at 6269–70. Thus, the withdrawal of the objection put CLO Holdco on the opposite side of the legal argument that Charitable DAF now makes in its second and fifth causes of action. The first element of judicial estoppel is established because Charitable DAF has taken inconsistent positions in separate proceedings.

ii. The bankruptcy court accepted the prior position

The bankruptcy court solely relied on the withdrawal of the Objection to find the second element of judicial estoppel established. *In re Highland*, 2022 WL 780991, at *12. In the words of the bankruptcy court, it "perceived [this objection] as one of the major arguments that was relevant to the HarbourVest Settlement." *Id.* "The [b]ankruptcy [c]ourt relied upon that withdrawal of CLO Holdco's objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement." *Id.*

Charitable DAF argues that there is no acceptance by the bankruptcy court of a prior position because without the transcription error, there is no admission and no inconsistent position. Doc. 9, Appellant's Br., 25–26. Further, it contends that the withdrawal of the Objection is not the equivalent of stating the Right of First Refusal causes of action are meritless. *Id.* at 26–27.

The bankruptcy court did not err in finding the second element of judicial estoppel met because it necessarily relied on the change in CLO Holdco's assessment of its Objection. The Right of First Refusal created a major obstacle to approval of the HarbourVest Settlement. When CLO

Holdco withdrew its Objection based on the Right of First Refusal, the Court had to accept CLO Holdco's position that the Right of First Refusal no longer posed an obstacle to the HarbourVest Settlement. Thus, the Court finds no error by the bankruptcy court for the second element of judicial estoppel.

iii. Inadvertence of Charitable DAF

The bankruptcy court did not examine the inadvertence of Charitable DAF in asserting inconsistent legal positions. *See In re Highland*, 2022 WL 780991, at *12.

Charitable DAF argues that it did not know the facts for several of its claims until after the settlement hearings, so it could not have asserted these claims at the hearing. Doc. 9, Appellant's Br., 27. Charitable DAF relies on the allegations surrounding the valuations of the HCLOF assets and the alleged acts violating the RICO statutes. *Id.* at 27–29. Additionally, the bankruptcy court did not address the inadvertence element for judicial estoppel and a failure to apply the correct legal standard is reversible error, Charitable DAF contends. Doc. 9, Appellant's Br., 27; Doc. 27, Appellant's Reply, 3–4.

The Court agrees with Appellant's last argument. A court abuses its discretion by applying the wrong legal standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Def. Distrib. v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022). And the misapplication of a legal standard is reviewed de novo. *In re Woerner*, 783 F.3d 266, 270–71 (5th Cir. 2015). By not addressing the third element of judicial estoppel, the bankruptcy court applied the wrong legal standard. The Fifth Circuit implicitly recognized this third element—inadvertence—in *In re Coastal Plains, Inc.*, 179 F.3d at 206, 210, which the bankruptcy court cited for its legal standard. *In re Highland*, 2022 WL 780991, at *11. The Fifth Circuit has since clarified that "[t]his circuit . . . recognizes *three* particular requirements"

for judicial estoppel. *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008) (emphasis added). Because the bankruptcy court did not address the inadvertence element in its order dismissing Charitable DAF's second and fifth causes of action, the bankruptcy court abused its discretion. While the district court finds no issue in the bankruptcy court's analysis of the first two elements of judicial estoppel, the bankruptcy court did not address this third element, warranting remand for determination by the bankruptcy court whether Charitable DAF acted inadvertently to change its legal position.

3. Leave to Amend

Charitable DAF requested leave to amend its complaint in its response to the motion to dismiss, R. at 2272–73, which the bankruptcy court denied by dismissing all claims with prejudice. *In re Highland*, 2022 WL 780991, at *12. The Court need not address this argument because, upon remand, the bankruptcy court will have the opportunity to reassess Charitable DAF's claims and determine whether amendment should be allowed under Federal Rule of Civil Procedure 15(a). *See Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (listing factors a court considers when determining whether to allow amendment of the complaint).

C. *Appeal of the Motion to Stay Order*[6]

Appellant Charitable DAF raises one issue on appeal of the Motion to Stay Order: "Did the bankruptcy court err by proceeding with the case rather than staying it" when Charitable DAF was enjoined "from litigating any action against Appellee [HCM]"? Doc. 11, Appellant's Br., 2. The bankruptcy court denied Charitable DAF's Motion to Stay All Proceedings and the subsequent Amended Motion to Stay All Proceedings, reasoning:

[6] For this appeal, the record and document citations are in case No. 3:21-CV-3129-B.

> I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

R. at 2087; *see also id.* at 4–5.

On appeal, Charitable DAF argues that the bankruptcy court erred in its denial of the motion for a stay because the Plan Confirmation Order's injunction prohibited Charitable DAF from participating in the case, "terminat[ing] any case or controversy and stripp[ing] the bankruptcy court of jurisdiction." Doc. 11, Appellant's Br., 7. Accordingly, "[t]he bankruptcy court could only stay the case pending the [appeal of the Plan Confirmation Order's injunction], or dismiss the case as barred by the injunction[,]" Charitable DAF contends." *Id.* at 9.

As noted above, the Fifth Circuit affirmed the Plan in all respects except one and specifically affirmed the injunction. *Highland*, 2022 WL 3571094, at *13–14. The injunction in the Plan provides that "all Enjoined Parties are and shall be permanently enjoined . . . from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind . . . against or affecting the Debtor or the property of the Debtor." R. at 2401. And the term Enjoined Parties includes "(i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor [and] . . . (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case." *Id.* at 2358.

Relatedly, the Plan exculpates HCM[7] "from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of [execution of the Plan]." *Id.* at 2398. However, this exculpation provision[8] does "not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) [other specific entities actions]." *Id.* at 2398–99.

The bankruptcy court did not abuse its discretion[9] in denying the motion for a stay of the case. The bankruptcy court found that the Plan's injunction and exculpation provisions—*which it approved*—did not prevent Charitable DAF from pursuing its causes of action. *Id.* at 2087. In effect, the bankruptcy court held that Charitable DAF could continue to litigate its causes of action and the Court agrees. *See id.* Just like the bankruptcy court, this Court does not see how the injunction and exculpation provisions prohibit Charitable DAF from participating in the below action. The exculpation provision permits Charitable DAF to bring claims against HCM for "bad faith, fraud,

[7] The Plan makes clear that the term Exculpated Party does not include Charitable DAF. R. at 2359 ("Exculpated Parties" means, collectively, (i) the Debtor . . . provided, however, that, for the avoidance of doubt, none of . . . the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities) . . . is included in the term 'Exculpated Party.'").

[8] Subsequently to this appeal, the Fifth Circuit vacated a portion of the exculpation provision. *Highland*, 2022 WL 3571094, at *12. The Fifth Circuit held that "the exculpation of certain non-debtors . . . was unlawful" so the court "str[uck] all exculpated parties from the Plan except for [HCM], the Committee and its members, and the Independent Debtors." *Id.* Charitable DAF brings its causes of action against HCM, so what remains of the exculpation provision still applies to this case. *See id.*

[9] The parties disagree on whether this Court reviews the denial of the stay for abuse of discretion or de novo. Doc. 11, Appellant's Br., 6 ("Questions of law are reviewed de novo."); Doc. 16, Appellee's Br., 2 ("The Court reviews the bankruptcy court's order for abuse of discretion."). Charitable DAF does not pursue this argument in its Reply, so this argument is considered waived, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006), as well as incorrect. *See Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 392 (5th Cir. 2013) (citing *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992)) ("We review a district court's denial of a stay pending appeal for abuse of discretion.").

gross negligence, criminal misconduct, or willful misconduct" and Charitable DAF's causes of action—breach of fiduciary duty, breach of contract, negligence, and RICO—appear to fit within these categories of claims. *Id.* at 490–504, 2398–99. Further, Charitable DAF continued to participate by responding to HCM's motion to dismiss and participating in the hearing regarding the motion to dismiss. *See* Section III(A) *supra*. Lastly and importantly, Charitable DAF did not even attempt to address the traditional stay elements. R. at 2087 ("I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay."). Without argument on the factors for a stay, this Court lacks any basis to overturn the bankruptcy court.

The bankruptcy court's Motion to Stay Order is **AFFIRMED**.

IV.

CONCLUSION

For the foregoing reasons, the Court **REVERSES** and **REMANDS** the bankruptcy court's Motion to Dismiss Order and **AFFIRMS** the bankruptcy court's Motion to Stay Order.

SO ORDERED.

SIGNED: September 2, 2022.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

EXHIBIT 13

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY

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THIS AGREEMENT is made the 15th day of November 2017

BETWEEN

(1) CLO HOLDCO, LTD. whose registered office address is at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands;

(2) HARBOURVEST DOVER IX INVESTMENT L.P. of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA

(3) HARBOURVEST 2017 GLOBAL AIF L.P. of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA

(4) HARBOURVEST 2017 GLOBAL FUND L.P. of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA

(5) HV INTERNATIONAL VIII SECONDARY L.P. of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA

(6) HARBOURVEST SKEW BASE AIF L.P. of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA

(7) HIGHLAND CAPITAL MANAGEMENT, L.P. of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA

(8) LEE BLACKWELL PARKER, III of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA

(9) QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311 of 17171 Park Row #100, Houston, Texas 77084, USA

(10) QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811 of 17171 Park Row #100, Houston, Texas 77084, USA

(11) QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612 of 17171 Park Row #100, Houston, Texas 77084, USA

(12) QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211 of 17171 Park Row #100, Houston, Texas 77084, USA

(together the "Members") and

(13) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "Company") and

(14) HIGHLAND HCF ADVISOR, LTD., whose registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "Portfolio Manager").

WHEREAS:

(A) The Company is a limited company incorporated under the laws of the Island of Guernsey on 30 March 2015.

(B) The Company has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy as set forth in the Offering Memorandum dated 15 November 2017, the (the "Offering Memorandum"), subject to the restrictions set forth therein.

(C) The Members are the owners of the entire issued capital of the Company.

(D) The Parties are entering into this Agreement to regulate the relationship between them and the operation and management of the Company.

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement, including the Schedule:

1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

"Adherence Agreement" means the agreement under which a person agrees to be bound by the terms of this Agreement in the form substantially similar as set out in the Schedule;

"Advisers Act" shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Affiliate" means, with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute "control" of such other person and no entity shall be deemed an "Affiliate" of the Company solely because the administrator or its Affiliates serve as administrator or share trustee for such entity;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

"CLO Holdco" means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

"Dover IX" means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

"DOL" shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

"DOL Regulations" shall mean the regulations of the DOL included within 29 C.F.R. section 2510.3-101.

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;

1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;

1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;

1.5 any reference to time shall be to Guernsey time;

1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. ADVISORY BOARD.

4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "Advisory Board") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.

4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.

4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.

4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. DEFAULTING MEMBERS

5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "Outstanding Settlement Amount"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "Default Interest Rate") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "Defaulting Member"), the following provisions shall apply:

5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.

5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.

5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of $0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).

5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).

5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.

5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.

5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;

6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;

6.1.3 such Transfer would not cause the Company to considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and

6.1.4 such sale, assignment, disposition or transfer would not to cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.

6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).

6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.

6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.

6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.

6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. CONFIDENTIALITY

7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.

7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. DIVIDENDS

8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled "Summary—Dividend Policy" of the Offering Memorandum.

9. TERM OF THE COMPANY

9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the "Term"); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.

9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. ERISA MATTERS

10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. TAX MATTERS

11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a "passive foreign investment company"), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.

11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.

11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. AMENDMENTS TO CERTAIN AGREEMENTS

12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "Management Agreement") without the consent of the Parties.

12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.

12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. FINANCIAL REPORTS

13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. TERMINATION AND LIQUIDATION

14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

14.1.1 when one Party holds all the Shares;

14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or

14.1.3 with the written consent of all the Parties.

14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;

14.4.2 the Company shall not enter into any new contractual obligations;

14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and

14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. WHOLE AGREEMENT

15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.

15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.

15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. STATUS OF AGREEMENT

16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.

16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. ASSIGNMENTS

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. VARIATION AND WAIVER

18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.

18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.

18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. SERVICE OF NOTICE

19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:
Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee PROVIDED THAT if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. GENERAL

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**

By:.....
Name: Grant Scott
Title: Director

SIGNED for and on behalf of
HARBOURVEST DOVER STREET IX INVESTMENT L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: .....
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: .....
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL FUND L.P.

By: HarbourVest 2017 Global Associates L.P.,
its General Partner

By: HarbourVest GP LLC,
its General Partner

By: HarbourVest Partners, LLC,
its Managing Member

By: .....
Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HV INTERNATIONAL VIII SECONDARY L.P.

By: HIPEP VIII Associates L.P.
Its General Partner
By: HarbourVest GP LLC
Its General Partner
By: HarbourVest Partners, LLC
Its Managing Member

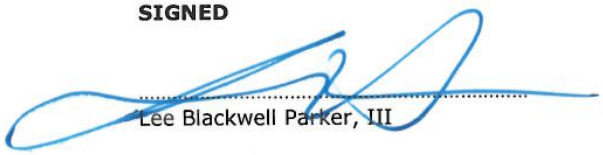
By:.....
Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HARBOURVEST SKEW BASE AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By:.....
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED



Lee Blackwell Parker, III

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name: Emmanuel Magel
Title: transactions supervisor

Read and approved

X

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name: Emmanuel Macias
Title: Transactions Supervisor

Read & Approved

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name: Emmanuel Magee
Title: Transactions Supervisor

Read and Approved:
11/7/17

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name: Emmanuel Maoel
Title: Transaction Specialist

Read and approved

SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner

By:.....
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.

By:.....
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND CLO FUNDING, LTD.

By:.....
Name: William Scott
Title: Director

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [●] 200[●]

BETWEEN:

(1) [●] of [●] (the "Covenantor");

(2) CLO HOLDCO, LTD. of [ ] (a "Member");

(3) [●] of [ ] (a "Member");

(4) [●] of [ ] (a "Member");

(5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "Company")

(6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "Portfolio Manager").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "Members Agreement").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.

2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.

3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

EXHIBIT 14

SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT

THIS SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this "***Agreement***"), dated to be effective from January 1, 2017 (the "***Effective Date***") is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the "***Fund***"), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the "***General Partner***"), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the "***Investment Advisor***"). Each of the signatories hereto is sometimes referred to herein individually as a "***Party***" and collectively as the "***Parties***."

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor entered into that certain Investment Advisory Agreement dated January 1, 2012 (the "***Original Agreement***");

WHEREAS, the Parties amended and restated the Original Agreement in its entirety on the terms set forth in that certain Amended and Restated Investment Advisory Agreement dated July 1, 2014 (the "***Existing Agreement***");

WHEREAS, the parties desire to amend and restate the Existing Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree, and the Existing Agreement is hereby amended and restated in its entirety, as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a "Custodian"). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depository Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, "***Financial Instruments***"), and the sale of Financial Instruments short and covering such sales.

(b) engaging in such other lawful Financial Instruments transactions;

(c) research and analysis;

(d) purchasing Financial Instruments and holding them for investment;

(e) entering into contracts for or in connection with investments in Financial Instruments;

(f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;

(g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;

(h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;

(i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;

(j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services ("***Other Accounts***") and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open "average price" accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor's activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a "***Sub-Advisor***"), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor's advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees.

(a) The Fund shall pay the Investment Advisor a quarterly fee (the "***Management Fee***") equal to 2.0% per annum (0.5% per quarter) of the Net Assets (as defined below) of the Fund, payable in advance at and calculated as of the first business day of each calendar quarter. For purposes of calculating the Management Fee, the Net Assets of the Fund will be determined before giving effect to any of the following amounts payable by the Fund generally or in respect of any Investment which are effective as of the date on which such determination is made: (i) any fee payable to the Investment Advisor as of the date on which such determination is made; (ii) any capital withdrawals or distributions payable by the Fund which are effective as of the date on which such determination is made; and (iii) withholding or other taxes, expenses of processing withdrawals and other items payable, any increases or decreases in any reserves, holdback or other amounts specially allocated ending as of the date on which such determination is made. The Management Fee shall be prorated for partial periods and any applicable excess fees should be returned to the Fund by the Investment Advisor. Capital contributions made to the Fund after the commencement of a calendar quarter shall be subject to a prorated Management Fee based on the number of days remaining during such quarter.

(b) Subject to clauses (c) and (d) below, at the end of each Calculation Period (as defined below), an amount equal to 20% of the net capital appreciation of the Fund's Investments (as defined below) after deducting the Management Fee shall be paid to the Investment Advisor (the "***Performance Fee***"); *provided*, *however*, that the net capital appreciation upon which the calculation of the Performance is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Fund. The amount of the unrecovered balance remaining in the Loss Recovery Account at the time of calculating the Performance Fee shall be the amount existing immediately prior to its reduction pursuant to the second clause of the second sentence of clause (c) below.

(c) There shall be established on the books of the Fund a memorandum account (the "***Loss Recovery Account***"), the opening balance of which shall be zero. At the end of each Calculation Period, the balance in the Loss Recovery Account shall be adjusted as follows: first, if there has been, in the aggregate, net capital depreciation of the Fund's Investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period (or with respect to the initial Calculation Period, since the Effective Date), an amount equal to such net capital depreciation shall be credited to the Loss Recovery Account, and, second, if there has been, in the aggregate, net capital appreciation of the Fund's investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period, an amount equal to such net capital appreciation, before taking into account any Performance Fee to be paid to the Investment Advisor, shall be debited to and reduce any unrecovered balance in the Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining the Loss Recovery Account, net capital appreciation and net capital

depreciation for any applicable Calculation Period shall be calculated by taking into account the amount of the Management Fee paid for such period.

(d) In the event that all or a portion of the Fund's capital is distributed or withdrawn while there exists an unrecovered balance in the Loss Recovery Account, the unrecovered balance in the Loss Recovery Account shall be reduced as of the beginning of the next Calculation Period by an amount equal to the product obtained by multiplying the balance in such Loss Recovery Account by a fraction, the numerator of which is the amount distributed or withdrawn with respect to the immediately preceding distribution or withdrawal date, and the denominator of which is the total fair value of the Fund's Investment immediately prior to such distribution or withdrawal.

(e) For purposes of this Section 10, the net capital appreciation and net capital depreciation of the Fund's Investments for any given period will be calculation in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided upon the General Partner's request. As soon as reasonably practicable following the end of a Calculation Period, the Investment Advisor shall deliver, or cause to be delivered, to the General Partner a statement showing the calculation of the Performance Fee, if any, with respect to such Calculation Period. The Performance Fee, if any, shall be payable within three (3) business days of the General Partner's receipt of such statement.

(f) Payments due to the Investment Advisor shall be made by wire transfer to:

Bank Name:	Compass Bank
ABA#:	113010547
FBO:	Highland Capital Management, L.P. (Master Operating Account)
Acct#:	0025876342

(g) For purposes of this Section 10, the following terms have the definitions set forth below:

"***Calculation Period***" means the period commencing on the Effective Date (in the case of the initial Calculation Period) and thereafter each period commencing as of the day following the last day of the preceding Calculation Period, and ending as of the close of business on the first to occur of the following: (i) the last day of a calendar year; (ii) the distribution or withdrawal of capital of the Fund (but only with respect to such distributed or withdrawn amount); (iii) the permitted transfer of all or any portion of a partner's interest in the Fund; and (iv) the final capital distribution of the Fund following its dissolution;

"***Investments***" means all investments, securities, cash, receivables, financial instruments, contracts and other assets, whether tangible or intangible, owned by the Fund;

"***Net Assets***" means, with respect to the Fund as of any date, the excess of the total fair value of all Investments over the total liabilities, debts and obligations of the Fund, in each case, calculated on an accrual basis in accordance with accounting principles generally accepted in the United States and the then current valuation policy of the Service Provider, a copy of which will be provided to the General Partner upon request; and

"***Services Agreement***" means that certain Second Amended and Restated Service Agreement, dated effective as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a "***Covered Person***" and collectively, "***Covered Persons***") shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the "***Indemnified***

Party"), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person's responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party's conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party's conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party's successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment

Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct, fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received, reviewed and had an opportunity with respect to (a) a copy of Part 2 of the Investment Advisor's Form ADV, and (b) the supplemental disclosures attached hereto as Exhibit A, each of which further describes conflicts of interest relating to the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2017 and shall be automatically extended for additional one-year terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute ("***Dispute***") shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof ("***Enforcement Court***"). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Nothing in this Section 14(f) shall be construed to limit either party's right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons' firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____

Name: James Dondero
Title: President
Date: 6/21/17

CHARITABLE DAF GP, LLC

By:_____

Name: Grant J. Scott
Title: Managing Member
Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By:_____

Name: Grant J. Scott
Title: Managing Member
Date:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____

Name: James Dondero
Title: President
Date:

CHARITABLE DAF GP, LLC

By:_____

Name: Grant J. Scott
Title: Managing Member
Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By:_____

Name: Grant J. Scott
Title: Managing Member
Date: 6/21/2017

EXHIBIT A

Supplemental Disclosures

Potential Conflicts of Interest

The scope of the activities of Highland Capital Management, L.P. (the "***Investment Adviser***"), its affiliates, and the funds and clients managed or advised by the Investment Adviser or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on Charitable DAF Fund, L.P. and its subsidiaries (collectively, the "***Fund***") in the future that cannot be foreseen or mitigated at this time. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts. Additional conflicts are described in the Investment Adviser's Form ADV. You are urged to review the Investment Adviser's Form ADV in its entirety prior to investing in the Fund.[1]

Highland Group & Highland Accounts. None of the Investment Adviser, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the "***Highland Group***") is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Adviser is permitted to manage other client accounts, and does manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Adviser or any of its affiliates may have an equity interest.

The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group including, among other things, the fact that: (i) the Highland Group conducts substantial investment activities for accounts, funds, collateralized debt obligations and collateralized loan obligations that invest in leveraged loans (collectively, "***CDOs***") and other vehicles managed by members of the Highland Group (collectively, "***Highland Accounts***") in which the Fund has no interest; (ii) the Highland Group advises Highland Accounts, which utilize the same, similar or different methodologies as the Fund and may have financial incentives (including, without limitation, as it relates to the composition of investors in such funds and accounts or to the Highland Group's compensation arrangements) to favor certain Highland Accounts over the Fund; (iii) the Highland Group may use the strategy described herein in certain Highland Accounts; (iv) the Investment Adviser may give advice and recommend securities to, or buy or sell securities for, the Fund, which advice or securities may differ from advice given to, or securities recommended or bought or sold for, Highland Accounts; (v) the Investment Adviser has the discretion, to the extent permitted under applicable law, to use its affiliates as service providers to the Fund and its portfolio investments; (vi) certain investors affiliated with the Highland Group may choose to personally invest only in certain funds advised by the Highland Group and the amounts invested by them in such funds is expected to vary significantly; (vii) the Highland Group and Highland Accounts may actively engage in transactions in the same securities sought by the

[1] The Investment Adviser's latest Form ADV filed and Part 2 Brochures can be accessed here: https://adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=110126

Fund and, therefore, may compete with the Fund for investment opportunities or may hold positions opposite to positions maintained by the Fund; (viii) the Fund may invest in CDOs and Highland Accounts managed by members of the Highland Group; and (ix) the Investment Adviser will devote to the Fund only as much time as the Investment Adviser deems necessary and appropriate to manage the Fund's business.

The Investment Adviser undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.

Allocation of Trading Opportunities. It is the policy of the Investment Adviser to allocate investment opportunities fairly and equitably over time. This means that such opportunities will be allocated among those accounts for which participation in the respective opportunity is considered appropriate, taking into account, among other considerations: (i) fiduciary duties owed to the accounts; (ii) the primary mandate of the accounts; (iii) the capital available to the accounts; (iv) any restrictions on the accounts and the investment opportunity; (v) the sourcing of the investment, size of the investment and amount of follow-on available related to the investment; (vi) whether the risk-return profile of the proposed investment is consistent with the account's objectives and program, whether such objectives are considered in light of the specific investment under consideration or in the context of the portfolio's overall holdings; (vii) the potential for the proposed investment to create an imbalance in the account's portfolio (taking into account expected inflows and outflows of capital); (viii) liquidity requirements of the account; (ix) potentially adverse tax consequences; (x) regulatory and other restrictions that would or could limit an account's ability to participate in a proposed investment; and (xi) the need to re-size risk in the account's portfolio.

The Investment Adviser has the authority to allocate trades to multiple Highland Accounts on an average price basis or on another basis it deems fair and equitable. Similarly, if an order for any accounts cannot be fully allocated under prevailing market conditions, the Investment Adviser may allocate the trades among different accounts on a basis it considers fair and equitable over time. One or more of the foregoing considerations may (and are often expected to) result in allocations among the Fund and one or more Highland Accounts on other than a *pari passu* basis. The Investment Adviser will allocate investment opportunities across its accounts for which the opportunities are appropriate, consistent with (i) its internal conflict of interest and allocation policies and (ii) the requirements of the U.S. Investment Advisers Act of 1940, as amended. The Investment Adviser will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Fund fairly or equitably in the short-term or over time and there can be no assurance that the Fund will be able to participate in all investment opportunities that are suitable for it.

The Investment Adviser and/or its affiliates may open "average price" accounts with brokers. In an "average price" account, purchase and sale orders placed during a trading day for the Fund, the Highland Accounts or affiliates of the Investment Adviser are combined, and securities bought and sold pursuant to such orders are allocated among such accounts on an average price basis.

Highland Group Trading. As part of their regular business, the members of the Highland Group hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The members of the Highland Group also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets oriented investment activities. The members of the Highland Group will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The members of the Highland Group may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Fund may invest. In particular, such persons may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Fund or in which partners, security holders, members, officers, directors, agents, personnel or employees of such persons serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Fund and otherwise create conflicts of interest for the Fund. In such instances, the members of the Highland Group may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Fund's investments. In connection with any such activities described above, the members of the Highland Group may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to investments for the Fund. The members of the Highland Group will not be required to offer such securities or investments to the Fund or provide notice of such activities to the Fund. In addition, in managing the Fund's portfolio, the Investment Adviser may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Investment Adviser in accordance with its fiduciary duties to its other clients, the Investment Adviser may take, or be required to take, actions which adversely affect the interests of the Fund.

The Highland Group has invested and may continue to invest in investments that would also be appropriate for the Fund. Such investments may be different from those made by the Fund. The Highland Group does not have any duty, in making or maintaining such investments, to act in a way that is favorable to the Fund or to offer any such opportunity to the Fund, subject to the Investment Adviser's internal allocation policy. The investment policies, fee arrangements and other circumstances applicable to such other accounts and investments may vary from those applicable to the Fund and its investments. The Highland Group may also provide advisory or other services for a customary fee with respect to investments made or held by the Fund, and neither the Fund nor its investors shall have any right to such fees. The Highland Group may also have ongoing relationships with, render services to or engage in transactions with other clients who make investments of a similar nature to those of the Fund, and with companies whose securities or properties are acquired by the Fund.

As further described below, in connection with the foregoing activities the Highland Group may from time to time come into possession of material nonpublic information that limits the ability of the Investment Adviser to effect a transaction for the Fund, and the Fund's investments may be constrained as a consequence of the Investment Adviser's inability to use such information for

advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Fund.

Although the professional staff of the Investment Adviser will devote as much time to the Fund as the Investment Adviser deems appropriate to perform its duties in accordance with the Fund's advisory agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Fund and the Investment Adviser's other accounts.

Various Activities of the Investment Adviser and its Affiliates. The directors, officers, personnel, employees and agents of the Investment Adviser and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories or provide banking, agency, insurance and/or other services, and receive arm's length fees in connection with such services, for the Fund or its investments or other entities that operate in the same or a related line of business as the, for other clients managed by the Investment Adviser or its affiliates, or for any obligor or issuer in respect of the CDOs, and the Fund shall have no right to any such fees. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Fund. The Fund may compete with other Highland Accounts for capital and investment opportunities.

There is no limitation or restriction on the Investment Adviser or any of its affiliates with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Investment Adviser and/or its affiliates may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Investment Adviser's investment committee, the Investment Adviser or its affiliates have to other clients.

The Investment Adviser and its affiliates may participate in creditors or other committees with respect to the bankruptcy, restructuring or workout of an investment of the Fund or another account. In such circumstances, the Investment Adviser or its affiliates may take positions on behalf of themselves or another account that are adverse to the interests of the Fund.

The Investment Adviser and/or its affiliates may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of CDOs, Highland Accounts and other investments purchased by the Fund. Such transactions shall be subject to fees that are intended to be no greater than arm's-length fees, and the Fund shall have no right to any such fees. There is no expectation for preferential access to transactions involving CDOs and Highland Accounts that are underwritten, originated, arranged or placed by the Investment Adviser and/or its affiliates and the Fund shall not have any right to any such fees.

Investments in Highland Accounts Managed by the Investment Manager or its Affiliates. The Fund may invest a significant portion of its capital in Highland Accounts. The Investment Adviser or its affiliates will receive senior and subordinated management fees and, in some cases, a performance-based allocation or fee with respect to its role as general partner and/or manager of the Highland Accounts. If the Fund invests in Highland Accounts in secondary transactions, the Fund will indirectly pay the fees (senior and subordinated) of such Highland Accounts and any

carried interest. If the Fund provides all of the equity for a Highland Account, there may be no third party with whom the amount of such fees, expenses and carried interest can be negotiated on an arm's-length basis. The Investment Adviser or its affiliates will have conflicting division of loyalties and responsibilities regarding the Fund and a Highland Account, and certain other conflicts of interest would be inherent in the situation. There can be no assurance that the interests of the Fund would not be subordinated to those of a Highland Account or to other interests of the Investment Adviser.

Multiple Levels of Fees. The Investment Adviser and the Highland Accounts are expected to impose management fees, other administrative fees, carried interest and other performance allocations on realized and unrealized appreciation in the value of the assets managed and other income. This may result in greater expense than if investors in the Fund were able to invest directly in the Highland Accounts or their respective underlying investments. Investors in the Fund should take into account that the return on their investment will be reduced to the extent of both levels of fees. The general partner or manager of a Highland Account may receive the economic benefit of certain fees from its portfolio companies for services and in connection with unconsummated transactions (*e.g.*, break-up, placement, monitoring, directors', organizational and set-up fees and financial advisory fees).

Cross Transactions and Principal Transactions. The Investment Adviser may effect client cross-transactions where the Investment Adviser causes a transaction to be effected between the Fund and another client advised by it or any of its affiliates. The Investment Adviser may engage in a client cross-transaction involving the Fund any time that the Investment Adviser believes such transaction to be fair to the Fund and such other client.

The Investment Adviser may effect principal transactions where the Fund acquires securities from or sells securities to the Investment Adviser and/or its affiliates, in each case in accordance with applicable law, which will include the Investment Adviser obtaining independent consent on behalf of the Fund prior to engaging in any such principal transaction between the Fund and the Investment Adviser or its affiliates.

The Investment Adviser may advise the Fund to acquire or dispose of securities in cross trades between the Fund and other clients of the Investment Adviser or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Fund may invest in securities of obligors or issuers in which the Investment Adviser and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Fund may enhance the profitability of the Investment Adviser's own investments in such companies. Moreover, the Fund may invest in assets originated by the Investment Adviser or its affiliates. In each such case, the Investment Adviser and such affiliates may have a potentially conflicting division of loyalties and responsibilities regarding the Fund and the other parties to such trade. Under certain circumstances, the Investment Adviser and its affiliates may determine that it is appropriate to avoid such conflicts by selling a security at a fair value that has been calculated pursuant to the Investment Adviser's valuation procedures to another client managed or advised by the Investment Adviser or such affiliates. In addition, the Investment Adviser may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Fund and for the other party to the transaction, to the extent permitted under applicable law. The Investment Adviser may obtain independent consent

in writing on behalf of the Fund, which consent may be provided by the managing member of the General Partner or any other independent party on behalf of the Fund, if any such transaction requires the consent of the Fund under Section 206(3) of the U.S. Investment Advisers Act of 1940, as amended.

Material Non-Public Information. There are generally no ethical screens or information barriers among the Investment Adviser and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Investment Adviser, any of its personnel or its affiliates were to receive material non-public information about a particular obligor or issuer, or have an interest in causing the Fund to acquire a particular security, the Investment Adviser may be prevented from advising the Fund to purchase or sell such asset due to internal restrictions imposed on the Investment Adviser. Notwithstanding the maintenance of certain internal controls relating to the management of material nonpublic information, it is possible that such controls could fail and result in the Investment Adviser, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material nonpublic information could have adverse effects on the Investment Adviser's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Investment Adviser's ability to perform its portfolio management services to the Fund. In addition, while the Investment Adviser and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Investment Adviser's ability to operate as an integrated platform could also be impaired, which would limit the Investment Adviser's access to personnel of its affiliates and potentially impair its ability to manage the Fund's investments.

Conflicts Relating to Equity and Debt Ownership by the Fund and Affiliates. In certain circumstances, the Fund and other client accounts may invest in securities or other instruments of the same issuer (or affiliated group of issuers) having a different seniority in the issuer's capital structure. If the issuer becomes insolvent, restructures or suffers financial distress, there may be a conflict between the interests in the Fund and those other accounts insofar as the issuer may be unable (or in the case of a restructuring prior to bankruptcy may be expected to be unable) to satisfy the claims of all classes of its creditors and security holders and the Fund and such other accounts may have competing claims for the remaining assets of such issuers. Under these circumstances it may not be feasible for the Investment Adviser to reconcile the conflicting interests in the Fund and such other accounts in a way that protects the Fund's interests. Additionally, the Investment Adviser or its nominees may in the future hold board or creditors' committee memberships which may require them to vote or take other actions in such capacities that might be conflicting with respect to certain funds managed by the Investment Adviser in that such votes or actions may favor the interests of one account over another account. Furthermore, the Investment Adviser's fiduciary responsibilities in these capacities might conflict with the best interests of the investors.

Other Fees. The Investment Adviser and its affiliates are permitted to receive consulting fees, investment banking fees, advisory fees, breakup fees, director's fees, closing fees, transaction fees and similar fees in connection with actual or contemplated investments. Such fees will not reduce

or offset the Management Fee. Conflicts of interest may also arise due to the allocation of such fees to or among co-investors.

Soft Dollars. The Investment Adviser's authority to use "soft dollar" credits generated by the Fund's securities transactions to pay for expenses that might otherwise have been borne by the Investment Adviser may give the Investment Adviser an incentive to select brokers or dealers for transactions, or to negotiate commission rates or other execution terms, in a manner that takes into account the soft dollar benefits received by the Investment Adviser rather than giving exclusive consideration to the interests of the Fund.